

Falls Church, Virginia 22041

File: D2021-0014

Date: MAY 18 2021

In re: Oleh R. TUSTANIWSKY, Attorney

IN PRACTITIONER DISCIPLINARY PROCEEDINGS

FINAL ORDER OF DISCIPLINE

ON BEHALF OF EOIR: Paul A. Rodrigues, Disciplinary Counsel

ON BEHALF OF DHS: Catherine M. O'Connell, Disciplinary Counsel

The respondent will be suspended from practice before the Board of Immigration Appeals, the Immigration Courts, and the Department of Homeland Security (DHS) for 2 years, effective February 23, 2021.

On September 16, 2020, the Supreme Court of California accepted the respondent's resignation from the practice of law in California with disciplinary charges pending, effective October 16, 2020. On January 25, 2021, the Disciplinary Counsel for the Executive Office for Immigration Review (EOIR) and the Disciplinary Counsel for the DHS jointly petitioned for the respondent's immediate suspension from practice before the Board of Immigration Appeals, the Immigration Courts, and the DHS. We granted the petition on February 23, 2021.

On February 24, 2021, the respondent filed an answer to the Notice of Intent to Discipline and admitted the allegations against him (Response to Disciplinary Counsel's Joint Notice at 2; Joint Notice of Intent to Discipline at 1). The respondent, however, argues that there are mitigating circumstances in his case that weigh against further disciplinary sanctions. In particular, he points out that the disciplinary matter in California arose directly or indirectly from his suspension by the United States Court of Appeals for the Second Circuit in 2014, a suspension for which he was already disciplined before the Board of Immigration Appeals, the Immigration Courts, and the DHS (Response at 2-3). He notes that, at the time of his suspension before the Second Circuit, he was an inactive member of the State Bar of California, but he had never practiced law in California (Response at 3). The State Bar Court of California, however, initiated disciplinary proceedings based on the suspension in the Second Circuit, and the respondent stipulated to a 2-year suspension, a 4-year stayed suspension, and a 4-year probation in California (Response at 3).

Subsequently, the California State Bar charged the respondent with probation violations including failure to timely file 12 quarterly reports and file an additional 2 substantively compliant reports (Response at 4). Because the respondent had never practiced in California and did not intend to do so, he entered into a stipulation to resign from the California State Bar with disciplinary charges pending (Response at 4). Accordingly, he maintains that his discipline in California is based on the same facts as his earlier suspension before the Second Circuit, a suspension for which he was already disciplined before EOIR and the DHS. The respondent asks that he not be disciplined a second time for the same facts. He also notes that he remains an attorney in good standing in New York and that he is now 69 years old. He requests that he be allowed to practice immigration law for a few more years until his retirement.

In response to the respondent's filing, the Disciplinary Councils for EOIR and the DHS have moved for summary adjudication. The Disciplinary Councils argue that summary proceedings are proper because the respondent has not raised a material issue of fact or an exception to reciprocal discipline (Motion for Summary Adjudication at 2-3). The Disciplinary Councils also maintain that sanctions would not amount to a grave injustice because the respondent resigned from the State Bar of California of his own accord and should have known that his resignation with disciplinary charges pending could affect his ability to practice before EOIR and the DHS (Motion at 3).

Further, the Disciplinary Councils note that the respondent's current discipline in California was not based on his conduct before the Second Circuit but on his probation violations in California (Motion at 3). Finally, the Disciplinary Councils contend that the respondent's status in New York and his age are immaterial as the regulations provide that a practitioner is subject to sanctions if he or she is subject to a final order of disbarment or suspension or has resigned while a disciplinary investigation or proceeding is pending (Motion at 3). The Disciplinary Councils therefore ask the Board to proceed in summary proceedings and to disbar the respondent from practice before the Board of Immigration Appeals, the Immigration Courts, and the DHS.

The respondent has not requested a hearing before an Adjudicating Official. We therefore deem the opportunity to request a hearing waived. 8 C.F.R. § 1003.105(c)(3). We further agree with the Disciplinary Councils for EOIR and the DHS that summary proceedings are appropriate in the respondent's case. First, the respondent has not made a prima facie showing that there is a material issue of fact in dispute regarding the basis for summary disciplinary proceedings. *See* 8 C.F.R. § 1003.106(a). The respondent has admitted that the Supreme Court of California accepted his resignation with disciplinary charges pending, and this fact is sufficient to establish that disciplinary proceedings are appropriate. *See* 8 C.F.R. § 1003.103(b)(2); *see also* 8 C.F.R. § 1003.102(e).

Second, the respondent has not challenged the fairness of his California proceedings and he has not made a prima facie showing that imposing discipline would result in "grave injustice." 8 C.F.R. § 1003.106(a). As the Disciplinary Councils for EOIR and the DHS point out, the respondent's most recent disciplinary proceedings in California were not based on his suspension before the Second Circuit but on probation violations he committed in California after being suspended on the basis of his conduct before the Second Circuit (Appendix to Response). The respondent therefore has not established that he is being disciplined for a second time on the same facts, and he has not made a prima facie showing that imposing discipline based on the new incident would result in grave injustice. Summary proceedings therefore are appropriate in the respondent's case. 8 C.F.R. § 1003.106(a) (discussing when referral for a hearing is required).

In addition, the Disciplinary Councils for EOIR and the DHS have presented sufficient evidence to sustain the charge against the respondent (Joint Notice of Intent to Discipline at 1). In particular, the Disciplinary Councils have established that the respondent is subject to reciprocal discipline due to his resignation while disciplinary proceedings were pending in California. *See* 8 C.F.R. § 1003.103(b)(2); *see also* 8 C.F.R. § 1003.102(e).

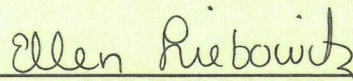
The Notice of Intent to Discipline proposes that the respondent be disbarred from practicing before the Board of Immigration Appeals, the Immigration Courts, and the DHS. The respondent argues that the proposed sanction is too harsh in this case in light of his circumstances including the nature of the underlying disciplinary violations, the fact that he is an attorney in good standing in New York, and has been in inactive status with the State Bar of California in 2005. We conclude that a sanction of disbarment is not appropriate in this case given the nature of the respondent's disciplinary violations in California (Appendix to Response). The recommendation from the Office of the Chief Trial Counsel and the State Bar Court of California notes that the Supreme Court of California has not filed a disbarment order, that the State Bar Court has not filed a decision or opinion recommending disbarment, and that it would be unlikely that the respondent would be disbarred for his probation violations (Appendix to Response at 3-4). We accordingly decline to disbar the respondent from practice before the Board of Immigration Appeals, the Immigration Courts or the DHS. We instead will order the respondent suspended from practice before the Board of Immigration Appeals, the Immigration Courts, and the DHS for 2 years. Further, as the respondent is currently suspended under our February 23, 2021, order of suspension, we will deem his suspension to have commenced on that date.

ORDER: The Board hereby suspends the respondent from practice before the Board of Immigration Appeals, the Immigration Courts, and the DHS for 2 years, effective February 23, 2021.

FURTHER ORDER: The respondent must maintain compliance with the directives set forth in our prior order. The respondent must notify the Board of any further disciplinary action against him.

FURTHER ORDER: The contents of the order shall be made available to the public, including at the Immigration Courts and appropriate offices of the DHS.

FURTHER ORDER: The respondent may petition this Board for reinstatement to practice before the Board, the Immigration Courts, and the DHS under 8 C.F.R. § 1003.107.



FOR THE BOARD