

United States Department of Justice
Executive Office for Immigration Review
Immigration Court
Falls Church, Virginia

File No. D2004-066

In the Matter of:)
)
Carroll A. CLARK)
)
Respondent)
)

IN DISCIPLINARY PROCEEDINGS

ON BEHALF OF THE RESPONDENT:

Carroll A. Clark, *pro se*
931 East Southern Avenue, Suite 208
Meza, AZ 85204

ON BEHALF OF THE EOIR:

Jennifer J. Barnes
Bar Counsel
Executive Office for Immigration Review

ON BEHALF OF THE DHS:

Eileen M. Connolly
Appellate Counsel
Department of Homeland Security

DECISION OF THE ADJUDICATING OFFICIAL

Bar Counsel of the Executive Office for Immigration Review (Bar Counsel) has charged the respondent, Carroll A. Clark; with being subject to discipline under two provisions of the Rules of Professional Conduct for Practitioners: 8 C.F.R. § 1003.102(e)(1) and 8 C.F.R. § 1003.102(f)(1). Bar Counsel asks that the respondent be suspended for a period of time from practice before the Executive Office for Immigration Review.

The Department of Homeland Security has moved that the respondent be suspended for the same period of time from practice before that agency.

The respondent has denied the charges, asserting that they do not state a claim upon which relief can be granted.

For reasons stated below, the ground for discipline under 8 C.F.R. § 1003.102(e)(1) has been established, but the ground for discipline under 8 C.F.R. § 1003.102(f)(1) has not. The respondent will be suspended from practice before the Executive Office for Immigration Review and the Department of Homeland Security for a period of six (6) months and one (1) day.

Procedural History

Disciplinary proceedings were begun on May 17, 2004, with the filing of a Notice of Intent to Discipline (NID) with the Board of Immigration Appeals. (Exhibit 1).

On May 24, 2004 the Department of Homeland Security (DHS) filed a request to have the same discipline apply to respondent's authority to practice before that agency. 8 C.F.R. § 1003.105(b). (Exhibit 2).

The respondent filed a timely answer. Although the respondent denied the charges, he did not request a hearing. (Exhibit 3).

On August 2, 2004, in accordance with the procedures set forth codified at 8 C.F.R. § 1003.106(a), the Chief Immigration Judge, by and through the Chief Clerk of the Immigration Court, appointed the undersigned judge as the adjudicating official in this disciplinary proceeding.

A pre-hearing conference was scheduled for September 9, 2004. The respondent was directed to appear at the Immigration Court in Tucson, Arizona, where he would participate by video conferencing. Two days before the conference, the respondent mailed a motion to the Office of the Chief Immigration Judge asking that the conference be held in Phoenix rather than Tucson. The motion, however, was not received at the Office of the Chief Immigration Judge until September 15, 2004.

The day before the conference, Bar Counsel submitted document captioned Government's Motion to Amend Notice of Intent to Discipline, To Lodge Additional Charge, and Notice of Intent to File Certified Copy of Suspension Order (Motion to Amend and Lodge Additional Charge). (Exhibit 4).

When the respondent did not appear for the video conference on September 9, 2004, he was contacted by telephone. He stated that although he had filed an answer to the NID, his address had changed and he had not been properly served. To insure that the record was complete, Bar Counsel was instructed to re-serve the respondent.

Respondent was re-served with the NID and the motion to amend the NID and lodge and additional charge by certified mail on September 13, 2004. (Exhibits 5 and 6). On September 29, 2004, Bar Counsel submitted certified copies of previously submitted orders of the Supreme Court of Arizona. (Exhibit 7).

The respondent sent another answer via Federal Express to the Board of Immigration Appeals on October 15, 2004. In his second answer the respondent denied the allegations and requested a hearing. The respondent's second answer was received on October 18, 2004, but was not placed in the record of proceeding until October 27, 2004. (Exhibit 8).

Also on October 27, 2004 Bar Counsel submitted Motion for Summary Judgment and Default Order, asserting that the respondent has not filed a substantive answer.

Bar Counsel's Motion to Amend and Lodge Additional Charge is granted. The motion for Summary Judgement and Default Order is denied. Exhibits 1 through 7 are admitted into the record. Exhibit 8 is admitted only for purposes of showing that it is untimely.

Respondent's answers and request for hearing

Although the respondent's original answer (Exhibit 3) denied all allegations in the NID, it did not contain a request for a hearing. If a hearing is not requested, the opportunity to have one will be deemed waived. 8 C.F.R. § 1003.105(c)(3).

As noted above, because the respondent asserted he was not properly served with the NID, he was re-served with Exhibit 5, the NID and the Motion to Amend and Lodge Additional Charge. Exhibit 6 is a certified mail receipt showing that the documents were received on September 13, 2004. The respondent's answer was due within 30 days of service. 8 C.F.R. § 1003.105(c)(1). The 30-day period ended on October 13, 2004. However, the respondent did not send his second answer (Exhibit 8) to the Board of Immigration Appeals via Federal Express until October 15, 2004, and it was not received until October 18, 2004.

The respondent's second answer is untimely. Accordingly, his request for a hearing is deemed waived. The charges will be adjudicated on the basis of the written record only.

Alleged violation of 8 C.F.R. § 1003.102(e)(1)

Under 8 C.F.R. § 1003.102(e)(1), it is in the public interest to impose disciplinary sanctions against a practitioner who is subject to a final order of disbarment or suspension, or has resigned with an admission of misconduct in the jurisdiction of any state, possession, territory, commonwealth, or the District of Columbia, or in any Federal court in which the practitioner is admitted to practice. The respondent falls into that category.

Exhibit 5 establishes that the respondent has twice been suspended by the Supreme Court of Arizona. The first suspension, a period of 60 days, was ordered on November 19, 2003, and went into effect 30 days later. (Attachment 1 to the NID at Exhibit 5). The second suspension, a period of 6 months and 1 day, was ordered on August 16, 2004. (Attachment to the Motion to Amend and Lodge Additional Charge at Exhibit 5).

The record does not establish whether the respondent was reinstated to practice after the period of his first suspension. Whether he was or not, the second order of suspension became effective on August 16, 2004, and runs at least until February 17, 2005. Clear, unequivocal and convincing evidence establishes that the respondent is subject to an order of suspension at this time. Therefore, the ground for discipline under 8 C.F.R. § 1003.102(e)(1) is established.

Alleged violation of 8 C.F.R. § 1003.102(f)(1)

Under 8 C.F.R. § 1003.102(f)(1), it is in the public interest to impose disciplinary sanctions against a practitioner who "knowingly or with reckless disregard makes a false or

misleading communication about his or her qualifications or services.” The provision continues, “A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.”

The NID charges that the respondent violated 8 C.F.R. § 1003.102(f)(1) by filing three Notices of Entry of Appearance (Forms EOIR-27 and EOIR 28) falsely claiming to be in good standing as an attorney in Arizona when he was, in fact, under the first period of suspension. (NID at Exhibit 5).

However, although the NID charges that the respondent violated 8 C.F.R. § 1003.102(f)(1), the NID paraphrases a different provision of the regulation: 8 C.F.R. § 1003.102(c). Specifically, the NID charges that respondent “knowingly or with reckless disregard, made a false statement of material law or fact concerning any material and relevant matter relating to a case.”

It is unclear what the NID is charging as the violation. Is it alleging that the respondent violated 8 C.F.R. § 1003.102(f)(1) – the provision cited – by knowingly or with reckless disregard making false or misleading communications about his qualifications or services? Or is it alleging that the respondent violated 8 C.F.R. § 1003.102(c) – the provision paraphrased but not cited – by knowingly or with reckless disregard making a false statement of material fact or law concerning any material and relevant matter relating to a case?

At the time the regulation was published as a proposed rule, the Department of Justice did not make specific comments about either provision. 63 Fed. Reg. 2901 (1998). When the rules were published in final form, there was no discussion of 8 C.F.R. § 1003.102(f). However, the Department had received comments about 8 C.F.R. § 1003.102(c). In addressing those comments, the Department’s comments suggest that the provision was intended to cover fraudulent documents submitted as evidence and deliberately false statements in applications for relief. 65 Fed. Reg. 39513, 39518 (2000). There is nothing to suggest that this provision relates to a practitioner who lies about his qualifications, including his status as a member of the bar in good standing.

As drafted, the NID does not adequately inform the respondent of the provision of the regulation allegedly violated by his alleged mis-statements about his standing as a member of the state bar of Arizona. Accordingly, the charge under 8 C.F.R. § 1003.102(f)(1) is dismissed.

Request by DHS for identical discipline

In its motion, DHS states it is seeking to join the proceedings brought by Bar Counsel under 8 C.F.R. § 1003.102(c). DHS makes no mention of 8 C.F.R. § 1003.102(f)(1), nor does it cite the charge brought by Bar Counsel under 8 C.F.R. § 1003.102(e)(1). (Exhibit 2). DHS’s request for discipline under 8 C.F.R. § 1003.102(c) is undercut by the same deficiency that requires dismissal of the second charge in the NID.

Nevertheless, at 8 C.F.R. 292.3(b), the regulations governing DHS provide that it is in the public interest for an adjudicating official to impose disciplinary sanctions against any practitioner who, with certain exceptions not relevant here, falls within one or more of the categories

enumerated at 8 C.F.R. § 1003.102. Therefore, because the respondent is subject to a final order of suspension by the Supreme Court of Arizona, it is in the public interest to impose disciplinary sanctions against him under 8 C.F.R § 1003.102(e)(1) as it relates to his practice before DHS.

Discipline

The regulations provide for a range of discipline, including suspension. 8 C.F.R. § 1003.101(a). Bar Counsel initially sought a suspension of 60 days. However, Bar Counsel now seeks a suspension of 6 months and 1 day, the same time imposed by the Supreme Court of Arizona in its second suspension of the respondent.

Although respondent's suspension by the Supreme Court of Arizona is for 6 months and 1 day, the respondent will not automatically be restored to good standing when that time elapses. The order of suspension imposes other conditions upon the respondent, and the Rules of the Supreme Court of Arizona prescribe a series of steps that must be taken for reinstatement after a suspension of more than six months. 17-A Ariz. Rev. Stat. Ann., Supreme Court Rules 64 and 65.

If a period of suspension is imposed under the Executive Office for Immigration Review's regulations, the practitioner cannot be reinstated by the Board until the period of suspension has expired and, if the practitioner is an attorney, the practitioner is in good standing with his or her licensing authorities. 8 C.F.R. § 1001.1(f) and 8 C.F.R. § 1003.107(a).

The respondent should not be permitted to appear before the Board of Immigration Appeals, the Immigration Court or the Department of Homeland Security until he is fully restored to practice in the State of Arizona. Therefore, as requested by Bar Counsel, I will impose a suspension of six months and 1 day, recognizing that when the period of suspension has run, the respondent still cannot be reinstated by the Board of Immigration Appeals until he is again admitted to practice by the Supreme Court of Arizona.

Accordingly, the following orders are entered:

ORDER

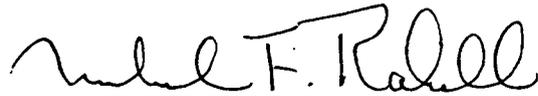
The respondent is found subject to discipline under 8 C.F.R. § 1003.102(e)(1).

FURTHER ORDER

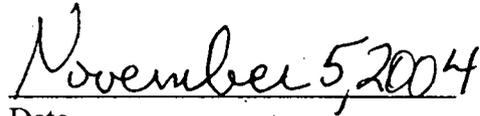
The respondent is not found subject to discipline under 8 C.F.R. § 1003.102(f)(1).

FURTHER ORDER

The respondent is suspended from practice before the Executive Office for Immigration Review and the Department of Homeland Security for a period of six (6) months and one (1) day. The period of suspension is to run from the date of this order.



Michael F. Rahill
Michael F. Rahill
Adjudicating Official



November 5, 2004
Date

In the Matter of: Carroll A. Clark

Case No: D2004- 066

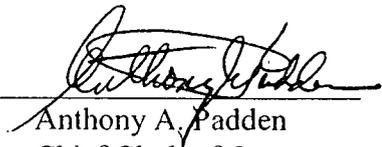
CERTIFICATE OF SERVICE

This Order was served by: () Mail; () Personal Service ()

To: (✓) Practitioner by Certified Mail Return Receipt Requested

(✓) EOIR in person

Date: November 5, 2004

By: 

Anthony A. Padden
Chief Clerk of Court