

Falls Church, Virginia 22041

File: D2011-024

Date:

In re: KOSTON HUI FENG a.k.a. KOSTON F. PELLY, ATTORNEY

MAY 25 2011

IN PRACTITIONER DISCIPLINARY PROCEEDINGS

FINAL ORDER OF DISCIPLINE

ON BEHALF OF EOIR: Jennifer J. Barnes, Disciplinary Counsel

ON BEHALF OF DHS: Eileen M. Connolly
Chief, Immigration Court Practice Section - East

ON BEHALF OF RESPONDENT: Chris McDonough, Esquire

The respondent will be suspended from practice before the Board, Immigration Courts, and Department of Homeland Security (the "DHS"), for six months.

On September 28, 2010, the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, suspended the respondent from the practice of law for a period of six months, effective October 29, 2010, and until further order of the court. Consequently, on March 21, 2011, the Disciplinary Counsel for the Executive Office for Immigration Review petitioned for the respondent's immediate suspension from practice before the Board of Immigration Appeals and the Immigration Courts.

The DHS then asked that the respondent be similarly suspended from practice before that agency. On April 12, 2011, we suspended the respondent from practicing before the Board, the Immigration Courts, and the DHS pending final disposition of this proceeding.

The respondent filed an "Opposition to Petition for Immediate Suspension" on April 14, 2011. In substance, however, his filing is akin to a timely answer to the allegations contained in the Notice of Intent to Discipline. *See* 8 C.F.R. § 1003.105(c)(1); EOIR Disciplinary Counsel "Motion For Summary Adjudication" at 2, as the filing mainly deals with the timing of any discipline to be imposed by the Board.

The respondent does not dispute the allegations in the Notice of Intent to Discipline, does not seek a hearing, and acknowledges that he is subject to discipline by the Board. The respondent argues only that his suspension should run concurrently with the suspension imposed in New York; in other words, his suspension by the Board should be deemed to have commenced on October 29, 2010, the effective date of his discipline in New York.

We therefore find it appropriate to issue a final order on the government's charges. Where a respondent is subject to summary disciplinary proceedings based on suspension from the practice of law, the regulations now provide that the attorney "must make a prima facie showing to the Board in his or her answer that there is a material issue of fact in dispute with regard to the basis for summary disciplinary proceedings, or with one or more of the exceptions set forth in 8 C.F.R. § 1003.103(b)(2)(i)-(iii)." See 8 C.F.R. § 1003.106(a)(2010); 73 Fed. Reg. 76914, 76925 (December 18, 2008). Where no such showing is made, the Board is to retain jurisdiction over the case, and issue a final order. *Id.*; EOIR Mot. at 3-4.

As to the "exceptions" set forth in 8 C.F.R. § 1003.103(b)(2)(i)-(iii), this regulation provides that a final order of disbarment or suspension creates a rebuttable presumption that disciplinary sanctions should follow, and such a presumption can be rebutted only upon a showing, by "clear, unequivocal, and convincing evidence" that the underlying disciplinary proceeding resulted in a deprivation of due process, that there was an infirmity of proof establishing the misconduct, or that discipline would result in grave injustice. See *Matter of Kronegold*, 25 I&N Dec. 157, 160-61 (BIA 2010); EOIR Mot. at 5. Thus, in considering whether reciprocal discipline is appropriate, the Board conducts a "deferential review" of the underlying proceedings. *Id.*

None of the exceptions contained in 8 C.F.R. § 1003.103(b)(2) are implicated in this case. EOIR Mot. at 5.

First, the respondent does not show that "the underlying disciplinary proceeding was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process." 8 C.F.R. § 1003.103(b)(2)(i); EOIR Mot. at 5-6. The respondent's suspension in New York resulted after proceedings in which the respondent was permitted to be represented by counsel, and heard. EOIR Mot. at 5-6. He was provided with full due process in those disciplinary proceedings.

Next, the respondent does not show that "there was such an infirmity of proof establishing the attorney's professional misconduct as to give rise to the clear conviction that the [adjudicator] could not, consistent with his or her duty, accept as final the conclusion on that subject." 8 C.F.R. § 1003.103(b)(2)(ii). The New York court had sufficient evidence of the respondent's misconduct. EOIR Mot. at 6.

Neither does the respondent show that imposing identical reciprocal discipline would result in "grave injustice", if the period of discipline does not run concurrently with his six-month suspension in New York. See 8 C.F.R. § 1003.103(b)(2)(iii); *Matter of Kronegold, supra*, at 160, 162; EOIR Mot. at 6-9.

Rather, the Board will deem the suspension to have commenced on April 12, 2011, the date of the Board's immediate suspension order. The respondent makes no claim that he notified EOIR concerning his New York suspension, under 8 C.F.R. § 1003.103(c). Where the respondent failed to report his state suspension to EOIR, it is not a "grave injustice" to deem the respondent's suspension to have commenced as of the date of our immediate suspension order. EOIR Mot. at 7-8; citing 73 Fed. Reg. 76914, 76920-21 (December 18, 2008).

The respondent argues that he is a solo practitioner, and people rely on him for advice. The respondent also contends that he made a "mistake" but did not injure his clients. Such claims do not establish that imposing a six-month suspension concurrent with our immediate suspension order would result in a grave injustice under 8 C.F.R. § 1003.103(b)(2)(iii). EOIR Mot. at 8-9; *Matter of Kronegold, supra*, at 162.

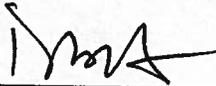
The Board will therefore suspend the respondent from practice before the Board, the Immigration Courts, and the DHS, for six months, effective April 12, 2011.

ORDER: The Board hereby suspends the respondent from practice before the Board, the Immigration Courts, and the DHS, for six months, effective April 12, 2011.

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

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

FURTHER ORDER: As the Board earlier imposed an immediate suspension order in this case, today's order of the Board becomes effective immediately. 8 C.F.R. § 1003.105(d)(2)(2010); *Matter of Kronegold, supra*.



FOR THE BOARD