

#49

UNITED STATES
PATENT AND TRADEMARK OFFICE
BEFORE THE ADMINISTRATIVE LAW JUDGE
OF THE DEPARTMENT OF COMMERCE

IN THE MATTER OF:)
)
MICHAEL DAVID ROSTOKER,) Proceeding No. D04-15
)
)
Respondent)

INITIAL DECISION

DATE: May 31, 2006

JUDGE: BARBARA A. GUNNING, ADMINISTRATIVE LAW JUDGE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY¹

APPEARANCES:

FOR COMPLAINANT: William LaMarca
Thomas W. Krause
Associate Solicitors
Office of the Solicitor-USPTO
P.O. Box 15667
Arlington, VA 22215

FOR RESPONDENT: Michael David Rostoker, *Pro Se*²
[REDACTED]
[REDACTED], [REDACTED]³

¹The Administrative Law Judges of the United States Environmental Protection Agency are authorized to hear cases pending before the United States Department of Commerce, Patent and Trademark Office, pursuant to an Interagency Agreement dated March 22, 1999.

²Respondent was represented by counsel, Howard M. Cohn, Esquire, prior to the hearing.

³In Respondent's most recent correspondence received by facsimile on April 2, 2006, Respondent listed his address as [REDACTED]

were cancelled. The proceeding was stayed until the Massachusetts Board of Bar Overseers issued its determination or order in its disciplinary proceeding against Respondent, and Respondent was ordered to promptly serve the undersigned and the OED Director with notice of any determination or decision rendered by the Massachusetts Board of Bar Overseers concerning its disciplinary proceeding against him. Additionally, Respondent's Motion to Dismiss the Complaint was denied.

On August 11, 2005, Complainant filed unopposed Motions to Lift the Stay and to Amend the Complaint based upon the completion of the Massachusetts disciplinary proceedings against Respondent and his disbarment from the practice of law in that jurisdiction. Complainant's Motions to Lift the Stay and to Amend the Complaint were granted by Order entered on November 3, 2005, and the prehearing procedures and hearing were reinstated.

The two-count Amended Complaint filed against Respondent on August 11, 2005 alleged that Respondent committed several violations of the PTO Code of Professional Responsibility in 37 C.F.R. §§ 10.20-10.112. Specifically, in Count I Complainant alleges that Respondent's conduct and/or criminal conviction of eleven felony counts on October 7, 2002 in the United States District Court for the Northern District of California violated Disciplinary Rules 10.23(b)(3), (4), and (6), and 10.23(c)(1), 37 C.F.R. §§ 10.23(b)(3), (4), and (6), and 10.23(c)(1). Count II of the Amended Complaint alleges violation of Disciplinary Rules 10.23(b)(1) and (6), and 10.23(c)(5), 37 C.F.R. §§ 10.23(b)(1) and (6), and 10.23(c)(5) because Respondent was disbarred on ethical grounds from practice as an attorney by the Massachusetts Board of Overseers on December 15, 2004, based on the same eleven felony convictions cited in Count I of the Complaint. On the basis of these allegations, Complainant requests the entry of an order excluding Respondent from practice before the PTO pursuant to 37 C.F.R. § 10.154.

On February 3, 2006, Respondent filed Motions to Stay the Proceedings and for Partial Summary Judgment, which were opposed by Complainant. Respondent's Motions to Stay the Proceedings and for Partial Summary Judgment were denied in an Order entered on February 28, 2006. *The February 28, 2006 Order is incorporated in this Initial Decision by reference.*

Respondent proffered his resignation from practice before the PTO on Sunday, April 2, 2006, and advised the undersigned that he would not be attending the hearing scheduled for April 4, 2006. The hearing, as scheduled, was held before the undersigned on April 4, 2006 in San Francisco, California. Respondent did

not appear at the hearing. A briefing schedule, affording both parties an opportunity to submit proposed findings and conclusions and a post-hearing memorandum, was entered on April

19, 2006. Complainant submitted its Post-Hearing Brief on May 10, 2006, in accordance with the April 19, 2006 Order Setting the Briefing Schedule.

FINDINGS OF FACT

1. Respondent has been an attorney registered to practice before the PTO (Registration No. 31,193) and has been engaged in the prosecution of patent applications before the PTO. Complainant's Exhibit ("C's" Ex.) A.

2. On October 7, 2002, Respondent was convicted in the United States District Court for the Northern District of California after trial by jury of the following crimes: One count of Conspiracy (Class D Felony) in violation of 18 U.S.C. § 371; four counts of Travel with Intent to Engage in Sexual Act with a Minor (Class C Felony) in violation of 18 U.S.C. § 2423(b); four counts of Using Facilities of Interstate Commerce to Induce a Minor to Engage in Illegal Sexual Acts (Class C Felony) in violation of 18 U.S.C. § 2422(b); one count of Conspiracy to Induce an Alien to Violate the Law (Class D Felony) in violation of 8 U.S.C. § 1324(a)(1)(A)(iv)-(v)(I); and one count of Encouraging an Alien to Come to the United States in Violation of Law (Class C Felony) in violation of 8 U.S.C. § 1324(a)(1)(A)(iv). C's Ex. C.

3. For these above-cited felony convictions, Respondent was sentenced for a term of fifteen (15) months in federal prison and three (3) years of supervised release. C's Ex. C. Respondent also was assessed criminal monetary penalties in the amount of \$1,100. *Id.*

4. On July 6, 2005, the Supreme Judicial Court for Suffolk County entered the judgment of disbarment against the Respondent, disbaring him from the practice of law in the Commonwealth of Massachusetts retroactive to October 27, 2004.⁵ C's Ex. A. The court's judgment of disbarment was based on Respondent's Affidavit of Resignation and the Recommendation and Vote of the

⁵ On January 26, 2006, after the filing of the Amended Complaint in this matter, Respondent was disbarred on reciprocal grounds by the Supreme Court of Pennsylvania. C's Ex. D.

Board of Bar Overseers filed by the Board on June 30, 2005. *Id.* The Petition of Discipline against Respondent charged that Respondent's criminal conduct constituted professional misconduct. *Id.* Subsequently, in Respondent's Affidavit of Resignation, he acknowledged that the investigation against him was based on his convictions in the United States District Court for the Northern District of California cited above, and he waived his right to a hearing. *Id.*

5. In an Order entered by the undersigned on January 21, 2005, Respondent was ordered to promptly serve the undersigned and the OED Director with notice of any determination or decision rendered by the Massachusetts Board of Bar Overseers concerning its disciplinary proceeding against him. Respondent failed to notify the undersigned and the OED Director as ordered.

6. On April 2, 2006, Respondent tendered his resignation from practice before the PTO.

7. Respondent failed to appear at the April 4, 2006 hearing after notices of the hearing had been given to him by the undersigned administrative law judge ("ALJ"). The undersigned proceeded with the hearing in the absence of the Respondent.

CONCLUSIONS OF LAW

1. Respondent is subject to the PTO Disciplinary Rules found at 37 C.F.R. part 10, and this Tribunal has jurisdiction over this proceeding under 35 U.S.C. § 32 and 37 C.F.R. §§ 10.132 and 10.139.

2. Respondent's criminal conduct, cited above, constitutes engaging in illegal conduct involving moral turpitude under 37 C.F.R. § 10.23(b)(3), justifying suspension or exclusion under 37 C.F.R. § 10.130(a).

3. Respondent's criminal conduct, cited above, constitutes engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation under 37 C.F.R. § 10.23(b)(4), justifying suspension or exclusion under 37 C.F.R. § 10.130(a).

4. Respondent's criminal conduct, cited above, constitutes engaging in other conduct that adversely reflects on the practitioner's fitness to practice before the PTO under 37 C.F.R. § 10.23(b)(6), justifying suspension or exclusion under 37 C.F.R. § 10.130(a).

5. Respondent's felony convictions, cited above, constitute conviction of a criminal offense involving moral turpitude, dishonesty, or breach of trust under 37 C.F.R. § 10.23(c)(1), justifying suspension or exclusion under 37 C.F.R. § 10.130(a).

6. Respondent's criminal conduct, cited above, resulted in his disbarment from practice as an attorney on ethical grounds by a duly constituted authority of the Commonwealth of Massachusetts, and such constitutes violation of 37 C.F.R. §§ 10.23(b)(1) and (6), and 37 C.F.R. § 10.23(c)(5), justifying suspension or exclusion under 37 C.F.R. § 10.130(a).

7. Respondent's exclusion from practice before the PTO is an appropriate penalty, considering the public interest, the seriousness of the violations of the Disciplinary Rules, the deterrent effects, and the integrity of the legal profession.⁶ Additionally, exclusion from practice before the PTO is warranted pursuant to Respondent's disbarment by the Commonwealth of Massachusetts on the basis of reciprocal discipline as to sanction. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979).

8. The OED of the PTO has proven his case by clear and convincing evidence. See 37 C.F.R. § 10.149.

9. Respondent's proffered resignation does not meet the requirements for a resignation set forth at 37 C.F.R. § 10.133(d).

10. Respondent is deemed to have waived the right to a hearing by failing to appear at the hearing after a notice of hearing had been given by the presiding ALJ. See 37 C.F.R. § 10.144(b).

ORDER

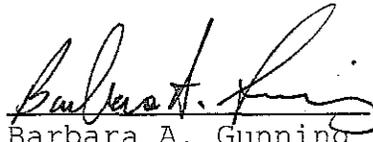
After careful and deliberate consideration of the above findings and conclusions, as well as the factors identified in 37 C.F.R. § 10.154(b),

⁶ I need not reach the question of whether a default judgment is warranted based on Respondent's failure to appear for the scheduled hearing. See Complainant's Post-Hearing Brief at 21-22. I note that the governing regulations do not provide explicit authority for such sanction.

IT IS HEREBY ORDERED that Respondent Michael David Rostoker, PTO Registration No. 31,193, be excluded from practice before the U.S. Patent and Trademark Office.

Respondent's attention is directed to 37 C.F.R. § 10.158 concerning responsibilities in the case of suspension or exclusion, and 37 C.F.R. § 10.160 concerning any subsequent petition for reinstatement.

Pursuant to 37 C.F.R. § 10.155, any appeal by Respondent from this Initial Decision, issued pursuant to 35 U.S.C. § 32 and 37 C.F.R. § 10.154, must be filed in duplicate with the Director, Office of Enrollment and Discipline, U.S. Patent and Trademark Office, P.O. Box 15667, Arlington, VA 22215, within thirty (30) days of the date of this Decision. Such appeal must include exceptions to the Administrative Law Judge's Decision and supporting reasons for those exceptions. Failure to file such an appeal in accordance with 37 C.F.R. § 10.155 will be deemed to be both an acceptance by Respondent of the Initial Decision and a waiver by Respondent of the right to further administrative or judicial review.



Barbara A. Gunning
Administrative Law Judge

Dated: May 31, 2006
Washington, D.C.

**In the Matter of *Harry I. Moatz, Director Office of Enrollment and Discipline, Complainant*
v. Michael David Rostoker, Respondent.
Proceeding No. D04-15**

CERTIFICATE OF SERVICE

I certify that the foregoing **Initial Decision**, dated May 31, 2006, was sent this day in the following manner to the addressees listed below.



Mary Angeles
Legal Staff Assistant

Copy by Certified Mail to:

William LaMarca, Esq.
Associate Solicitor
Office of the General Counsel / Office of the Solicitor
U.S. Patent and Trademark Office
P.O. Box 15667
Arlington, VA 22215

Copy by Certified Mail to:

Howard M. Cohn, Esq.
Howard M. Cohn Patent Attorneys, LLC
21625 Chagrin Blvd., Suite 220
Cleveland, OH 44122

Copy by Certified and Regular Mail to:

[REDACTED]

Dated: May 31, 2006
Washington, D.C.



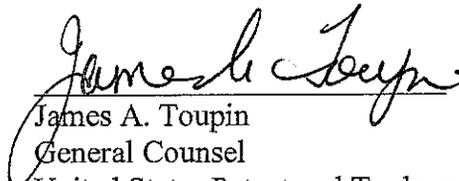
UNITED STATES PATENT AND TRADEMARK OFFICE

OFFICE OF ENROLLMENT AND DISCIPLINE

Notice of Exclusion

Michael D. Rostoker, of Castroville, California and Boulder Creek, California, Registration Number 31,193. An Administrative Law Judge entered an initial decision dated May 31, 2006, ordering Rostoker be excluded. No appeal has been filed. Failure to appeal is deemed to be both acceptance by Rostoker of the initial decision and waiver of the right to further administrative or judicial review. 37 CFR 10.155(d). Rostoker has been excluded, as of Saturday, July 1, 2006, from practice before the United States Patent and Trademark Office in patent, trademark, and other non-patent law. This action is taken pursuant to 35 U.S.C. 32, and 37 CFR 10.155(d), and 10.159(b).

August 2, 2005
Date


James A. Toupin
General Counsel
United States Patent and Trademark Office
on behalf of

Jon W. Dudas
Under Secretary of Commerce For Intellectual Property and
Director of the United States Patent and Trademark Office