Commissioner of Patents and Trademarks
Patent and Trademark Office (P.T.O.)

IN RE ARTHUR O. KLEIN, PETITIONER
September 13, 1990

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Harry F. Manbeck, Jr.

Commissioner of Patents and Trademarks

Decision denying Petition under 37 CFR § 10.170

MEMORANDUM OPINION AND ORDER

William J. Carter, Esq., on behalf of Arthur O. Klein (petitioner), filed a petition on September 13, 1990, seeking relief for petitioner under 37 CFR § 10.170. Section 10.170 provides for waiver of rules in disciplinary matters. Petitions to waive a rule are addressed to the discretion of the Patent and Trademark Office (PTO). Compare Mobil Oil Corp. v. Dann, 448 F.Supp 487, 489 n. 3, 198 USPQ 347, 349 n. 3 (D.D.C.1978). For the reasons given herein, the petition is denied.

Background

At one time, petitioner was registered to practice before PTO. In August of 1984, petitioner was charged with several counts of professional misconduct in a disciplinary proceeding brought under 35 U.S.C. § 32 and then 37 CFR § 1.348 (1984). Administrative Law Judge Hugh J. Dolan (ALJ) recommended sanctions. In re Klein, 6 U.S.P.Q.2d 1528 (ALJ 1986). Upon consideration of the ALJ's recommendation, then Deputy Commissioner Donald W. Peterson suspended petitioner from practice as an attorney before PTO. In re Klein, 6 U.S.P.Q.2d 1547 (Comm'r Pat.1987).

The Deputy Commissioner's decision stated the terms of petitioner's suspension, in pertinent part, as follows (6 U.S.P.Q.2d at 1556):

(1) The period of suspension is seven years;

(2) Execution of the last five years is suspended and petitioner is placed on probation for those five years;

(3) After the first two years and subject to the probationary five-year period, petitioner may be reinstated to practice before the Office in patent cases upon compliance with 37 CFR § 10.160;

(4) Petitioner may or may not be required by the Director of Enrollment to take an examination;

(5) No application for readmission shall be considered in less than two (2) years from the effective date of the decision; and

(6) The effective date of the decision is set for thirty days from the decision date or, if appealed and sustained, thirty days following

exhaustion of the appeal process.

Petitioner sought judicial review (35 U.S.C. § 32), but did not prevail in either the district court or the Federal Circuit. His petition for certiorari was denied. Klein v. Peterson, 696 F.Supp. 695, 8 U.S.P.Q.2d 1434 (D.D.C.1988), aff'd, 866 F.2d 412, 9 U.S.P.Q.2d 1558 (Fed.Cir.), cert. denied, --- U.S. ---, 109 S.Ct. 2432 (1989).

***2** Petitioner's suspension became effective no earlier than March 27, 1989. Thus, under the terms of the Deputy Commissioner's decision, no petition for reinstatement shall be considered before March 27, 1991.

Petitioner seeks "relief from the two year period of suspension, and the five year period of probation[.]" He states that he is petitioning to be reinstated at this time to practice before the Office in both patent and trademark cases. Petitioner offers the following reasons for seeking reinstatement at this time:

(a) the severity of the punishment imposed;

(b) the devastating effect upon his law practice;

(c) the hardships which he has endured to date;

(d) the questionable nature of the evidence upon which he was found to have violated Office regulations; and

(e) the existence of new evidence, not considered by the Deputy Commissioner or any reviewing court, which, according to petitioner, casts in doubt the evidence which was presented against him before the ALJ.

Opinion

37 CFR § 10.170(a) states, in pertinent part:

> In an extraordinary situation, when justice requires, any requirement of the regulations of this part which is not a requirement of the statutes may be suspended or waived by the Commissioner ... on petition of any party ... subject to such other requirements as may be imposed.

Petitioner does not state the specific requirement(s) of the regulations which should be suspended or waived. Petitioner does state, however, that he seeks to be readmitted to practice at this time, presumably with no preconditions, since no preconditions are suggested in the petition. The Deputy Commissioner's decision expressly provides, inter alia, that (1) petitioner must comply with 37 CFR § 10.160 in order to be reinstated, and (2) no petition for reinstatement will be considered in less than two years. Hence, it is apparent that petitioner is in reality asking that these express provisions of the Deputy Commissioner's decision be waived.

Petitioner has not shown an extraordinary situation where justice requires that he be given any relief, i.e., that he be reinstated now and that he not be required to comply with any of the provisions of 37 CFR § 10.160. Indeed, other than paragraph (a) of section 10.160, which provides that petitions for reinstatement will not be considered until the period of suspension has passed, petitioner has not addressed any of the provisions in section 10.160 which are applicable to him. Thus, petitioner seeks to by-pass any consideration by the Director of

the Office of Enrollment and Discipline as to the extent to which paragraph (c), including subparagraphs (c)(1) and/or (c)(2), of 37 CFR § 10.160 is applicable. Likewise, petitioner seeks to by- pass any consideration by the Director as to whether petitioner fully complied with the provisions of 37 CFR § 10.158. See 37 CFR § 10.160(d). Finally, petitioner seeks to by-pass the public notice provisions of § 10.160(e).

***3** The petition was not signed under oath or otherwise by petitioner Klein. The petition consists solely of arguments of counsel. But argument of counsel is not evidence. Compare Meitzner v. Mindick, 549 F.2d 775, 782, 193 USPQ 17,22 (CCPA), cert. denied, 434 U.S. 854 (1977); In re Pearson, 494 F.2d 1399, 1405, 181 USPQ 641, 646 (CCPA 1974); and In re Cole, 326 F.2d 769, 773, 140 USPQ 230, 233 (CCPA 1964). Since argument of counsel is not evidence, the factual allegations of the petition are not supported by evidence. The petition is denied on that basis alone.

Assuming arguendo that petitioner could support the factual assertions in the petition under oath, and that PTO chose to believe those allegations, the proffered "hardships" and "devastations" which petitioner claims he has suffered as the result of his suspension do not rise to the level of an extraordinary situation. While a sanction for professional misconduct is not intended as punishment, it is recognized that a consequence of a sanction, especially one of suspension or disbarment, is likely to be hardship. And it is also recognized that the consequence is generally greater on a sole practitioner, or small firm practitioner, than it would be on a practitioner in a large firm or in corporate practice. Nevertheless, the sanction is fair when considered in light of:

(1) the public interest, including the need for integrity in PTO's practice under 37 CFR § 1.8, which relies solely on the word of individuals mailing material to PTO;

(2) the seriousness of petitioner's misconduct;

(3) deterrent effects deemed necessary;

(4) the integrity of the profession which practices before PTO; and

(5) all extenuating circumstances presented by petitioner during the disciplinary proceeding.

Compare 37 CFR § 10.154(b) and see Small v. Weiffenbach, 10 U.S.P.Q.2d 1898 (Comm'r Pat.1989), where harsher sanctions were imposed for conduct which included backdating of certificates of mailing. Petitioner had an opportunity to seek judicial review of the terms of his suspension as part of his "appeal" under 35 U.S.C. § 32. Compare Jaskiewicz v. Mossinghoff, 822 F.2d 1053, 3 U.S.P.Q.2d 1294 (Fed.Cir.1987). The sanction imposed by the Deputy Commissioner was upheld by both the district court and the Federal Circuit. The petition does not establish grounds for waiving any of the terms of petitioner's suspension.

Neither the allegation of the "questionable" nature of the evidence nor the allegation of later-discovered evidence not considered by the Deputy Commissioner or the reviewing courts establishes grounds for granting petitioner relief.

***4** These allegations pertain to the question of petitioner's guilt, not to the terms of his suspension. Petitioner claims that the "statistical" case against him was invalid because there was evidence

of additional mailings to PTO by petitioner or practitioners at the firm of Klein & Vibber. According to petitioner, those additional mailings were not considered by the Solicitor in his case-in-chief against petitioner. In effect, petitioner is asking PTO to reopen the disciplinary proceeding in light of both evidence already in the record and evidence which petitioner claims he discovered after the decision of the ALJ.

Petitioner raised an issue of the sufficiency of the evidence during judicial review of the Deputy Commissioner's decision. Petitioner lost on that issue at all levels of appeal.

Petitioner also raised the issue about the so-called later-discovered evidence during judicial review. The evidence, to the extent it exists, was always available to petitioner. Petitioner does not, and did not, present any legitimate reason why it could not have been discovered while the disciplinary proceeding was pending before the ALJ, especially when, before any hearing, petitioner (1) was made aware of the number of mailings which the Solicitor had found in his investigation and (2) was given copies of these mailings. The reviewing courts declined to side with petitioner on the issue. There is no legitimate reason why PTO should now grant relief, when the Deputy Commissioner and the reviewing courts declined to grant relief. Compare 37 CFR § 1.184.

Petitioner and his counsel are aware that the evidence of Klein & Vibber mailings of record in the disciplinary proceeding was used to perform calculations showing a "practical" impossibility that the 11 mailings for which petitioner was charged with backdating were mailed when he claimed they were mailed. If petitioner is correct that there were 73 additional Klein & Vibber mailings which should have been considered, it is inconceivable, whatever these mailings may show, that their consideration would have resulted in a conclusion other than practical impossibility about the 11 mailings charged or that the final outcome of the disciplinary proceeding would have been different.

Petitioner and his counsel know that evidence of Klein & Vibber mailings, other than the 11 mailings for which petitioner was charged, was only part of the considerable convincing evidence used against petitioner to show that he backdated, or caused to be backdated, certificates of mailing. The other credible evidence included: (1) the large number of mailings with purportedly long delivery times and the purported times themselves of the 11 mailings charged; (2) coincidence of due date and certificate of mailing date for all 11 mailings charged; (3) Postal Service New York City to Washington, D.C., mailing data; (4) mailing experiences of neighboring firms; (5) out-of-sequence checks; (6) Klein & Vibber law firm outgoing mail log entries or lack thereof; and (7) client letter dates. The other credible evidence was more than sufficient by itself to prove by clear and convincing evidence that petitioner committed the misconduct for which he was charged. Curiously, however, the petition simply ignores the other evidence.

Order

***5** Upon consideration of the petition for reinstatement filed on behalf of Arthur O. Klein on September 13, 1990, it is

ORDERED that the petition for reinstatement is denied and it is

FURTHER ORDERED that Arthur O. Klein is refused recognition to practice before the Patent and Trademark Office at this time, without prejudice to filing a request for reinstatement as indicated in Deputy Commissioner Peterson's decision and opinion, and it is

FURTHER ORDERED that prior to March 27, 1991, PTO shall give NO consideration to any petition for reinstatement filed by, or on behalf of, Arthur O. Klein, regardless of when any petition for reinstatement is filed, and it is

FURTHER ORDERED that any petition for reinstatement shall be filed with the Director of the Office of Enrollment and Discipline--not the Commissioner.

16 U.S.P.Q.2d 1965

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