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

DALE R. SMALL, APPELLANT
v.
CAMERON WEIFFENBACH, DIRECTOR, OFFICE OF ENROLLMENT AND DISCIPLINE, APPELLEE
Proceeding No. DP86-3
April 13, 1989

Donald J. Quigg

Commissioner of Patents and Trademarks

FINAL MEMORANDUM OPINION AND ORDER

***1** Dale R. Small ("Small") appeals under 37 CFR § 10.155 from an Initial Decision of an Administrative Law Judge [FN1] in a disciplinary proceeding under 37 CFR Part 10.

The Director of the Office of Enrollment and Discipline (OED) of the Patent and Trademark Office (PTO) charged Small with ten counts of misconduct arising out of backdating certificates of mailing used to mail correspondence to the PTO. 37 CFR § 1.8.

The Director also charged Small with false representation in answers Small provided in response to questions propounded by the Director.

Lastly, the Director charged Small with neglect of legal matters entrusted to him and failure to exercise due care arising out of nine patent applications which became abandoned because Small did not file a timely response and three patent applications which became abandoned for failure to comply with PTO drawing correction requirements.

The Director sought to have Small suspended or excluded from further practice before the PTO.

In the Initial Decision, Judge Dolan concluded that Small (1) engaged in dishonesty, fraud, deceit and misrepresentation and (2) neglected legal matters entrusted to him. [FN2] Judge Dolan also concluded that Small violated the duty of candor and good faith toward the PTO. [FN3] Judge Dolan recommended that Small be barred from practice as an attorney before the PTO. [FN4]

For the reasons hereinafter given, the Findings and Conclusions of Judge Dolan are affirmed and his sanction recommendation is modified as set forth below.

FACTS

The facts are fully recited in Judge Dolan's thorough opinion. A few of those facts are summarized below.

In July of 1982, Small's prior Detroit law firm of Whittemore, Hulbert and Belknap, merged with another Detroit law firm and became Barnes, Kisselle, Raisch, Choate, Whittemore & Hulbert, P.C. ("Barnes, Kisselle"). [FN5] The physical merger of the offices took place in July of 1982. [FN6] However, as late as the fall of 1983, Small:

(a) still had not unpacked many of his active files; [FN7]

(b) had not notified the PTO of his change of address in many pending patent applications; [FN8] and

(c) claims that he had not adapted to the docketing/calendar system in the merged Barnes, Kisselle firm. [FN9]

Whatever the reasons, the evidence as a whole demonstrates beyond any doubt that Small was disorganized, inattentive, delinquent and negligent in his practice before the PTO for a period of more than two years. [FN10] Unfortunately, his disorganization and disregard for PTO procedures and deadlines precipitated his repeated and calculated coverup which led to the false responses to inquiries by the PTO.

1. Counts 1 through 10

***2** The first ten counts of the complaint concern Small's entering dates on certificates of mailing which were earlier than the actual mailing dates.

Beginning in January 1982 and continuing (randomly) until March 5, 1984, Small backdated certificates of mailing from three (3) to approximately twenty- five (25) days in an attempt to keep patent applications, which he had seriously neglected, from becoming abandoned. [FN11]

A brief chronological account of the facts relating to backdating of mailing certificates is as follows:

I.--Count 4

Small was an attorney of record in patent application Serial No. 131,064, naming Jerome Clary as inventor ("Clary application"). [FN12] A notice of appeal from a final rejection was due on or before January 14, 1982. [FN13] The notice of appeal signed by Small and accompanied by a certificate of mailing also signed by Small were received in PTO on January 27, 1982, thirteen (13) days after the date on the certificate of mailing and the due date for the notice. [FN14] Small instructed his former secretary, Ellen Psujek (a/k/a Brenda Psujek), to backdate the date on the certificate of mailing used to mail the notice of appeal to PTO, and she in fact backdated the certificate of mailing. [FN15]

II.--Count 5

Small was an attorney of record in patent application Serial No. 248,654, naming Terry A. Fuller as inventor ("Fuller application").

[FN16] A response was due in the PTO on or before July 28, 1983. [FN17] The response was received in the PTO Mail Room on August 12, 1983. [FN18] The response was signed by Small and was accompanied by a certificate of mailing also signed by Small fifteen (15) days after the date on the certificate of mailing and the due date for the response. [FN19] Small instructed his former secretary, Ms. Psujek, to backdate the date on the certificate of mailing used to mail the response to the PTO, and she in fact backdated the certificate of mailing. [FN20]

III.--Count 6

Small was an attorney of record in patent application Serial No. 252,479, naming Reiner Gollwitzer as inventor ("Gollwitzer application"). [FN21] A petition to revive was due in PTO on or before October 3, 1983. [FN22] The petition was received in the PTO Mail Room on October 28, 1983. [FN23] The petition was signed by Small and accompanied by a certificate of mailing also signed by Small twenty-five (25) days after the date on the certificate of mailing and the due date for the response. [FN24] Small instructed his former secretary, Ms. Psujek, to backdate the date on the certificate of mailing used to mail the petition to PTO, and she in fact backdated the certificate of mailing. [FN25]

IV.--Count 7

Small was an attorney of record in patent application Serial No. 271,126, naming Alexander Kuckens as inventor ("Kuckens I application"). [FN26] A petition to revive and proposed response were due in PTO on or before October 11, 1983. [FN27] The petition and response were received in the PTO Mail Room on November 7, 1983. [FN28] The petition and response were signed by Small and accompanied by a certificate of mailing dated October 8 also signed by Small thirty (30) days after the date on the certificate of mailing and the due date of the petition. [FN29] Small instructed his former secretary, Ms. Psujek, to backdate the date on the certificate of mailing used to mail the petition and response to the PTO, and she in fact backdated the certificate of mailing. [FN30]

V.--Count 8

***3** Small was an attorney of record in patent application, Serial No. 343,876, naming Kuckens as inventor ("Kuckens II application"). [FN31] A petition to extend the time and response were due in the PTO on or before October 11, 1983. [FN32] The petition and response were received in the PTO Mail Room on October 28, 1983. [FN33] The petition and response were signed by Small and were accompanied by a certificate of mailing dated October 8 also signed by Small twenty (20) days after the date on the certificate of mailing and the due date of the petition. [FN34] Small instructed his former secretary, Ms. Psujek, to backdate the date on the certificate of mailing used to mail the petition and response to the PTO, and she in fact backdated the certificate of

mailing. [FN35]

VI.--Count 9

Small was an attorney of record in patent application Serial No. 349,499, naming Kuckens as inventor ("Kuckens III application"). [FN36] A response and petition to extend the time for filing the response were due in the PTO on or before October 12, 1983. [FN37] The petition and response were received in the PTO Mail Room on October 28, 1983. [FN38] They were signed by Small and were accompanied by a certificate of mailing also signed by Small sixteen (16) days after the date on the certificate and the due date of the response. [FN39] Small instructed his former secretary, Ms. Psujek, to backdate the date on the certificate of mailing used to mail the petition and response to the PTO, and she in fact backdated the certificate of mailing. [FN40]

VII.--Count 10

Small was an attorney of record in patent application Serial No. 339,728, naming Edward W. Bottum as inventor ("Bottum application"). [FN41] A response and petition to extend the time for filing the response were due in the PTO on or before October 25, 1983. [FN42] The petition and response were received in the PTO Mail Room on November 9, 1983. [FN43] The petition and response were signed by Small and accompanied by a certificate of mailing also signed by Small fifteen (15) days after the date on the certificate of mailing and the due date of the response. [FN44] Small instructed his former secretary, Ms. Psujek, to backdate the date on the certificate of mailing used to mail the petition and response to PTO, and she in fact backdated the certificate of mailing. [FN45]

VIII.--Count 1

Small was an attorney of record in patent application Serial No. 214,006, naming George H. Muller as inventor ("Muller application"). [FN46] A proposed amendment and petition for an extension of time for filing the amendment to and including November 15, 1983, were received by PTO on November 21, 1983. [FN47] The documents contain a certificate of mailing signed by Small, which certifies that they were deposited with the United States Postal Service on Tuesday, November 15, 1983. [FN48] The envelope in which these documents were mailed was cancelled by the U.S. Postal Service on Friday, November 18, 1983. [FN49]

IX.--Count 2

***4** Small was an attorney of record in patent application Serial No. 336,516, naming Francis Droll as inventor ("Droll application"). [FN50] A response was due in PTO on or before Tuesday, December 27, 1983. [FN51] The response was received by PTO on January 3, 1984. [FN52] The

response contains a certificate of mailing signed by Small, which certifies that it was deposited with the United States Postal Service on Monday, December 26, 1983. [FN53] The envelope in which this document was mailed had a U.S. Postal Service cancellation date of Thursday, December 29, 1983. [FN54]

X.--Count 3

Small was an attorney of record in patent application Serial No. 193,816, naming Richard N. Anderson as inventor ("Anderson application"). [FN55] Small filed an appeal brief which was received by PTO on March 9, 1984. [FN56] The brief contained a certificate of mailing signed by Small which certifies that it was deposited with the U.S. Postal Service on Friday, March 2, 1984. [FN57] The envelope in which the brief was mailed had a U.S. Postal Service cancellation date of Monday, March 5, 1984. [FN58]

XI.

In each of the ten instances discussed briefly above, testimony and evidence of record show that the PTO Mail Room dates of receipt were accurate [FN59] and that the U.S. Postal Service cancellation dates were accurate. [FN60] The evidence also support Judge Dolan's finding that Small knew or should have known that the certificates of mailing were in fact mailed after the dates set forth in the certificates and not deposited in the mail on the dates alleged. [FN61]

2. Count 11

The charges associated with Count 11 arise out of events which transpired after the backdating episodes and following a time when the Director confronted Small with the possibility that "backdating" had occurred.

Small received a letter on June 8, 1984, from the Director of OED ("Director's Letter") regarding documents mailed to PTO in connection with the Clary, Fuller, Gollwitzer, Kuckens I, Kuckens II, Kuckens III and Bottum applications. [FN62] The Director's Letter asked Small whether he knew when the documents were actually deposited with the U.S. Postal Service, and how he knew when each document was actually deposited. [FN63]

In a "Verified Response" [FN64] dated August 15, 1984, Small stated that all of the documents were deposited with the Postal Service on their certificate of mailing dates by his former secretary. [FN65] What Small neglected to point out in the Verified Response was the fact that he had asked his former secretary to backdate certificates of mailing. [FN66] Small further represented that he based his belief, as to some of the documents, on the date entered on Small's own application file jacket and on the firm's master docket. [FN67]

The evidence shows that Small knew the documents were not deposited in the mail on the dates indicated on the certificates and he also knew or should have known that the dates on his own file jackets and the firm's master calendar were also inaccurate. [FN68] It necessarily follows that Judge Dolan had ample basis for finding that the representations made in the Verified Response were false. [FN69]

3. Counts 13 and 14

***5** A brief summary of the facts relating to the dishonesty, fraud, deceit, misrepresentation and neglect of legal matters, as set out in Counts 13 and 14 of the complaint, are as follows:

I.--Count 13

In the Director's Letter of June 8, 1984, Small was also asked to explain why he failed to file a response by the last possible due date in each of nine patent applications [FN70] for which he was responsible and which became abandoned. [FN71] Small represented that he had not been notified of the due dates in the nine patent applications, because either (1) the date had not been properly docketed on his firm's master docket [FN72] or (2) his secretary failed to notify him of the due dates in a timely fashion. [FN73]

The evidence shows that Small was notified of due dates on a regular basis and in a timely fashion. [FN74] Accordingly, the record supports Judge Dolan's finding that Small's representations in the Verified Response failed to reveal the extent of his notifications prior to the due dates in these applications. [FN75] The record also supports Judge Dolan's finding that Small knew these representations were false. [FN76]

II.--Count 14

Small was an attorney of record in each of three patent applications [FN77] which the PTO required a drawing correction. [FN78] The drawing corrections were not made in a timely fashion and the three applications became abandoned. [FN79]

In the Director's Letter of June 8, 1984, Small was asked about these applications. In the Verified Response to the Director's Letter, Small represented that the Gollwitzer application had become abandoned because it was not entered on his law firm's master docket; [FN80] that the Tone application had become abandoned because his secretary never brought it to his attention; [FN81] and that the Kearns application became abandoned because the drawing correction requirement was not separately docketed and his former secretary never brought it to his attention. [FN82]

III.

The evidence of record shows that the requirements for drawing corrections were docketed on the firm's master docket and Small was given notice by his secretary of the need to make the corrections. [FN83] Small's representations in the Verified Response failed to reveal the extent of his notification prior to the due dates or falsely represented that he was not notified. Further, by failing to respond or otherwise comply with outstanding requirements in all the above-mentioned patent applications, and permitting those applications to become abandoned, Judge Dolan correctly found that Small failed to exercise due care and neglected legal matters entrusted to him. [FN84]

DISCUSSION

Small has maintained throughout this proceeding that he did not backdate, or instruct his secretary to backdate, any documents mailed to PTO. [FN85] He claims that the "discrepancies" in (a) Postal Service cancellation dates and (b) certificates of mailing and PTO receipt dates are the fault of (i) the Postal Service [FN86] and/or (ii) his former secretary, Ms. Psujek. [FN87]

***6** The testimony of James Harris, the Supervisor of the Detroit Post Office where the Barnes, Kisselle firm's mail was cancelled, established that all mail deposited with the U.S. Postal Service is cancelled within 24 hours and in most cases it is cancelled within 12 hours. [FN88] Thus, the Harris testimony provides ample evidence to support Judge Dolan's findings that mail was "cancelled" within 24 hours of being deposited with the Postal Service.

Small challenges Mr. Harris' testimony and alleges mail is not delivered overnight (within a 600-mile radius). Small has misunderstood Mr. Harris' testimony. Mr. Harris testified that when mail is received at the post office for an A.M. or P.M. postmark, the post office is committed to "overnight delivery" within a 600-mile radius. [FN89] Mr. Harris did not mean that the mail is delivered to its addressee by the next day. Rather, he meant that the mail cancelled with the A.M. or P.M. cancellation is delivered to its distribution point [FN90] overnight. Mr. Harris testified about the accuracy of postmark cancellation dates and the importance that particular cancellations are used at certain times as to accurately reflect the time the mail was picked up. [FN91] Accordingly, Small's exception to Mr. Harris' testimony is a misunderstanding of that testimony.

Further support for the prompt processing of mail by the U.S. Postal Service is found in other testimony. Mr. Harry I. Moatz conducted the OED investigation of Small. In the course of that investigation, Mr. Moatz compiled a chart of all mail received by the PTO from the Barnes, Kisselle firm between November 1983 and May 1984. [FN92] A review of the chart reveals that for all other attorneys in the Barnes, Kisselle firm, mail was cancelled within 24 hours of the date on the certificate of mailing. The envelopes which contained the documents mailed by Small all bore cancellation dates three (3) days after the date on the certificate of mailing. [FN93] In light of this evidence, Small's contention that the delays were occasioned by the Postal Service was properly rejected by Judge Dolan. [FN94]

Small also takes exception to Judge Dolan's finding that the periodic reminders, logs and a main monthly docket calendar were available and furnished to Small to enable him to have responded timely. [FN95] Small contends that there was only one monthly calendar and the rest of the reminders were haphazard. Small's position cannot be reconciled with the evidence before Judge Dolan and does not obviate the fact that certificates of mailing were backdated in an attempt to cover up missed dates.

Small has repeatedly attacked the credibility of his former secretary, Ms. Psujek. Small claims that she was the cause of the backdating (or late mailing) and the missed deadlines. Small further claims that she has misrepresented the facts. Ms. Psujek testified that she was instructed by Small to backdate certificates of mailing. [FN96] Another secretary in the Barnes, Kisselle firm, Ms. Grace Maceri, testified that she saw a document with a backdated certificate of mailing that had Small's original signature on it. [FN97] Judge Dolan observed the demeanor of all of the witnesses in this case. He expressly stated that he believed the testimony of the secretaries to be credibly based, inter alia, on their demeanor. [FN98] Judge Dolan dismissed Small's argument that all of the evidence of the alleged misconduct by him is based solely on Ms. Psujek's testimony. Instead, Judge Dolan concluded that there is significant, independent evidence in the record indicating that Small mailed the documents in question on dates other than those on the certificates of mailing. [FN99] A review of the record demonstrates no error in this respect by Judge Dolan.

***7** Judge Dolan correctly found that (1) the discrepancy in mailing dates, i.e., postmark versus certificate of mailing date, (2) the deviations from the average mailing times of other members of Small's firm, and (3) the testimony of Small's secretary and Ms. Maceri, all constitute clear and convincing evidence that Small did in fact backdate certificates of mailing as set out in Counts 1-10 of the Complaint. In this case a clear pattern of backdating has been established by clear and convincing evidence. Viewing the evidence as a whole, the record supports Judge Dolan's conclusion that Small knowingly caused the documents to be mailed after the corresponding certificate of mailing dates (Counts 1-10) and has consistently attempted to "cover up" that fact (Count 11).

With respect to Counts 13 and 14, Small stands by his original explanation that the nine patent applications were neglected and abandoned because he was unaware of recent changes in patent procedures; the docketing system in his new firm did not function effectively; and it was a simple matter to revive abandoned applications. [FN100]

The testimony of other members of Small's firm [FN101] and Ms. Psujek, the documentary evidence of record [FN102], and Small's own testimony [FN103] all constitute clear and convincing evidence that Small was aware of the missed deadlines. Small failed to exercise due care and certainly neglected legal matters entrusted to him. The record establishes that Small demonstrated a blatant disregard for the consequences which abandonment would have on his clients. [FN104]

The PTO has a continuing concern for the integrity of the certificate

of mailing practice allowed by 37 CFR § 1.8. [FN105] The practice permits attorneys appearing before the PTO in patent and trademark cases to file papers in a timely fashion anywhere in the United States by merely depositing the paper in a U.S. Postal Service mail box. The need to retain "local" counsel to hand-deliver papers to the PTO has ceased and has eliminated a considerable expense for applicants and others having business before the PTO who reside far from PTO's facilities in Arlington, Virginia. The practice also provides an important tool for practitioners to avoid possible mail delays. It is apparent, however, that there are those who have taken advantage of 37 CFR § 1.8-- including Small. Indeed, this is the third case involving backdated certificates of mailing by practitioners. [FN106]

Small contends that the sanctions recommended by Administrative Law Judge Dolan are disproportionate to his culpability. However, as indicated above, all of Judge Dolan's findings of fact are supported by the evidence. Small knew that his conduct in backdating certificates and misrepresenting his actions could result in his suspension or disbarment. [FN107] In this case, unlike the two previous disciplinary cases involving backdated certificates of mailing, Small involved his secretary in his falsification of the mailing dates, and has consistently attempted to rest all the blame on her. Judge Dolan considered Small's previous record of 25 years of practice before the PTO. Despite this previous record, Judge Dolan was of the opinion that Small lacked contrition or remorse.

DECISION

***8** Both Klein and Dula, received what in effect amounted to two-year suspensions from practice for backdating certificates of mailing. Small likewise has backdated certificates of mailing. In addition, Small used his secretary to accomplish backdating and was not candid with the Director when asked about backdating. Lastly, Small neglected legal matters which were entrusted to him. Accordingly, Small's overall unethical activities are more aggravated than the unethical activities of either Klein or Dula.

Small will be suspended from practice for a period of two (2) years on each of Counts 1 through 10, the suspensions to run concurrently.

Small will be suspended from practice for a period of one (1) year on Count 11, the suspension to run consecutively with the suspension for Counts 1 to 10.

Small will be suspended from practice for a period of two (2) years on each of Counts 13 and 14, the suspensions to run consecutively with the suspensions on Counts 1 through 10 and the suspension on Count 11.

The sanctions are being taken pursuant to 35 U.S.C. § 32 (as to patent cases) and the Commissioner's authority to suspend attorneys from practice in trademark and other cases. [FN108]

ORDER

Upon consideration of the entire record, it is

ORDERED that, effective immediately upon entry of this order, DALE R. SMALL, of Detroit, Michigan, whose OED Registration No. is 19461, is suspended from practice before the Patent and Trademark Office in all cases (patent, trademark, and other cases), for a period of five (5) years and it is

FURTHER ORDERED that SMALL is given limited recognition under 37 CFR § 10.9(a) for a period of thirty (30) days from the date of this ORDER in which to conclude any pending matters before the Patent and Trademark Office.

FURTHER DISCUSSION

Small is entitled to ask reconsideration of this decision. [FN109] Alternatively, Small is entitled to seek judicial review in the U.S. District Court for the District of Columbia. [FN110]

Subject to the thirty-day limited recognition granted under 37 CFR § 10.9(a), the suspension shall otherwise take effect immediately upon entry of this order. Based on a review of the record, there is no basis for granting any stay of the suspension pending consideration of any request for reconsideration or judicial review. Compare Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 842-843 (D.C.Cir.1977). [FN111]

When Judge Dolan's findings and conclusions are compared with the evidence, there is no reasonable expectation that Small can succeed (either on reconsideration or by judicial review) on the merits in this matter. This is particularly true in view of the Federal Circuit's recent decision in Klein v. Peterson, supra. The Klein backdating case was based solely on circumstantial evidence. In this case, there are envelopes with postmark dates and the direct testimony of Small's former secretary.

***9** Likewise, it is not apparent that Small can succeed on the merits with respect to the appropriateness of the sanction. The sanction is committed to the discretion of the Commissioner. Compare Kingsland v. Dorsey, 338 U.S. 318 (1949), reh'g denied, 338 U.S. 939 (1950) (Commissioner is primarily responsible for protecting the public from unethical practitioners). Moreover, the sanction for backdating certificates of mailing is similar to previous sanctions for the same "offense." The additional ethical violations for misrepresenting facts to the Director (Count 11) and neglecting legal matters (Counts 13 and 14) justify a longer period of suspension than those effectively ordered in Klein and Dula. The additional one-year sanction for misrepresenting facts to the Director and not telling the Director "the whole story" is similar to the one-year suspension of In re Milmore, 196 USPQ 628 (Comm'r Pat.1977) (one-year suspension for failing to reveal known prior art to PTO). [FN112] The additional two-year sanction for neglecting legal matters is entirely appropriate inasmuch as permitting a client's application to become abandoned is a serious matter. Moreover, a two-year suspension is similar to a two-year suspension of In re Paley, 49 Fed.Reg. 10023 (Mar. 16, 1984).

Manifestly, entry of a stay might harm others. Small simply is not fit to practice before the Patent and Trademark Office. Nor would his continued registration be consistent with the public interest.

While Small may be injured by entry of an immediate suspension order, the fact remains he committed unethical acts and his injury is this respect is a "self-imposed" hardship.

FN1. Hon. Hugh J. Dolan, Chief Administrative Law Judge for the Department of Commerce.

FN2. Initial Decision, p. 36.

FN3. Initial Decision, p. 36.

FN4. Initial Decision, p. 36.

FN5. Tr. day 2, pp. 43-44, day 3, p. 60; Initial Decision, p. 10.

FN6. Tr. day 2, pp. 43-44, day 3, p. 68.

FN7. Tr. day 3, p. 64.

FN8. Tr. day 3, pp. 76, 86-89, 125, 127-131.

FN9. Tr. day 3, pp. 67, 132-133.

FN10. Mr. Small testified "there is no question that my docket fell further and further behind." Tr. day 3, p. 61, lines 20-21.

FN11. Govt Exs. 1 and 5.

FN12. Initial Decision, uncontested Finding 22 ("uncontested" means Small did not take exception to Judge Dolan's finding in RESPONDENT'S BRIEF received November 1, 1989.

FN13. Initial Decision, uncontested Finding 23.

FN14. Govt Ex. 1, p. 2 and Attachment V; Tr. day 3, p. 9; Initial Decision, uncontested Findings 24 and 25.

FN15. Govt Ex. 1, p. 2, ¶ 7(a).

FN16. Initial Decision, uncontested Finding 31.

FN17. Initial Decision, uncontested Finding 32.

FN18. Initial Decision, uncontested Finding 33.

FN19. Govt Ex. 1, p. 2 and Attachment VI; Tr. day 3, p. 10; Initial Decision, uncontested Finding 34.

FN20. Govt Ex. 1, p. 2, ¶ 7(b).

FN21. Initial Decision, uncontested Finding 40.

FN22. Initial Decision, uncontested Finding 42.

FN23. Govt Ex. 1, p. 3 and Attachment VII; Govt Ex. 17; Initial Decision, uncontested Finding 43.

FN24. Govt Ex. 1, p. 3 and Attachment VII; Govt Ex. 17; Tr. day 2, pp. 120-22, 135; Tr. day 3, p. 10; Initial Decision, uncontested Finding 44.

FN25. Govt Ex. 1, p. 3, ¶ 7(c).

FN26. Initial Decision, uncontested Finding 50.

FN27. Initial Decision, uncontested Finding 52. The response would have been due Saturday, Oct. 8, 1983, if the 8th had been a business day (Tr. day 3, pp. 78-81).

FN28. Govt Ex. 1, p. 3 and Attachment VIII; Govt Ex. 18; Initial Decision, Finding 53.

FN29. Govt Ex. 1, pp. 3-4; Govt Ex. 18; Tr. day 2, pp. 120-22, 134-35; Tr. day 3, p. 10; Initial Decision, uncontested Finding 54.

FN30. Govt Ex. 1, p. 3, ¶ 7(d).

FN31. Initial Decision, uncontested Finding 60.

FN32. Initial Decision, uncontested Finding 62. The documents would have been due Saturday, Oct. 8, 1983, if the 8th had been a business day (Tr. day 3, pp. 78-81).

FN33. Govt Ex. 1, p. 3 and Attachment IX; Initial Decision, uncontested Finding 63.

FN34. Govt Ex. 1, p. 3; Tr. day 2, pp. 120-22, 134-35, day 3, p. 10; Initial Decision, uncontested Finding 64.

FN35. Govt Ex. 1, p. 3, ¶ 7(e).

FN36. Initial Decision, uncontested Finding 70.

FN37. Initial Decision, uncontested Finding 72.

FN38. Govt Ex. 1, p. 3 and Attachment X; Initial Decision, uncontested Finding 73.

FN39. Govt Ex. 1, p. 3 and Attachment X; Tr. day 3, p. 10; Initial Decision, uncontested Finding 74.

FN40. Govt Ex. 1, p. 3, ¶ 7(f).

FN41. Initial Decision, uncontested Finding 80.

FN42. Initial Decision, uncontested Finding 82.

FN43. Govt Ex. 1, p. 3 and Attachment XI; Initial Decision, uncontested Finding 83.

FN44. Govt Ex. 1, p. 3 and Attachment XI; Tr. day 3, p. 10; Initial Decision, uncontested Finding 84.

FN45. Govt Ex. 1, p. 3, ¶ 7(g).

FN46. Initial Decision, uncontested Finding 2.

FN47. Govt Ex. 1, p. 1 and Attachment I.

FN48. Govt Ex. 1, p. 1 and Attachment I; Initial Decision, uncontested Finding 3.

FN49. Govt Ex. 1, p. 1; Govt Ex. 2; Govt Ex. 5, Document No. 0000011; Tr. day 1, p. 19, day 2, pp. 9-11; Initial Decision, uncontested Finding 4.

FN50. Initial Decision, uncontested Finding 8.

FN51. Initial Decision, uncontested Finding 9. The response would have been due December 26 if the 26th had not been a Federal holiday.

FN52. Govt Ex. 1, p. 2 and Attachment III; Govt Ex. 5, Document No. 0000078.

FN53. Initial Decision, uncontested Finding 10.

FN54 Govt Ex. 1, p. 2; Govt Ex. 3; Tr. day 2, pp. 11-12; Initial Decision, uncontested Finding 11.

FN55. Initial Decision, uncontested Finding 15.

FN56. Govt Ex. 1, p. 2 and Attachment IV; Govt Ex. 5, Document No. 0000201; Initial Decision, uncontested Finding 16.

FN57. Govt Ex. 1, p. 2 and Attachment IV.

FN58. Govt Ex. 1, p. 2; Govt Ex. 4; Govt Ex. 5, Document No. 0000201); Tr. day 2, pp. 12-14; Initial Decision, uncontested Finding 18. There may be places where mail is not picked up on weekends. However there is testimony in the record that there was a mail pickup in Mr. Small's office building on Saturdays (Tr. day 2, pp. 56-57). Mr. Small testified that he did not really remember mailing anything from his home (Tr. day 3, p. 77) and that he did not recall mailing any documents at all (Tr. day 3, p. 82).

FN59. Govt Ex. 5.

FN60. Tr. day 2, pp. 10-14.

FN61. Initial Decision, Findings 91 and 96.

FN62. Initial Decision, uncontested Finding 92.

FN63. Respondent's Answer, Ex. 1, p. 28; Tr. day 1, pp. 29-31.

FN64. Respondent's Answer, Ex. 1.

FN65. Respondent's Answer, Ex. 1, pp. 28-35; Initial Decision, uncontested Findings 93 and 94.

FN66. Govt Ex. 1, pp 1-3; Tr. day 3, pp. 8-9; Initial Decision, uncontested Finding 99.

FN67. Respondent's Answer, Ex. 1, pp. 28-35; Initial Decision, uncontested Finding 95.

FN68. Govt Ex. 1, pp. 1-3; Tr. day 3, pp. 8-9; Initial Decision, Findings 91 and 96.

FN69. Initial Decision, Findings 97, 98, 100, 101.

FN70. The applications are:
(1) Serial No. 271,126 (Kuckens I);
(2) Serial No. 327,526 (Cherrington);
(3) Serial No. 343,875 (Farrow I);
(4) Serial No. 387,704 (Farrow II);
(5) Serial No. 350,987 (Farrow III);
(6) Serial No. 392,050 (Kuckens IV);
(7) Serial No. 385,375 (Shima);
(8) Serial No. 353,667 (Saxlund); and
(9) Serial No. 294,365 (Kuckens V).
Small was asked about nine other applications, but they are not the subject of the Complaint against him.

FN71. Respondent's Answer, Ex. 1, p. 1; Govt Ex. 10, pp. 1005, 1024, 1008, 1037, 1014, 1031, 1011, 1028.

FN72. Respondent's Answer, Ex. 1, pp. 15, 17-19, 22; Initial Decision, uncontested Finding 106(A-C).

FN73. Respondent's Answer, Ex. 1, pp. 22, 24-26; Initial Decision, uncontested Finding 106(D-I).

FN74. Tr. day 3, pp. 35, 94-95, 103-114, 126, 131; Govt Ex. 11, 12, 13, 14. Accordingly, the evidence supports Judge Dolan's Finding 107 in the Initial Decision.

FN75. Initial Decision, Finding 108.

FN76. Initial Decision, Findings 109-111.

FN77. The applications were:
(1) Serial No. 252,479 ("Gollwitzer");
(2) Serial No. 197,965 ("Tone"); and
(3) Serial No. 250,482 ("Kearns").

FN78. Govt Ex. 10, p. 1002; Govt Ex. 10, p. 1018; Govt Ex. 10, p. 1021; Initial Decision, uncontested Findings 115, 123, and 131.

FN79. Govt Ex. 10, pp. 1002, 1018, 1021; Initial Decision, uncontested Findings 119, 121, 122, 127, 128, 130, 135, 136.

FN80. Respondent's Answer, Ex. 1, p. 13; Initial Decision, uncontested Finding 138.

FN81. Respondent's Answer, Ex. 1, p. 9; Initial Decision, uncontested Finding 139.

FN82. Respondent's Answer, Ex. 1, p. 12; Initial Decision, uncontested Finding 140.

FN83. Govt Ex. 1, p. 8; Tr. day 2, p. 114. Accordingly, the record supports Finding 141 in the Initial Decision.

FN84. Initial Decision, Findings 142-148.

FN85. See e.g., Tr. day 3, p. 71.

FN86. Tr. day 3, p. 72.

FN87. Tr. day 3, p. 72.

FN88. Tr. day 2, pp. 10-14. Mr. Harris' testimony was corroborated by the Postal Operations Manual (Govt Ex. 19), the Standard Operating Procedure Operations (Govt Ex. 20), and a chart of all mail received by

PTO from the Barnes, Kisselle firm between November 1983 and May 1984 prepared by OED (Govt Ex. 5).

FN89. Tr. day 2, p. 12.

FN90. Distribution point is the post office which is responsible for the actual delivery to the addressee. See Tr. day 2, p. 21 and Postal Operations Manual (Govt Ex. 19).

FN91. Tr. day 2, pp. 12-15.

FN92. Govt Ex. 5, document 0000011 [Muller]; Tr. day 1, pp. 16-21; Initial Decision, p. 8.

FN93. Govt Exs. 2, 3, and 4. These exhibits are envelopes in which the Muller, Droll and Anderson responses were mailed to PTO. See also Govt Ex 5, documents 0000011 [Muller], 0000078 [Droll], and 0000201 [Anderson].

FN94. Initial Decision, pp. 8, 35.

FN95. Tr. day 2, pp. 105-112; Govt Ex. 11, 12; Initial Decision, p. 35.

FN96. Ms. Psujek testified that, after she completed typing a document for Small, she would place a certificate of mailing on the document and would type in whatever date Small instructed her to insert (Govt Exs. 1, 11 and 12; Tr. day 2, pp. 103-112).

FN97. Tr. day 2, p. 149 and Govt Ex. 8.

FN98. Initial Decision, p. 12 n. 15; p. 13 n. 18.

FN99. Initial Decision, pp. 12-13, 35.

FN100. Tr. day 3, pp. 64-67.

FN101. Mr. Choate, a partner of Small, testified that when Choate and the other members of the firm went through all of Small's patent files, they found several with Notices of Abandonment (Tr. Day 2, pp. 47-48).

FN102. A copy of one of the reminders which Ms. Psujek regularly gave to Small is Govt Ex. 13. A copy of the firm's master docket is Govt Ex.

FN103. Tr. day 3, p. 69.

FN104. Tr. day 3, pp. 64-66, 69-70, 96-97.

FN105. 37 CFR § 1.8 provides with certain exceptions that a paper required to be filed in the PTO within a set period will be considered as being timely filed if the paper:

(1) is addressed to the Commissioner of Patents and Trademarks at Washington, D.C. 20231;

(2) is deposited with the U.S. Postal Service with sufficient postage as first-class mail prior to the expiration of the set period; and

(3) includes a certificate stating the date of deposit with the U.S. Postal Service.

FN106. See In re Klein, 6 U.S.P.Q.2d 1528 (ALJ 1986), aff'd, 6 U.S.P.Q.2d 1547 (Comm'r Pat. 1987), aff'd sub nom., 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.1989) and In re Dula, 49 Fed.Reg. 10012, 10023 (Mar. 16, 1984), 27 BNA's Patent, Copyright & Trademark Journal, No. 658, p. 133 (Dec. 8, 1983). See also 1030 Official Gazette 21 (May 17, 1983).

FN107. Tr. day 3, p. 71. Further, Small's activities occurred after the publication of the Dula decision.

FN108. See 5 U.S.C. § 500(d)(2); Herman v. Dulles, 205 F.2d 715 (D.C.Cir.1953); Attorney General's Manual on the Administrative Procedure Act, pp. 65-66 (1947). See also 49 Fed.Reg. 10012, 10014 (col. 2) (March 16, 1984).

FN109. See 54 Fed.Reg. 6659 (Feb. 14, 1989) Final rule; Requests for reconsideration in Patent and Trademark Office disciplinary proceedings.

FN110. See 35 U.S.C. § 32 and Local Rule 213 of the U.S. District Court for the District of Columbia. Any complaint must be served in the manner required by the Federal Rules of Civil Procedure.

FN111. See also Virginia Petroleum Jobbers Ass'n v. Federal Power Commission, 259 F.2d 921 (D.C.Cir.1958).

FN112. It is noted that Judge Dolan found (Initial Decision, p. 17) that "[o]ne of the most distressing aspects of this case is ... [Small's] failure to make a clean breast of his misconduct when

confronted with the Director's allegations."

10 U.S.P.Q.2d 1898

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