

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
FALLS CHURCH, VIRGINIA

File Number: D2002-040

Date: 01/28/03

IN THE MATTER OF)
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Muto, Joseph Francis)
)
)
)
RESPONDENT)
CHARGE:

IN SUMMARY DISCIPLINARY
PROCEEDINGS

8 C.F.R. § 3.102(e)(1) - 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.

ON BEHALF OF RESPONDENT
Joseph Francis Muto, *pro se*

ON BEHALF OF THE EXECUTIVE OFFICE
FOR IMMIGRATION REVIEW

Charles F. Smith, Esquire
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U. S. Department of Justice
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2600
Falls Church, VA 22041

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. Statement of Facts

Respondent was admitted to practice law in the state of New York in January 1987. In an order dated March 19, 2002, the New York Supreme Court, Appellate Division, First Judicial Department, disbarred Respondent from the practice of law. Respondent's disbarment was based upon 43 counts of professional misconduct in connection with his immigration law practice. Thirty-six of the charges related to Respondent's neglect of the cases of 17 clients in proceedings before the Immigration Court.

II. Procedural History

On April 6, 2002, the General Counsel of the Executive Office for Immigration Review filed with the Board of Immigration Appeals (Board) a Petition for Immediate Suspension and Notice of Intent to Discipline (NID), together with supporting documentation, including a certified copy of a per curiam disciplinary decision and disbarment order of the New York Supreme Court, Appellate Division, First Judicial Department, in *Matter of Joseph F. Muto, M-6977 (March 19, 2002)*. On April 16, 2002, the Immigration & Naturalization Service (Service) had filed motions, which the Board granted, to broaden the scope of the Petition to include immediate suspension and final reciprocal discipline before the Service.

In the NID, the General Counsel sought reciprocal (i.e., identical) discipline of Respondent before EOIR. By order dated May 3, 2002, the Board granted the Petition and immediately suspended Respondent from the practice of law before the Board, Immigration Courts, and Service, pending a final disposition in this proceeding.

On July 2, 2002, Respondent filed an answer to the Petition and NID, together with supporting documentation. In the answer, Respondent asserted that the New York Court had failed to properly take into account his "acknowledged aviaphobia", which had caused him to fail to appear personally at immigration hearings, that there was a total infirmity of proof by which to establish his misconduct, and that to reciprocally suspend him would work a "grave injustice." In support of his contentions, Respondent stated that the New York Court's findings and conclusions of law "were against the weight of the evidence," insofar as he had not knowingly taken referrals from non-lawyers. He also stated that the state of Colorado had declined to impose reciprocal discipline arising from the New York disbarment. Finally, Respondent states that the New York court deprived him of "his right to due process and equal protection."

By order dated August 2, 2002, following a pre-hearing conference of the same date, in which Respondent participated, the Court ordered the parties to file a Joint Pre-Hearing Statement on or before October 16, 2002. In a separate order served on the parties on August 2, 2002, the Court scheduled an evidentiary hearing in the matter for November 14, 2002.

On October 9, 2002, the parties filed a joint motion to cancel the evidentiary hearing and submit briefs in the matter.

By order dated October 15, 2002, the Court granted the joint motion to cancel the hearing and submit briefs in the matter. In its order, the Court directed Respondent to file a supporting brief no later than November 8, 2002, with the General Counsel to file a response on December 2, 2002. No supporting brief from Respondent has been filed with the Court. On December 2, 2002, the General Counsel filed its brief with the Court.

III. Statement of Law

A. Jurisdiction

Immigration Judges are authorized to conduct "proceedings which the Attorney General may assign . . ." 8 C.F.R. § 3.10. In disciplinary proceedings, the Chief Immigration Judge shall appoint an Immigration Judge as an adjudicating official . . ." 8 C.F.R. § 3.106(a)(1)(i).

An adjudicating official "may impose disciplinary sanctions against any practitioner . . . if it finds it to be in the public interest to do so." 8 C.F.R. § 3.101(a). The term "practitioner" is defined as "any attorney defined in § 1.1(f) of this chapter who does not represent the federal government . . ." 8 C.F.R. § 3.101(b). The term "attorney" is defined as a "member in good standing of the bar of the highest court of any State, possession, territory, commonwealth, or the District of Columbia, and is not under any order of any court suspending, enjoining, restraining, disbaring, or otherwise restricting him in the practice of law." 8 C.F.R. § 1.1(f). Although it appears that the respondent does not meet the definition of attorney since he has been disbarred and suspended, it is clear that the adjudicating official must exercise independent judgement in disciplinary proceedings and that the imposition of penalty is discretionary. See Matter of Bogart, 15 I&N Dec. 552, 559-60 (A.G. 1976); 8 C.F.R. § 3.101(a) ["An adjudicating official may impose disciplinary sanctions . . ." (Emphasis added)]. Therefore, the court has jurisdiction over the respondent in these summary disciplinary proceedings.

B. Charge

The case is based on 8 C.F.R. § 3.102(e)(1), as 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 regulations provide as follows: "In the case of a summary proceeding based upon a final order of disbarment or suspension . . . (i.e., reciprocal discipline), a certified copy of a judgement or order of discipline shall establish a rebuttable presumption of the professional misconduct." 8 C.F.R. § 3.103(b)(2)(emphasis added). Since the presumption under this charge is rebuttable, a respondent can "rebut the presumption by demonstrating by clear, unequivocal, and convincing evidence that:

(i) The underlying disciplinary proceeding was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process;

(ii) There was such an infirmity of proof establishing the attorney's professional misconduct as to give rise to the clear conviction that the adjudicating official could not, consistent with his or her duty, accept as final the conclusion on that subject; or

(iii) The imposition of discipline by the adjudicating official would result in grave injustice. 8 C.F.R. § 3.103(b)(2).

V. ANALYSIS AND CONCLUSIONS OF LAW

The Court finds that a charge must be sustained by clear, unequivocal and convincing evidence to properly dispose of a case in summary disciplinary proceedings. This finding is based on the language of 8 C.F.R. § 3.106(b). The Court finds that it is limited to two possible outcomes: (1) if allegations have been sustained by clear, unequivocal and convincing evidence, the Court *shall* rule that the sanctions set forth in the NID be adopted, modified or otherwise amended; or (2) if allegations have not been sustained by clear, unequivocal and convincing evidence, the Court *shall* dismiss. There is no provision for the entry of disciplinary sanctions without such a finding.

Under 8 C.F.R. § 3.103(b)(2), and the applicable precedents, in reciprocal disciplinary proceedings Respondent shall be provided the opportunity to show that the state court order was based upon invalid procedure or patently inadequate evidence, or that for some reason a grave injustice would result if the underlying order were given effect before EOIR (and the Service). *See Matter of Bogart*, 15 I&N Dec. 552,561 (BIA, Attorney General, 1976). Respondent has been provided that opportunity, and has timely filed an answer, together with supporting documentation.

Given Respondent's unexplained failure to file an opening brief as directed by the Court any further opportunity to be heard is deemed to be waived. The Court will enter a decision on the merits in consideration of the record developed to date. On that basis, and in accordance with 8 C.F.R. § 3.103(b)(2), the Court concludes that Respondent has failed to rebut by clear, unequivocal, and convincing evidence, the presumption of professional misconduct in this reciprocal proceeding.

In his answer, Respondent states that he was denied due process and "equal protection" because the New York court failed to properly consider that (i) his failures to appear at several immigration hearings were due to a condition he termed "aviophobia", and (ii) certain Immigration Judges had denied him reasonable accommodation under the Americans with Disabilities Act by not permitting him to appear telephonically. Nonetheless, it is undisputed that Respondent had ample opportunity to raise these arguments and develop supporting evidence in the New York proceedings, and Respondent acknowledges as much in his answer and as indicated by his supporting documentation, including copies of pleadings filed in New York. (March 19, 2002). But having considered Respondent's arguments, the New York court rejected them outright. Not only was Respondent found to be not credible, but by accepting cases knowing that his condition would risk his inability to appear, the court determined that Respondent's evidence aggravated, rather than mitigated, the circumstances of his misconduct.

EOIR tribunals are not courts of general jurisdiction, and are in fact the intended repository of a relatively narrow expertise. Therefore, in reciprocal disciplinary matters before EOIR, "relitigation . . . of matters of state or even constitutional law previously litigated before a state supreme court . . . seems particularly inappropriate." *Matter of Bogart*, 15 I & N Dec. 552, 561 (BIA, Attorney General, 1976). Moreover, "if the opportunity to be heard on certain claims existed in the state system and was ignored, the Board may refuse to consider such claims." *Id.*

Respondent's due process and equal protection claims amount to a collateral attack on the New York court's disbarment order. Respondent is attempting to relitigate matters previously decided by a state supreme court. As the record shows, Respondent has had ample opportunity to present and develop his claims in New York, without success. He has also had the right to submit his constitutional arguments elsewhere, in a court of general jurisdiction, but has failed to avail himself of that privilege. Thus, Respondent's due process arguments fail in light of his failure to rebut the presumption of misconduct by the requisite standard of proof, as provided by regulation.

Respondent had asked this Court to conclude that the New York court's judgement of disbarment was premised upon such an infirmity of proof of the underlying misconduct as to give rise to the clear conviction on the part of this Court that it could not accept as final the New York court's conclusion on the subject, in keeping with § 3.103(b)(2)(ii).

The disbarment decision of the New York Court indicated that Respondent received notice and a statement of the charges alleging 43 counts of professional misconduct. After seven days of hearings before the Departmental Disciplinary Committee ("DDC"), a First Department Referee issued a report discrediting most of Respondent's testimony, sustaining each of the counts of misconduct, and recommending disbarment. Among other things, the Referee found that Respondent had made affirmative misrepresentations to the Immigration Courts and DDC in order to conceal his misconduct.

On review, a First Department Hearing Panel subsequently affirmed the Referee's report. On final review before the New York Supreme Court, Appellate Division, a unanimous court sustained all of the charges and recommended sanction of disbarment. Additionally, the court recognized that "to the extent [R]espondent sought to deny the charges or to excuse his admitted misconduct, the Referee found his testimony incredible." This Court finds that Respondent has failed to bear his burden in rebutting the presumption of misconduct by an infirmity of proof. Further, this Court finds that the underlying evidence developed during the New York proceedings fully supports the charges and findings of misconduct.

Respondent has asserted that a "grave injustice" would result should reciprocal discipline be imposed in this proceeding, given that he has not yet been, or will not be, reciprocally disciplined by the Colorado Supreme Court, where he is also admitted, but is on administrative suspension.

Neither EOIR's Rules and Procedures of Professional Conduct for Practitioners, 8C.F.R. § 3.101 *et seq.*, the definition of the term attorney as provided at 8 C.F.R. § 1.1(f) (member in good standing of the highest court of any state, not under *any order* of any court disbaring him from the practice of law)(emphasis added), nor the pertinent case law makes an exception under "grave injustice", or any other grounds, for disbarred attorneys holding an admission in another jurisdiction which has not yet taken, or will not otherwise impose, reciprocal discipline. At least one U.S. District Court has said that the issue of grave injustice may properly be framed as whether the underlying unethical conduct was sufficiently grave so as to deserve reciprocal discipline. Matter of Benjamin, 870 F. Supp. 41 (N.D.N.Y. 1994). The Court finds that the record of Respondent's misconduct underlying the discipline imposed in New York is sufficiently grave to warrant reciprocal discipline before EOIR.

V. PENALTY

The General Counsel has recommended that the respondent be suspended from practice before the Board, the Immigration Courts, and the Service for seven years. The Respondent has not submitted any evidence with this Court to show any mitigating factors that warrant the imposition of a lesser penalty. The Court finds that the recommended penalty is a just one and will adopt it pursuant to 8 C.F.R. § 3.106(b). Accordingly,

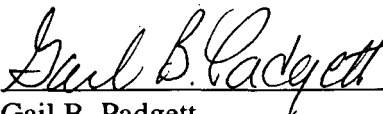
ORDER

IT IS ORDERED that the respondent be suspended for seven years from practicing before the Board, the Immigration Courts, and the Service;

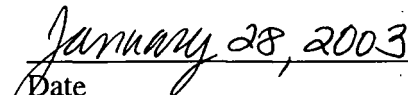
IT IS FURTHER ORDERED that the respondent be eligible to petition the Board for reinstatement after seven years from the date of this order;

IT IS FURTHER ORDERED that reinstatement by the Board may only be granted if the respondent can show that he is an attorney as defined in 8 C.F.R. § 1.1(f) and can demonstrate by clear, unequivocal and convincing evidence that he possesses the moral and professional qualifications required to appear before the Board, the Immigration Courts, and the Service pursuant to 8 C.F.R. § 3.107(b).

cc: Respondent
Mr. Smith for OGC-EOIR
Mr. Balasquide for INS



Gail B. Padgett
Assistant Chief Immigration Judge


Date

CERTIFICATE OF SERVICE

This document was served by: Certified Mail (CM) Personal Service (P)

To: Practitioner (CM) Practitioner's Atty/Rep. () INS/EOIR (Hand Del.)

Date: Jan. 30, 2003

By: 
Court Staff

File Number: D2002-040

In the Matter of: MUTO, JOSEPH FRANCIS