In the Matter of the qualifications of:

EDWARD A. SLAVIN, JR. **ARB CASE NO. 04-172**

DATE: October 20, 2004

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL ORDER SUSPENDING ATTORNEY FROM PRACTICE BEFORE THE ADMINISTRATIVE REVIEW BOARD

On August 27, 2004, the Supreme Court of Tennessee issued a decision suspending Edward A. Slavin, Jr., (the Respondent) from the practice of law for two years. *Board of Professional Responsibility of the Supreme Court of Tennessee v. Slavin*, No. M2003-00845-SC-R3-BP (Aug. 27, 2004) (copy attached). The Respondent is currently the counsel of record for a number of parties in appeals pending before the Administrative Review Board.

By order issued September 14, 2004, the Administrative Review Board directed the Respondent to show cause why this Board should not give reciprocal effect to the Tennessee Supreme Court's suspension order. *See Selling v. Radford*, 243 U.S. 46 (1917). On September 24, 2004, the Respondent filed a Response to Order [to] Show Cause and Motions for Recusal, to Vacate Order to Show Cause and to Order Full Disclosures of Ex Parte Contacts, and Alternative Motion to Order Briefing Schedule. For the reasons that follow, we deny the Respondent's motions. Moreover, in view of his failure to demonstrate any defect in the Tennessee Supreme Court's order or any other basis under the United States Supreme Court's *Selling* decision that would militate against reciprocal discipline, we suspend the Respondent from practicing before this Board for the remainder of the period of time that he is suspended from the practice of law by the Tennessee Supreme Court.[1]

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[1] The Tennessee Supreme Court order affords the Respondent the opportunity to apply for reinstatement after one year from the date of the court's August 27, 2004 order. *Slavin*, slip op. at 1, 13.

I. Motions Filed

A. Motion for recusal of the Administrative Review Board

1. The Respondent's arguments

The Respondent asserts that the members of the Administrative Review Board should recuse themselves from deciding this matter because they have demonstrated improper bias toward him. As support, the Respondent initially cites the well-settled principle that no one should be the judge in his own case and contends that the ARB, along with the Department of Labor Office of Administrative Law Judges and the Secretary of Labor, have a "quarrel" with him because he has been critical of each of them. Resp. to OSC at 2. The Respondent also argues that the issuance of the Board's September 14 order to show cause "shows animus and requires recusal" because the Board acted prematurely since, the Respondent asserts, the Tennessee Supreme Court order "is [the] subject of a timely petition for rehearing and motion for stay for purpose of filing a petition for *certiorari*." *Id.* at 4. The Respondent has offered neither facts nor legal authority that support these contentions, and we have found no factual or legal basis to agree that the ARB should be recused from deciding this matter.

2. The premature action contention

First, we reject the Respondent's contention that the Board acted prematurely on the Tennessee Supreme Court order. A Federal agency should act expeditiously in determining whether to impose reciprocal discipline based on the disciplinary order of a licensing jurisdiction, to effectively protect the interests of parties before it. *See generally In re Miguel Gadda,* 23 I & N Dec. 645, 648, 2003 WL 22222380 (BIA) (rejecting attorney's argument that agency should not suspend him from practice based on final disbarment decision of state court because he had filed a petition for writ of certiorari with the United States Supreme Court); *In re Root,* 1990 WL 603507 (F.C.C.), 67 Rad. Reg.2d (P&F) 1157 (refusing to stay temporary suspension of attorney who had been disbarred by licensing jurisdiction, while agency conducted reciprocal proceeding). The Respondent represents parties in several appeals pending before the Board. It was thus incumbent on the ARB, following receipt of the Tennessee court's August 27 order, to initiate this inquiry into the effect that should be given the Tennessee court order. We began this process by issuing the September 14 Order to Show Cause.

We also reject the Respondent's contention that the order issued by the Tennessee Supreme Court is not sufficiently final to support issuance of a similar suspension order by the ARB at this time, if the requirements of *Selling v. Radford* are met. The Respondent has not provided documents or specific information to substantiate his assertion that he filed a petition for rehearing and motion for stay with the Tennessee Supreme Court or a petition for writ of certiorari with the United States Supreme Court. If he had, we could rely on such substantiation to determine whether it is appropriate to issue an interim, as opposed to a final, suspension order. *See, e.g., In re Utz,* 769 P.2d

417 (Cal. 1989) (imposing interim suspension based on attorney's criminal conviction, which was pending on appeal). But the Respondent has offered no basis for us to issue a limited disciplinary order.[2]

The Respondent similarly offers no support for his statement, "I am a member in good standing of the Tennessee bar, as I have been since 1987." Resp. to OSC at 4. Pursuant to Tennessee Supreme Court Rules, orders of suspension are effective ten days after the date of the order, unless the court's order specifies that it is effective immediately. Tn. Sup. Ct. R. 9, § 18.5 (2004). In the absence of indications to the contrary, we conclude that the Tennessee court order took effect on September 13, 2004.[3] Upon issuance of the disciplinary order, Tennessee Supreme Court Rule 9 imposes a series of post-disciplinary obligations on the attorney.

Specifically, Rule 9 requires the disciplined attorney to immediately notify clients, co-counsel and opposing counsel of his disqualification from continuing to represent clients in any "pending matters." Tn. Sup. Ct. R. 9, § 18.1. Unless another attorney replaces the disciplined attorney "before the effective date of the . . . suspension . . . , it shall be the responsibility of the respondent to move in the court or agency in which the proceeding is pending for leave to withdraw." *Id.* at § 18.6. The Tennessee rules further prohibit the disciplined attorney from undertaking "any new legal matters" after the effective date of the disciplinary order. *Id.* at § 18.7. Finally, the Tennessee rules require the disciplined attorney to file an affidavit with the BPR "[w]ithin ten days after the effective date" of the disciplinary order, showing, among other things, that he has complied with the court's disciplinary order and with the provisions of Rule 9. *Id.* at § 18.8.

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[2] At our request, the Board of Professional Responsibility of the Supreme Court of Tennessee has provided the ARB with a certified copy of the Tennessee court's August 27, 2004 suspension order. In that connection, the Board of Professional Responsibility also provided us with a copy of its "Release of Information," dated September 27, 2004, which is entitled "Law License of Edward A. Slavin, Jr., Suspended" and which summarizes the August 27, 2004 decision and order suspending the Respondent. That notice contains no suggestion that the Tennessee Supreme Court has stayed its August 27 suspension order.

[3] Pursuant to Tennessee Supreme Court Rule 9, the Tennessee Rules of Civil Procedure apply to Rule 9 disciplinary proceedings, except where otherwise provided. Tn. Sup. Ct. R. 9, § 23.3. Section 18.5 of Rule 9 does not specify how the ten-day period provided by that section is to be computed. *Id.* at § 18.5. Our determination regarding the September 13 date is based on application of Rule 6.01 of the Tennessee Rules of Civil Procedure, which excludes Saturdays, Sundays and legal holidays from time periods of less than eleven days. Tn. R. Civ. P. 6.01.

Although the Respondent currently represents a number of parties in appeals before the ARB, we have not yet received either requests from attorneys to replace the Respondent as counsel of record in any of those cases or requests from the Respondent that he be allowed to withdraw from representation in any of those cases. *See* Tn. Sup. Ct. R. 9, § 18.6. Instead, the Respondent has continued to file documents in the capacity of a party's representative in a number of those cases.[4] Furthermore, since October 1, 2004, the Respondent has filed a notice of appearance before the ARB in at least one case in which he was not previously serving as the party's representative.[5] *See id.* at § 18.7. In the absence of documentation indicating that the Tennessee Supreme Court order has been stayed, these circumstances warrant immediate implementation of reciprocal discipline by this Board, if appropriate under the standard established by the United States Supreme Court in *Selling v. Radford.*

We thus reject the Respondent's contentions that the Board acted prematurely by initiating the reciprocal discipline inquiry with issuance of its September 14 Order to Show Cause and that imposition of reciprocal discipline at this time would be premature.

3. The general bias contention

With regard to the Respondent's more general contention that the ARB members are biased against him, we point out that Administrative Review Board judges, like administrative law judges and other quasi-judicial decision-makers, are presumed to act impartially. *See Verduzco v. Apfel*, 188 F.3d 1087, 1089 (9th Cir. 1999). To overcome this presumption of fairness, a party must show that a decision-maker has demonstrated prejudgment of the facts and law involved in the case, *see Cinderella Career & Finishing Schools, Inc. v. Federal Trade Comm'n*, 425 F.2d 583, 590-91 (D.C. Cir. 1970), or has a conflicting interest that is likely to influence their decision, *MFS Sec. Corp. v. Securities and Exch. Comm'n*, 380 F.3d 611, 617-18 (2d Cir. 2004). As a corollary to the

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[4] *See, e.g., Rockefeller v. United States Dep't of Energy, Carlsbad Area Office*, ARB Nos. 03-048, 03-084, ALJ Nos. 2002-CAA-0005, 2003-ERA-10, motion for reconsideration filed by facsimile with the Board on September 29, 2004 (the Board issued an Order of Consolidation and Final Decision and Order of Dismissal, in Part, and Remand, in Part on August 31, 2004); *Howick v. Campbell-Ewald Co.*, ARB Nos. 03-156, 04-065, ALJ Nos. 2003-STA-6, 2004-STA-7, supplemental brief entitled "Notice of Filing," filed by facsimile with the Board on October 4, 2004.

[5] On October 4, 2004, the Respondent filed a motion for reconsideration with the Board regarding its Final Decision and Order issued August 6, 2004, in *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071, 03-095, ALJ No. 2002-STA-35. The motion filed by the Respondent on October 4, 2004, begins, "Complainant David O. Roberts hereby respectfully gives notice of entry of the appearance of his new counsel, Edward A. Slavin, Jr." The complainant in that case had previously acted pro se in pursuing his appeal before the ARB.

presumption of fairness, the administrative agency must ensure the appearance of impartiality, as well as observing the procedural safeguards to due process. *Cinderella Career*, 425 F.2d at 591 and authorities there cited. Although a party who challenges the impartiality of an administrative decision-maker is thus not required to establish proof of actual partiality, *Utica Packing Co. v. Block*, 781 F.2d 71, 77 (6th Cir. 1986), the Respondent has failed to raise allegations that indicate either actual bias or the appearance of same.[6]

B. Motion to order full disclosure of "ex parte contacts"

The Respondent requests that the "ARB and all concerned in DOL" disclose ex parte contacts regarding what the Respondent characterizes as attempts by the DOL Office of Administrative Law Judges to have him disbarred by his licensing jurisdiction. Resp. to OSC at 6. The Respondent also states, "The Secretary must order disclosure of all DOL or other documents anywhere relating to the handling of government and contractor employee environmental whistleblower cases, whether complaints from agencies, directions from the White House, memoranda to investigators, ALJs or ARB staff, or otherwise." To the extent that the Respondent's request is addressed to the Secretary of Labor or other officials outside the ARB, it is beyond our jurisdiction. To the extent that the Respondent's request is addressed to the ARB, we reject the motion on two bases. First, assuming that the Respondent is suggesting that ARB members or staff have engaged in prohibited ex parte communications regarding cases that have been or currently are pending before this Board, we categorically deny that such communications have occurred. Secondly, we reject the Respondent's request as not responsive to the question posed by our September 14 Order to Show Cause, namely, whether the August 27, 2004 Tennessee Supreme Court suspension order supports imposition of a similar sanction by this Board.

An allegation of prohibited ex parte communications ordinarily raises a due process issue, but here the Respondent fails to show how this allegation relates to the propriety of the proceedings pursued by Disciplinary Counsel for the Tennessee Supreme Court Board of Professional Responsibility (Tennessee BPR), which culminated in the

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[6] The ARB is subject to not only the foregoing standards developed in the Federal courts to ensure fairness in agency decision-making but also to the regulations promulgated under the Ethics in Government Act of 1978, as amended, 5 U.S.C.A. App. 4 (West 1996 and Supp. 2002), and the conflict of interest provisions at 18 U.S.C.A. §§ 207, 208 (West 2000 and Supp. 2004), which are found at 5 C.F.R. Parts 2635, 2640, 2641 and 5201. Those regulations require, among other things, the disqualification of Federal employees from participation in matters that pose a conflict of interest or the possibility of an appearance of impropriety. The detailed guidance provided by those regulations aids the ARB in meeting the due process requirement of fairness in appearance as well as in fact. None of the criteria provided by those regulations suggests that it would be improper for any member of the ARB to participate in this decision concerning whether to impose reciprocal discipline.

court's August 27, 2004 suspension order. As we discuss below, the Tennessee BPR proceedings concerning the Respondent's professional misconduct span more than four years and produced decisions by officials and judges at three levels. *Slavin,* slip op. at 2-5. Contrary to the Respondent's characterization, the Department of Labor (DOL) Chief Administrative Law Judge was only one of a number of complainants who offered testimony in support of the Disciplinary Counsel's case. *Id.* at 2-4. Other complainants included a chancellor for the State's Sixth Judicial District and a judge on the United States District Court for the Eastern District of Tennessee. *Id.* at 2. The Respondent's document request thus fails to raise an issue with regard to the legal defensibility of the Tennessee court's suspension order, or a challenge to the propriety of our reliance on that suspension order to impose reciprocal discipline.

C. Motion to vacate Order to Show Cause and to allow briefing

The Respondent complains that the Board's Order to Show Cause imposed "a short, potentially unfair deadline," and urges that the Board should issue "a briefing order . . . in the normal manner . . . ." The only basis the Respondent cites for this request is the "spate of recent [h]urricanes in Florida [the Respondent resides in St. Augustine, Florida] and the loss of power and electricity that has afflicted" that area. Resp. to OSC at 7 n.3.

We deny this motion for the following reasons. First, the Respondent's September 24, 2004 response was filed with the Board via facsimile. The Board's acceptance of that instantaneous means of electronic filing allowed the Respondent more time in which to prepare his response than he would have been afforded were he required to file through traditional mail or courier service.

In addition, the Respondent does not provide an adequate explanation as to why, if he needed an extension of the show cause deadline, he did not request an extension. The fact that the State of Florida suffered through a number of hurricanes recently fails to provide specific support for the Respondent's suggestion that electrical and telephone outages substantially interfered with his preparation of a response to the September 14 order. The filing of the Respondent's reply by facsimile indicates that he likely had access to telephone service, by which he could have contacted the ARB Staff Assistant and requested an extension of the deadline. The Respondent has availed himself of this option for requesting an extension of deadlines on innumerable occasions over the years that he has practiced before this Board, including several instances in the recent past. We therefore deny the Respondent's request for an additional period of time in which to file a further response to the September 14 Order to Show Cause.

II. Application of the *Selling v. Radford* criteria to the August 27, 2004 Tennessee Supreme Court disciplinary order

A. The reciprocal discipline process

Federal courts and agencies are not required to impose reciprocal discipline when a licensing jurisdiction suspends or disbars an attorney. *Selling,* 243 U.S. at 50*; In re*

Ruffalo, 390 U.S. 544, 551 (1968). The disciplinary orders issued by licensing jurisdictions are entitled to great deference, however, as such orders relate to the attorney's qualifications to represent parties in legal proceedings before other tribunals. *Selling*, 243 U.S. at 50; *In re Thies*, 662 F.2d 771, 772 (D.C. Cir. 1980). A state suspension order like the one here, which is based partly on the attorney's conduct in cases that were appealed to this Board, is obviously of particular relevance to the attorney's qualifications to continue to represent parties before this agency. *See Slavin*, slip op. at 3, 5. *See generally In the Matter of Sparrow*, 20 I & N Dec. 920, 937, 1994 WL 6681676 (BIA) (attorney's convictions for violation of immigration laws of particular concern to Board of Immigration Appeals in determining sanction to impose). We accordingly began an inquiry into the propriety of imposing reciprocal discipline by issuing the September 14 Order to Show Cause immediately after the effective date of the Tennessee Supreme Court order.

To determine whether it is appropriate to suspend the Respondent from practice before the ARB based on the Tennessee suspension order, we must examine the Tennessee court's order under the criteria established by the United States Supreme Court in *Selling*. Specifically, we must answer these three questions:

> 1) Did the State proceedings comply with due process requirements by providing adequate notice of the charges and a full and fair opportunity to respond;
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> 2) Is the State's order based on adequate proof of misconduct; and
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> 3) In view of all the circumstances, is there a "grave reason" for us to conclude that it would violate principles of "right and justice" to impose the same discipline as the State.

Selling, 243 U.S. at 50-51; *see Ruffalo*, 390 U.S. at 550-52. In addition to independently applying the above criteria, we consider any issues raised in the Respondent's September 24, 2004 filing that are relevant to the *Selling* standard. As we discuss below, the Respondent has failed to advance any argument regarding a deficiency in either the due process safeguards the BPR proceedings provided or the proof of misconduct on which the Tennessee Supreme Court relied. It is thus unnecessary for us to look beyond a certified copy of the Tennessee court order to determine whether that order supports reciprocal discipline under *Selling*. *See In re Leaf*, 849 F. Supp. 1284, 1286-87 (E.D. Wisc. 1994) (under *Selling*, "the presumption is against any independent review of the underlying state court disciplinary proceedings" and the reciprocating court must "simply review that much of the record necessary to satisfy itself that the three *Selling* exceptions either do or do not apply."). *Cf. In re Kramer*, 282 F.3d 721, 724-25 (9th Cir. 2002) and cases there cited (holding that responding attorney bears burden of demonstrating that one or more *Selling* factors militate against imposition of reciprocal discipline).

We undertake this disciplinary inquiry pursuant to the Secretary's express grant of authority, which enables this Board to fulfill its responsibility for the integrity of the proceedings before it. *See* Secretary's Ord. 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002); *see also Koden v. Department of Justice*, 564 F.2d 228, 234 (7th Cir. 1977) (discussing *Goldsmith v. United States Bd. of Tax Appeals*, 270 U.S. 117, 121 (1926), principle that "an agency empowered to prescribe its own rules has the implied power to determine who can practice before it.").

B. Due process in the Tennessee BPR proceedings

The Tennessee BPR proceedings fully protected the Respondent's due process rights. The BPR proceedings followed the numerous procedural steps required by Tennessee Supreme Court Rule 9. The process began in August 2000 with the filing of Petitions for Discipline against the Respondent and culminated in issuance of the Supreme Court's decision imposing a suspension in August 2004. *Slavin*, slip op. at 1-7. The Respondent was adequately apprised of the complaints filed against him, which included the formalized concerns of four judges, one opposing counsel, and four individuals who had been represented by the Respondent. *Id.* at 2-4. The BPR proceedings provided the Respondent two opportunities to offer evidence in response to the charges against him, first before a Hearing Committee and subsequently before a Chancery Court. *Id.* at 5-7; *see* Tn. Sup. Ct. R. 9, §§ 8.2 – 8.4. In addition, the Respondent was afforded review of both findings of fact and conclusions of law by the Tennessee Supreme Court, based on the evidence developed in the proceedings below. *Slavin*, slip op. at 6-7; *see* Tn. Sup. Ct. R. 9, § 1.3, as discussed in *Slavin*, slip op. at 7 n.4.

After the hearing before the Chancery Court, the Respondent moved for the chancellor's recusal and for a new trial. In support of that motion, the Respondent argued that the chancellor was biased against the Respondent's attorney. The chancellor denied the motion and proceeded to issue his decision. *Slavin*, slip op. at 7-8. Although the Hearing Committee had recommended a public censure of the Respondent, the chancellor determined that the Respondent should be suspended for a three-year period. *Id.* at 4, 6, 13. The Respondent pursued the recusal issue on appeal to the Tennessee Supreme Court. Although the Supreme Court questioned whether the Respondent had waived his right to raise the issue by failing to pursue the chancellor's recusal until after the Chancery Court hearing, the Supreme Court proceeded to carefully examine and soundly reject the recusal contention. *Id.* at 8-9.

The Respondent does not raise a cognizable challenge to the fairness of the Tennessee BPR proceedings in his September 24 response. He does cite the *Selling* criteria, but he does not link those factors to his bald assertion that "there is no proof of

misconduct, there is [a] continuing violation of due process and a grave injustice would result . . . ." Resp. to OSC at 5.[7]

The Respondent has thus failed to point to any deficiency in the Tennessee BPR procedures and we do not discern any. Prior to the first evidentiary hearing, which was held on February 12, 2002, before a Hearing Committee, the Respondent was fully apprised of the specific charges against him. *Slavin*, slip op. at 2-4; *see* Tn. Sup. Ct. R. 9, § 8.2. *Cf. In re Bielac*, 755 A.2d 1018, 1024-25 (D.C. 2000) (reciprocal discipline not imposed because originating jurisdiction failed to provide clear, specific charges of misconduct that constituted disciplinary violations and thus failed to meet *Ruffalo* standard for adequate notice). Over the course of the three stages of adjudication in the disciplinary proceedings, the Respondent was afforded ample opportunity to develop evidence and to offer argument to refute those charges. *Slavin*, slip op. at 1-7; Tn. Sup. Ct. R. 9, §§ 8.2 – 8.4. *Cf. In re Theis*, 662 F.2d 771, 773-74 (D.C. Cir. 1980) (reciprocal discipline not imposed because originating jurisdiction acted "automatically" on attorney's felony conviction and thereby failed to provide adequate opportunity for hearing). The Supreme Court fully and fairly disposed of the Respondent's challenge to the impartiality of the Chancery Court judge. *See Slavin*, slip op. at 7-9 and authorities there cited.

We thus conclude that the Tennessee BPR proceedings fully protected the Respondent's due process rights in compliance with the first *Selling* criterion.

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[7] The Respondent's statement that we have quoted in the text is preceded by the following passage in his September 24 response:

> "Reciprocal" discipline based on DOL's own retaliatory complaints is hardly "reciprocal" – it is cruelly unfair and short-circuits the hearing required by 29 C.F.R. §[§] 18.34 & 18.36. There has been no hearing, no discovery and only a decision by a conflicted judge seeking to punish protected activity. See Selling v. Radford, 243 U.S. 46, 50-51 (1917)(no reciprocal discipline in cases where independent review reveals: (1) deprivation of due process; (2) insufficient proof of misconduct; and (3) grave injustice would result. A neutral hearing is again requested. ARB is not independent: it is a political creature not confirmed by the Senate. There is no proof of misconduct, thereis continuing violation of due process and a grave injustice would result from denying workers the right to a principled lawyer who does not hesitate to file peer review complaints against unjust judges.

Resp. to OSC at 5. It is thus unclear whether or not the Respondent is urging, generally, that the Tennessee BPR proceedings did not meet the *Selling* due process standard.

C. *The adequacy of proof of misconduct underlying the Tennessee Supreme Court's suspension decision*

The factual bases for the Tennessee Supreme Court's decision to suspend the Respondent are clear. The Supreme Court described in pertinent detail the complaints filed with the BPR that formed the impetus for the proceedings. *Slavin*, slip op. at 1-4. The court cited the findings regarding each of the complaints against the Respondent that were found by both the Hearing Committee and the Chancery Court. *Id.* at 4-6. The court also identified the differing legal conclusions reached by the decision-makers at those two levels regarding whether the numerous instances of conduct violated applicable disciplinary rules.[8] *Id.*

Noting the Respondent's contention that "the BPR, Department of Labor and Department of Energy have sought sanctions against him for speech protected by the First Amendment," the Supreme Court explained that the committee and the chancellor reached different conclusions concerning whether a number of the Respondent's in-court statements were protected by the First Amendment. *Id.* at 9-10; *see id.* at 5, 13. The court then fully analyzed that conduct under the free speech protections provided by both the United States and Tennessee constitutions. *Id.* at 9-11. Concluding that the chancellor had properly resolved the free speech issues, the Supreme Court sustained the Chancery Court's findings of additional misconduct beyond that found by the Hearing Committee.[9] *Id.* The Supreme Court ultimately determined that the Respondent had

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[8] The Tennessee court applied the Disciplinary Rules in the Code of Professional Responsibility, which was in effect in the State at the time the complaints were brought against the Respondent. *Slavin,* slip op. at 4 n.3. In March 2003, the Tennessee court adopted Rules of Professional Conduct that closely follow the Model Rules of Professional Conduct. *See* Tn. Sup. Ct. R. 8 (2003).

[9] The Hearing Committee found violations of these disciplinary rules:

> DR 1-102(A)(1), prohibition against violation of a Disciplinary Rule.
> DR 1-102(A)(4), prohibition against conduct involving dishonesty, fraud, deceit, or misrepresentation.
> DR 1-102(A)(5), prohibition against conduct that is prejudicial to the administration of justice.
> DR 7-101(A)(2), duty to keep a client reasonably informed about the status of a matter and to promptly comply with reasonable requests for communication or information.
> DR 7-102(A)(8), prohibition against knowingly engaging in other illegal conduct or conduct contrary to a Disciplinary Rule.

Continued . . .

engaged in misconduct including the use of language degrading to a tribunal, the systematic harassment and attempt to intimidate DOL administrative law judges, the use of offensive language toward opposing counsel when it was obvious that such action would serve merely to harass or maliciously injure that individual, and failure to properly communicate with clients and return their records. *Id.* at 10, 11.

Contrary to the Respondent's assertion that "there is no proof of misconduct," *see* n.6 *supra*, the Tennessee Supreme Court's decision indicates that the facts regarding the Respondent's conduct were not in dispute. The Supreme Court's decision also indicates that, aside from any questions of fact that could be involved in the Respondent's argument that the chancellor should have recused himself, the Respondent raised only questions of the proper application of the law – regarding First Amendment protections and the severity of the discipline to be imposed – in his appeal to the Supreme Court.[10] *Id.* at 7. The Respondent's September 24 filing contains a number of negative statements regarding th]e current DOL Chief Administrative Law Judge and his participation in the

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> DR 7-106(A), prohibition against disregarding or advising a client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding.

Slavin, slip op. at 4.

The Chancery Court found the following additional violations:

> DR 1-102(A)(5), prohibition against conduct involving dishonesty, fraud, deceit, or misrepresentation (the Chancery Court found a violation of this rule separate from that which was found by the Hearing Committee).
> DR 7-101(A)(4)(c), prohibition against conduct that is prejudicial or damaging to the client during the course of the professional relationship.
> DR 7-102(A)(1), prohibition against filing a suit, asserting a position, conducting a defense, delaying a trial, or taking other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.
> DR 7-106(C)(6), prohibition against undignified or discourteous conduct which is degrading to a tribunal.

Id. at 5-6, 10; *see id.* at 13.

[10] The Supreme Court's decision notes that the Respondent did not appear at the second evidentiary hearing, which was conducted before the Chancery Court, and that no testimony was adduced at that hearing. *Slavin*, slip op. at 5, 7. The Supreme Court also indicates that the Chancery Court agreed with the facts found by the Hearing Committee. *Id.* at 5.

Tennessee BPR proceedings, the Respondent does not identify any procedural defect in the reliance on that judge's testimony by the Hearing Committee, the Chancery Court or the Supreme Court. *See* Resp. to OSC at 1-2, 4-6. We therefore conclude that the Tennessee Supreme Court's August 27, 2004 suspension order suffers no infirmity of proof of misconduct and thus complies with the second *Selling* criterion.

D. Whether imposition of reciprocal discipline by the ARB would violate the principles of right and justice

The Respondent urges that a "grave injustice would result from denying workers the right to a principled lawyer who does not hestitate to file peer review complaints against unjust judges." Resp. to OSC at 5, quoted in n.7, *supra*. The United States Supreme Court applied the third *Selling* criterion and found that a grave injustice would result were reciprocal discipline to be imposed in the case of *Theard v. United States*, 354 U.S. 278 (1957). *Theard* involved a state disbarment based on forgery that had been committed eighteen years before, when the attorney was actually suffering "a degree of insanity" that required him to be institutionalized for treatment for a number of years thereafter. 354 U.S. at 279-80, 282-83. Circumstances giving rise to an injustice of the gravity found by the Court in the *Theard* case are rare. *See In re Smith*, 123 F. Supp. 2d 351, 358 n.14 (N.D. Tx. 2000) (noting that *Theard* was the only case the court had found in which the grave injustice criterion of *Selling* had precluded imposition of reciprocal discipline). When the disciplinary order of the originating jurisdiction complies with the first two *Selling* criteria, as here, the respondent attorney carries a heavy burden in establishing that a grave injustice would result from imposition of identical discipline by the reciprocating body. *See, e.g., In the matter of Calvo*, 88 F.3d 962, 967-68 (11th Cir. 1996) (rejecting attorney's argument that disqualification of one of the two attorneys representing him in the state bar proceedings constituted grave injustice under third *Selling* criterion); *In re McTighe*, 131 F. Supp. 2d 870, 873-74 (N.D. Tx. 2001) (rejecting attorney's contention that his efforts to improve his law practice and his personal life supported lessening of sanction from six-month suspension to probation under third *Selling* criterion).

Like the attorney in *Smith* who urged that the originating jurisdiction had disbarred him as punishment for the exercise of his right to freedom of speech and association and to petition the government for redress of grievances, the Respondent's "grave injustice" contention lacks merit under *Selling*. *See Smith*, 123 F. Supp. 2d at 358-60. In addition, the language used by the Respondent to frame his grave injustice contention – that he is a principled lawyer who does not hesitate to file peer review complaints against unjust judges – clearly does not provide a basis for mitigation of the Tennessee court's suspension order. In imposing the suspension, the Tennessee court cited the Respondent's manipulation of "the Peer Review process to 'systematically harass[] and attempt[] to intimidate judges'" at the DOL OALJ. *Slavin*, slip op. at 10; *see*

id. at 12-13.[11] The Respondent's statement here only serves to provide further reinforcement for the disciplinary order by suggesting that he has not accepted responsibility for the misconduct in which the Tennessee court found he had engaged. *See generally* American Bar Ass'n Standards for Imposing Lawyer Sanctions, Rule 9.22(g) (aggravating factors, refusal to acknowledge wrongful nature of conduct) (1992).

Therefore, consistent with the third *Selling* criterion, we conclude, in light of all relevant circumstances, that it would clearly serve the principles of right and justice to impose reciprocal discipline in this case. The Tennessee Supreme Court provided a full explanation for its assessment of the appropriate level of discipline. The court compared the Respondent's misconduct with that in a other disciplinary cases arising in Tennessee and other states. *Slavin,* slip op. at 11-13. The court considered the recommendations of the Hearing Committee and the Chancery Court concerning the appropriate level of discipline, in relationship to the different level of misconduct that each had found. *Id.* at 13. In reaching the determination to impose a two-year suspension, with leave to seek reinstatement after one year, the court cited the Respondent's "apparent defiance in refusing to respect the line separating, in the judicial context, tolerable criticism from unacceptable speech." *Id.* We have reason to share the court's concern. As the court indicated, the ARB has had first-hand experience with the Respondent's conduct that is prejudicial to the administration of justice and his undignified and discourteous conduct that is degrading to a tribunal. *Id.* at 3, 5. We accordingly conclude that the imposition of discipline similar to that ordered by the Tennessee Supreme Court is consistent with the third *Selling* factor.

CONCLUSION

We have examined the suspension order that was issued by the Tennessee Supreme Court on August 27, 2004, and determined that it is neither procedurally defective nor lacking in proof of misconduct under the *Selling* criteria. We have also considered Mr. Slavin's September 24, 2004 response and have determined that it offers no basis for concluding that the implementation of discipline similar to that imposed by the Tennessee Supreme Court would not be wholly consistent with the *Selling* standard. Further, in view of Mr. Slavin's failure to contest the facts on which the Tennessee Supreme Court based its conclusions, either before that court or before this Board, we conclude that no further proceedings are warranted prior to our imposition of discipline. We thus conclude that the lack of qualifications evidenced by the Tennessee BPR proceedings warrants suspension of Mr. Slavin from the practice of law before the

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[11] The Tennessee Supreme Court noted that the Chancery Court relied on the statements of an expert witness – a former Chief Administrative Law Judge at DOL — who the Respondent called and who testified to the Respondent's misuse of the Peer Review procedure to challenge issues that should have been pursued in an appeal. *Slavin,* slip op. at 6.

Administrative Review Board for the remainder of the period that he is suspended from practice by the Tennessee Supreme Court.

Accordingly, effective upon issuance of this Order, we **SUSPEND** the Respondent, Edward A. Slavin, Jr., from the practice of law before the Administrative Review Board until such time as he gains reinstatement as a member of the bar of the Tennessee Supreme Court.[12]

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

[12] A copy of this Order will be served on the Board of Professional Responsibility of the Tennessee Supreme Court.