In re David M. Kelsey. Case 5–AD–62

January 31, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN, SCHAUMBER, KIRSANOW, AND WALSH

The General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon a letter dated March 16, 2006, from Deputy Chief Administrative Law Judge C. Richard Miserendino referring misconduct allegations to the General Counsel pursuant to Section 102.177 of the Board's Rules and Regulations, the General Counsel issued a complaint and notice of right to hearing against the Respondent, David M. Kelsey. The Respondent failed to file an answer.

On December 11, 2006, the General Counsel filed a Motion for Default Judgment with the Board. On December 22, 2006, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent did not file a response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Default Judgment

Section 102.177(e)(4) of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint. In addition, the complaint affirmatively stated that unless an answer was filed by November 1, 2006, the allegations in the complaint could be found to be true. Further, the undisputed allegations in the General Counsel's motion disclose that the General Counsel notified the Respondent by letter dated November 8, 2006, that unless an answer was received by November 22, 2006, a motion for default judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's motion for default judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

At all material times, the Respondent held the position of corporate director for USA Remediation Services, Inc. (the Employer).

On December 6, 7, 9, 10, and 13, 2004, the Respondent appeared before the Board as a representative of the Employer during the unfair labor practice proceeding in Case 5–CA–31524.

During the proceeding in Case 5–CA–31524, the Respondent:

(a) Engaged in conduct involving dishonesty, fraud, deceit or misrepresentation during his testimony both as to the reason he is not licensed to practice law and as to whether subpoenaed documents relating to paragraph 9 of counsel for the General Counsel's subpoena had been produced by the Employer at the hearing in Case 5–CA–31524.

(b) Engaged in conduct that was disrespectful towards witnesses, the interpreter, counsel for the General Counsel, and the administrative law judge.

(c) Repeatedly asked witnesses irrelevant questions and cumulative questions despite being cautioned not to do so.

(d) Without a nonfrivolous basis in fact or law denied the allegation in paragraph 4 of the complaint in Case 5–CA–31524 that Eric Woodruff was a supervisor of the Employer within the meaning of Section 2(11) of the Act.

CONCLUSION OF LAW

By the conduct described above, the Respondent failed to conform to the standards of ethical and professional conduct required of practitioners before the courts, as described in Rules 3.1, 3.3, 3.4, 3.5, 4.1, and 8.4 of the District of Columbia Rules of Professional Conduct, and engaged in misconduct of an aggravated character that is grounds for suspension and/or disbarment from practice before the Board as described in Section 102.177(a) and (d) of the Board's Rules and Regulations.[1]

REMEDY

Having found that the Respondent has engaged in misconduct of an aggravated character, we shall suspend him from appearing or practicing before the Board. In determining the appropriate length of the suspension, we note that the General Counsel does not allege that the Respondent has previously engaged in misconduct while practicing or appearing before the Board, nor does the General Counsel identify any other aggravating factors. Further, as indicated by Deputy Chief Administrative Law Judge Miserendino in his decision in Case 5–CA–

[1] Secs. 102.177(a) and (d) provide as follows:

(a) Any attorney or other representative appearing or practicing before the Agency shall conform to the standards of ethical and professional conduct required of practitioners before the courts, and the Agency will be guided by those standards in interpreting and applying the provisions of this section.

(d) Misconduct by an attorney or other representative at any stage of any Agency proceeding, including but not limited to misconduct at a hearing, shall be grounds for discipline. Such misconduct of an aggravated character shall be grounds for suspension and/or disbarment from practice before the Agency and/or other sanctions.

31524, the Respondent was excluded from the hearing in that case based on the misconduct found above. Accordingly, given the progressive nature of disciplinary sanctions and considering that the Respondent has already been sanctioned by Judge Miserendino for the same conduct, we believe that a 6-month suspension, rather than the 2-year suspension requested by the General Counsel, is sufficient and appropriate.[2]

ORDER

In order to preserve and protect the orderly administration of the National Labor Relations Act and effectuate its policy:

IT IS HEREBY ORDERED that David M. Kelsey be, and he hereby is, suspended from appearing or practicing before the Board for a period of 6 months from the entry of this Order.

[2] Compare *Joel I. Keiler*, 316 NLRB 763 (1995) (1-year suspension for misconduct similar to that involved in this case; respondent had been warned and admonished in two prior cases); *Sargent Karch*, 314 NLRB 482, 487–488 (1994) (6-month suspension for violation of a sequestration order; Board noted that it was the second such violation by the respondent, but nevertheless declined to impose the full 1-year suspension requested by the General Counsel).