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REPORT OF INVESTIGATION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION OFFICE OF INSPECTOR GENERAL

Case No. OIG-498

Failure to Maintain Active Bar Status As Required

Introduction and Background

The Office of Inspector General (OIG) opened this investigation after receiving information that (b)(7)(C) Enforcement Attorney in the Securities and Exchange Commission's (SEC's or Commission's) (b)(7)(C) Office (b)(7)(C) had not maintained active Bar status since 1994, never advised his supervisors of the change in his Bar status, and continued to practice law as an (b)(7)(C) Enforcement Attorney.

(b)(7)(C) was admitted to the Pennsylvania Bar in October (b)(7)(C). He initially joined the Commission's (b)(7)(C) Office as a Trial Attorney in (b)(7)(C) and was employed as an attorney in (b)(7)(C) since (b)(7)(C).

(b)(7)(C) worked as an (b)(7)(C) Enforcement Attorney conducting investigations and supporting litigation. (b)(7)(C) management just recently learned that (b)(7)(C) was not an active Bar member, as required for his position, and that his Pennsylvania Bar membership had been inactive since 1994.

We conducted this investigation to determine (1) whether (b)(7)(C) in fact, failed to maintain active Bar status in violation of the requirement of his position as a (b)(7)(C) attorney; (2) whether he engaged in the unauthorized practice of law; and (3) whether he made any false statements regarding his Bar membership status.

Summary of Results of the Investigation

The OIG investigation found evidence that (b)(7)(C) Enforcement Attorney (b)(7)(C) failed to maintain an active status in any Bar, as required by his position, since 1994. The Supreme Court of Pennsylvania ordered his transfer to inactive status, effective December 19, 1994, for his failure to renew his Bar license. The investigation showed that the Disciplinary Board of the Supreme Court of Pennsylvania (Disciplinary Board) notified (b)(7)(C) in a December 5, 1994 letter of his transfer to inactive status and instructed him to comply with the Pennsylvania Rules of Disciplinary Enforced (Pa.R.D.E.) and Disciplinary Board Rules. (b)(7)(C) then violated these requirements, never completing the Statement of Compliance that Pa.R.D.E. 217(e) required to be filed within ten days after the effective date of the transfer to inactive status order.

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Moreover, the investigation disclosed that (b)(7)(C) continued to function as a Commission attorney after his transfer to inactive status, despite not being admitted to another Bar. In addition, he never disclosed the change in his Bar status to his supervisors or anyone else at the Commission, in violation of Pa.R.D.E. 217(c) and notwithstanding his admission that he learned of his inactive status in 2003.

The evidence further showed that (b)(7)(C) submitted a declaration under penalty of perjury to a Federal District Court in support of the SEC's emergency motion for a temporary restraining order, in which he stated that he was an attorney employed by the SEC. We referred the potential false statement or perjury to the United States District Court (b)(7)(C) which provided an oral declination of prosecution. We did not locate any evidence, however, that (b)(7)(C) had made a specific, false representation that he was an "active" Bar member.

During our investigation, (b)(7)(C) retired from the Commission, effective (b)(7)(C) 2008. While we would have referred this matter to management for appropriate disciplinary action, up to and including dismissal, in light of (b)(7)(C) retirement, we are not recommending disciplinary action but are providing this report for management's information. We are also providing this report to the Commission's Office of Ethics Counsel for referral to the Disciplinary Board of the Supreme Court of Pennsylvania. In addition, we have issued a separate memorandum recommending that the Commission require that all agency attorneys to certify on an annual basis that they are an active member of the Bar of at least one State, territory, the District of Columbia, or the Commonwealth of Puerto Rico.

Scope of Investigation

We contacted the Disciplinary Board of the Supreme Court of Pennsylvania and obtained information concerning (b)(7)(C) Pennsylvania Bar status. We also reviewed information concerning Pennsylvania Bar membership requirements contained on the website of the Disciplinary Board of the Supreme Court of Pennsylvania, www.padisciplinaryboard.org.

We reviewed (b)(7)(C) Official Personnel Folder and conduct file. We obtained and reviewed numerous other relevant documents, including

- positions descriptions for (b)(7)(C) attorney (b)(7)(C) level), dated April 1996 and January 2003, respectively;
- a sworn declaration (b)(7)(C) submitted in support of the SEC's Memorandum of Law in Support of Plaintiff SEC's Emergency Motion and Other Equitable Relief in *SEC v.* (b)(7)(C)

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- examples of correspondence signed and sent by (b)(7)(C) in connection with various (b)(7)(C) Enforcement matters; and
- examples of the introductory pages of testimony taken by (b)(7)(C) in (b)(7)(C) Enforcement matters.

We interviewed (b)(7)(C) Regional Director (b)(7)(C) telephonically on July 28, 2008.¹

Applicable Rules, Requirements and Statutes

Pennsylvania Bar Requirements and Rules

Attorneys admitted to practice law in the Commonwealth of Pennsylvania who go on inactive status are not permitted to engage in any activity which constitutes practice as a Pennsylvania lawyer. FAQs by Attorneys, The Disciplinary Board of the Supreme Court of Pennsylvania, www.padisciplinaryboard.org/faqs/attorneys.php (hereinafter "FAQS by Attorneys"). An attorney on inactive status in Pennsylvania "may not advise clients as to Pennsylvania law, contact third parties or courts in a representative capacity, file any document with a court on behalf of another, or *work in a position which requires [him or her] to be a lawyer in good standing.*" *Id.* at 3 (emphasis supplied).

Under Pennsylvania Rule of Disciplinary Enforcement (Pa.R.D.E.) 217(c), "[a] formerly admitted attorney shall promptly notify, or cause to be notified, of the . . . transfer to inactive status, by registered or certified mail, return receipt requested: (1) all persons or their agents or guardians to whom a fiduciary duty is or may be owed at any time after the . . . transfer to inactive status, and (2) all other persons with whom the formerly admitted attorney may at any time expect to have professional contacts under circumstances where there is a reasonable probability that they may infer that he or she continues as an attorney in good standing." Further, under Pa.R.D.E. 217(e), "[w]ithin ten days after the effective date of the . . . transfer to inactive status order, the formerly admitted attorney shall file with the Board a verified statement showing: (1) that the provisions of the order and these rules have been fully complied with; and (2) all other state, federal and administrative jurisdictions to which such person is admitted to practice"

A Pennsylvania attorney who has been on inactive status for more than three years and wishes to return to active status must file a Petition for Reinstatement and complete 36 hours of accredited Pennsylvania CLE courses with a minimum of 12 of those hours in the area of Ethics, appear for a hearing and prove that he or she has the

¹ Because (b)(7)(C) acknowledged his failure to maintain active Bar status as required by his position and agreed to resign from the Commission, we did not find it necessary to interview (b)(7)(C)

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moral qualifications, competency and learning in the law required for admission to practice law in Pennsylvania. FAQs by Attorneys at 2-3.

Commission Bar Membership Requirement

The Commission requires admission to the Bar as a condition of employment for Commission attorneys. See Ethics News Gram, *Attention All Attorneys – Be Active!*, dated Aug. 22, 2008. “This requirement means that a Commission attorney must be currently licensed and authorized to practice as an attorney under the laws of a state, territory, the District of Columbia, or the Commonwealth of Puerto Rico.” *Id.* Prior Commission guidance to attorneys on this topic indicated that the Office of Personnel Management issued a decision interpreting the Bar membership requirement to mean active Bar membership. Memorandum to All Commission Attorneys from John Innocenti, Director Office of Human Resources Management, dated Feb. 5, 1992.

False Statements/Perjury

Under 18 U.S.C. § 1001, “. . . whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry . . . shall be fined under this title, imprisoned not more than 5 years, . . . or both.” *Id.* To violate 18 U.S.C. § 1001, “the defendant must have: (1) made a statement; (2) that was false; (3) and material; (4) knowingly and willfully; and (5) that falls within agency jurisdiction.” *United States v. Hoover*, 467 F.2d 496 (5th Cir. 2006).

Under 18 U.S.C. § 1621, “[w]hoever . . . in any declaration . . . under penalty of perjury as permitted under section 1746 of title 28, United States Code,²] willfully subscribes as true any material matter which he does not believe to be true . . . is guilty of perjury and shall . . . be fined under this title or imprisoned not more than five years, or both.” As a general matter, “[a] person may be convicted of perjury if (1) he was under oath before a competent tribunal, (2) in a case in which a law of the United States authorizes an oath to be administered, (3) and he gives false testimony, (4) concerning a material matter, (5) which testimony was given with the willful intent to provide false testimony.” *United States v. Chaplin*, 25 F.3d 1373 (7th Cir. 1994).

² 28 U.S.C. § 1746 provides that “[w]herever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same . . . , such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in” the prescribed form.

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An administrative charge of falsification requires proof by a preponderance of the evidence that the defendant knowingly supplied incorrect information with the specific intent of defrauding, deceiving, or misleading the agency. See *Naekel v. Dept. of Transp.*, 782 F.2d 975, 977-78 (Fed. Cir. 1986). The employee's intent must be resolved from the totality of the circumstances. *Stein v. U.S. Postal Serv.*, 57 M.S.P.R. 434, 438-39 (1993). Intent may be inferred when a misrepresentation is made with a reckless disregard for the truth. *Deskin v. U.S. Postal Serv.*, 76 M.S.P.R. 505 (1997).

Results of the Investigation

The OIG investigation found evidence that (b)(7)(C) Pennsylvania Bar membership had been inactive continuously since December 19, 1994, and that he was never admitted to any other Bar. The Disciplinary Board informed us that (b)(7)(C) was transferred to inactive status as a result of his failure to file the license renewal form (and to pay the requisite licensing renewal fee) due July 1, 1994. According to the Disciplinary Board, (b)(7)(C) would have received a postcard reminder (dated 8/30/1994) and a final notice via certified mail (dated 10/4/1994).

On (b)(7)(C) was sent by certified mail a delinquent notice, informing him of the Supreme Court Order dated (b)(7)(C) 1994, transferring him to inactive status effective 30 days from the date of the Order. (The (b)(7)(C) letter and a copy of the signed certified mail receipt are at Attachment A.) The (b)(7)(C) letter enclosed several relevant materials, including Form DB-25i, Statement of Compliance (Attachment B), and instructed (b)(7)(C) that he was "now required to comply with the Pennsylvania Rules of Disciplinary Enforcement and Disciplinary Board Rules as enclosed herewith." The Disciplinary Board further informed us that (b)(7)(C) did not file the Statement of Compliance required by Pa.R.D.E. 217(e).

The evidence showed that (b)(7)(C) never notified anyone at the Commission of his transfer to inactive Bar status in December 1994, or at any time thereafter. Yet, (b)(7)(C) continued to function as a Commission attorney (b)(7)(C) Enforcement Attorney) from December 1994 through July 2008. The position descriptions for (b)(7)(C) Enforcement Attorney, GS-905 (b)(7)(C) and SK-905 (b)(7)(C) dated April 1996 and January 24, 2003, respectively, required that the incumbent be a member of the Bar. (b)(7)(C) was clearly on notice of this requirement as he signed the position description for a General Attorney (Finance) position, GS-905 (b)(7)(C) on April 8, 1996, certifying the accuracy of the statements contained in the position description.

The OIG investigation also found that during the specific time frame in which (b)(7)(C) admitted knowledge that his active Bar membership had lapsed, he represented himself as a Commission attorney on several occasions. Most significantly, (b)(7)(C) submitted a declaration dated (b)(7)(C) 2007, under penalty of perjury pursuant to 28 U.S.C. § 1746, in support of the Commission's Emergency Motion in *SEC v.* (b)(7)(C)

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(b)(7)(C) In that declaration, (b)(7)(C) stated: "I am an attorney employed by the Securities and Exchange Commission (b)(7)(C)" On several other occasions during the course of (b)(7)(C) Enforcement investigations, in correspondence and in testimony, (b)(7)(C) identified himself as a Commission attorney. Our investigation found no evidence that (b)(7)(C) signed pleadings or made court appearances on behalf of the Commission while his Bar status was inactive. In addition, we found no evidence that he had made a specific false statement that he was an "active" Bar member.

During our telephone interview with (b)(7)(C) Regional Director (b)(7)(C) (b)(7)(C) on July 28, 2008, we learned that (b)(7)(C) and Assistant Regional Director (b)(7)(C) met with (b)(7)(C) on July 22, 2008, concerning his Bar membership status. During that meeting, (b)(7)(C) told (b)(7)(C) that it had come to her attention that his Bar membership was inactive and that an active Bar license was required for his position. (b)(7)(C) stated that (b)(7)(C) did not dispute these facts, apologized, and admitted that he had been inattentive to his Bar status. According to (b)(7)(C) (b)(7)(C) claimed that he did not know how his Bar membership initially became inactive in 1994, but that he received notification from the Pennsylvania Bar in 2003 that his status was inactive. (b)(7)(C) acknowledged to (b)(7)(C) that even after learning that his Bar membership was inactive, he failed to take any action to regain active status.

At the conclusion of the meeting with (b)(7)(C) on July 22, 2008, (b)(7)(C) informed him that he was temporarily being moved to an (b)(7)(C) position and that he should not refer to himself as an attorney or use his attorney business card. (b)(7)(C) stated that (b)(7)(C) then informed (b)(7)(C) and her that he would retire at the end of (b)(7)(C) 2008, and would begin to process the necessary paperwork. (b)(7)(C) subsequently submitted the appropriate paperwork and retired, effective (b)(7)(C) 2008.

On August 13, 2008, we referred this matter to the United States Attorney's Office (b)(7)(C) for consideration of possible prosecution for false statements or perjury. That Office provided an oral declination of prosecution based upon the facts provided.

Conclusion

The OIG investigation disclosed evidence that (b)(7)(C) acted as a Commission attorney without maintaining an active Bar license, in violation of agency requirements, for a period of more than 13 years. After his Pennsylvania Bar membership was transferred to inactive status in 1994 due to his failure to renew his Bar license, he did not notify the Commission of the change in his Bar status and failed to file the required Statement of Compliance with the Disciplinary Board. The investigation further showed that, while his Bar status was inactive, he filed a declaration under penalty of perjury representing that he was an attorney employed by the Commission, and frequently represented himself to be a Commission attorney in correspondence and testimony. The

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investigation found no evidence, however, that (b)(7)(C) had made a specific false representation that he was an "active" Bar member.

In view of (b)(7)(C) failure to maintain an active Bar license for such a lengthy period of time, the fact he never notified his superiors or anyone else at the agency of his inactive Bar status, and his continued representation of himself as a Commission attorney, the OIG would have recommended that the Commission take appropriate disciplinary action against him, up to and including dismissal. However, because (b)(7)(C) has retired from the Commission, we are making no recommendation for disciplinary action and are providing this report for management's information. We are also providing this report to the Commission's Office of Ethics Counsel for referral to the Disciplinary Board of the Supreme Court of Pennsylvania. In addition, we have issued a separate memorandum recommending that Commission attorneys annually certify their active Bar membership status.

Submitted: (b)(7)(C) Date: Sept. 11, 2008

Concur: (b)(7)(C) Date: 9/11/08

Approved:  Date: Sept. 11, 2008
H. David Kotz