

dishonest or fraudulent.¹ In an explanatory statement to Question No. 20, Petitioner stated that his August 31, 2006 resignation from the position of Patent Examiner at the USPTO “was precipitated by alleged time card inconsistencies.”

On December 31, 2007, Petitioner was advised that he had passed the Registration Examination, but he would receive a separate letter regarding the requirement for additional information related to his answer to Question No. 20. In a letter dated February 6, 2008, OED requested further information from Petitioner and informed Petitioner that he had the burden of demonstrating that he possesses the good moral character to practice before the USPTO. *See* 37 C.F.R. §11.7.

OED also obtained records from the USPTO’s Office of Employee Relations (OER) regarding the investigation of discrepancies in Petitioner’s timekeeping which led to his resignation from the USPTO that included the following: Notice of Discharge During Probationary Period (Notice); copy of Petitioner’s swipe in swipe out (siso) records covering the time period between _____, through _____; copy of Petitioner’s biweekly time and attendance reports covering the time period between _____, through _____; and copy of a spreadsheet demonstrating discrepancies or “negative hours” in which Petitioner claimed to have worked on his time and attendance reports but the siso records demonstrated that he was not present in USPTO facilities. OED also established that Petitioner was employed in Technology Center 2100 and his first line supervisor was Supervisory Patent Examiner (SPE)

¹ Question No. 20 asks the following: “Have you ever resigned or quit a job when you were under investigation or inquiry for conduct which could have been considered as involving dishonesty, fraud, misrepresentation, deceit, or violation of Federal or State laws or regulations, or after receiving notice or been advised of possible investigation, inquiry, or disciplinary action for such conduct?”

In reviewing the records, the OER investigators found that Petitioner had claimed a total 254 (two hundred fifty-four) negative hours, i.e., hours that Petitioner claimed to have been at work but his records contain no record of him swiping in or out. During this time, Petitioner was a probationary employee and thus not entitled to work outside of the USPTO facilities. Petitioner was called to a meeting with a representative of OER, a Patent Office Professional Association (POPA or Union) representative, his Technology Center Director, and SPE Petitioner was informed of the discrepancies, shown the evidence, and informed that he had an opportunity to respond. Petitioner presented arguments and evidence in an attempt to demonstrate he was at work for some of the dates in question. Ultimately, USPTO management found the evidence unpersuasive. On , Petitioner was given the Notice of his pending discharge. As summarized in the Notice, Petitioner was informed of the following regarding the investigation:

On September 6, 2005, you were hired on a Career Conditional Appointment with the USPTO. This appointment required you to serve a probationary period for one year. The probationary period is an extension of the hiring process to provide an opportunity for the selecting official to further evaluate your qualifications and fitness for continued Federal employment through direct observation of your performance, character, conduct, and attitude. Based on your conduct, I conclude that you have not demonstrated the capacity and fitness to be retained in the Federal service.

Specifically, you have inaccurately reported your time and attendance on many occasions. On several occasions you overstated the time that you worked. Our records show that you did this repeatedly. In fact, on multiple days you claimed time and accepted pay for entire days you were not at work. Your improper conduct is very serious. It reveals

that you are not trustworthy and that your character is questionable. Your conduct indicates no potential for growth and development as a career professional in the U.S. Patent and Trademark Office.

On _____, Petitioner resigned his position as Patent Examiner stating that he was leaving to enter law school.

The primary focus of OED regarding discrepancies in Petitioner's timekeeping are the following dates, which were the primary focus of the OER investigation:

_____ and _____. In response to OED's February 6, 2008, communication, Petitioner filed a response received by OED on March 6, 2008. In the response, Petitioner submitted evidence in support of his moral character including screen snapshots of documents he alleged to have created in the Office Action Correspondence Subsystem (OACS) while at work for the following dates:

_____ ; and

He also presented evidence to demonstrate that he was at work on _____.

For the dates of _____, Petitioner presented no evidence.

Upon review of the evidence submitted by Petitioner, OED issued a Show Cause Requirement on May 12, 2008. OED explained that it did not find Petitioner's evidence to be credible, particularly regarding his explanation regarding the creation of documents in OACS. OED also submitted evidence that SPE _____ had no recollection of Petitioner attending the _____ art unit meeting.

Petitioner filed a Response dated August 10, 2008. Petitioner reiterated that the submitted documents showed the OACS time stamp and not the Microsoft® Word

(Word) time stamp, and thus, demonstrated that he was present at the USPTO on the dates of .

and . Petitioner also submitted thirteen (13) sworn witness statements attesting to his good moral character.

In response to Petitioner's communication, OED issued a Supplemental Show Cause on September 30, 2008. OED presented Petitioner with testimony from , the creator of OACS, who explained how documents may be created in Word and Adobe ® Acrobat (Adobe) and transferred into OACS. Thus, the creation and modification dates relied upon by Petitioner as evidence of his presence at work were not reliable because the properties shown in his snapshots were the properties of the Word or Adobe documents.

Prior to replying to the September 30, 2008, Supplemental Show Cause Requirement, Petitioner filed questions for Mr ., of which OED sent responses on January 14, 2009.

On January 29, 2009, Petitioner responded to the Supplemental Show Cause and stated that for the first time, after reading the responses of Mr. to his questions, Petitioner recalled how he created and modified the documents in question.

On February 24, 2009, OED issued the Final Decision and Memorandum Opinion (Final Decision) denying Petitioner's application for registration to practice before the Office.² Petitioner was notified of his right to appeal and filed the present appeal on April 27, 2009.

² Though OED denied Petitioner's application for registration, OED noted that Petitioner submitted credible evidence that he was in the Office on , at 3:05 PM.

II. LEGAL STANDARDS

A. Recognition.

35 U.S.C. § 2(b)(2)(D) states in pertinent part that the USPTO:

“may require [agents, attorneys, or other persons representing applicants or other parties before the USPTO], before being recognized as representatives of applicants or other persons, to show that they are of good moral character and reputation...”

Pursuant to the statute, Petitioner bears the burden of showing that he is of good moral character and reputation. In accordance with that statute, the USPTO Director promulgated 37 C.F.R. § 11.7, which states in pertinent part:

- (a) No individual will be registered to practice before the Office unless he or she has:
- (2) Established to the satisfaction of the OED Director that he or she:
 - (i) Possesses good moral character and reputation...

The primary responsibility for protection of the public from unqualified practitioners before the Office rests with the Director of the Office. *Kingsland v. Dorsey*, 338 U.S. 318, 319-20 (1949); *Cupples v. Marzall*, 101 F. Supp. 579, 583, 92 U.S.P.Q. 169, 172 (D.D.C. 1952), *aff'd*, 204 F.2d 58, 97 U.S.P.Q. 1 (D.C. Cir. 1953). The OED Director has been delegated authority to determine if an applicant has made a satisfactory showing of good moral character and reputation. See 37 C.F.R. §§ 11.2(b)(3) and 11.7(a)(2).

“Good moral character” denotes “an absence of proven conduct or acts which have been historically considered as manifestations of ‘moral turpitude.’” *Konigsberg v. State Bar of California*, 353 U.S. 252, 263 (1957).

In making a determination whether an applicant presently possesses the required good moral character, the OED Director considers, among other things, evidence presented by the applicant in answer to questions authorized by 37 C.F.R. § 11.7(g).

B. Review of OED Director's Final Decision.

An individual dissatisfied with the final decision of the OED Director may petition the USPTO Director for review. 37 C.F.R. § 11.2(d). The petition must be accompanied by the appropriate fee, and must be filed within sixty days of the mailing date of the final decision of the OED Director. *Id.* Petitions not filed within sixty days will be dismissed as untimely. *Id.*

III. OPINION

Petitioner's appeal is succinct; he simply asks for review of the evidence presented. Therefore, his arguments and evidence as presented through the course of the OED investigation as well as the findings of OED are reordered and reviewed herein.

A. Documents Submitted by Petitioner

In an attempt to demonstrate that Petitioner was physically at the USPTO on the dates of _____ and _____, Petitioner submitted screenshots of documents. Petitioner alleged that these documents were made in OACS based on the creation and modification dates and thus, the documents demonstrate that Petitioner was at the USPTO. The creator of OACS, Mr. _____, stated in his declaration that the documents submitted by Petitioner show properties of the Word documents or the Adobe documents, i.e., that the documents were created or modified in Word or Adobe. Mr. _____ also stated that a document could be created in Word or Adobe and then imported to OACS at

Petitioner's workstation via various means. For example, a Word or Adobe document could be e-mailed or transferred via a disk to the USPTO and uploaded into OACS. Additionally, the documents did not use the OACS default naming scheme, but had alternate names. Therefore, Mr. [redacted] concludes that the screenshots presented by Petitioner show documents created in Word or Adobe and later transferred to OACS.

When confronted with Mr. [redacted]'s evidence, Petitioner initially argued that it was only opinion and that changes in OACS may have led to his evidence appearing different. Petitioner submitted follow-up questions for Mr. [redacted]. Only when confronted with the responses to the follow-up questions was Petitioner's "recollection" "triggered." Thus, in the January 29, 2009, Response, Petitioner admitted to changing the names of the files he presented as evidence in order to make it clear that the documents were created on the dates he claimed.

The documents provided by Petitioner are not credible evidence of his being at the USPTO on the dates of [redacted]

[redacted]; and [redacted].³ As Mr. [redacted] indicates, the documents were likely created outside of OACS and uploaded by Petitioner. Moreover, there are no other documents to corroborate Petitioner's evidence. Petitioner did not present any other items created in USPTO software, for example, saved searches, to demonstrate he was working on campus on the dates in question.

Therefore, in reviewing the evidence collected by OED and the evidence presented by Petitioner, it appears that Petitioner was not at work for the hours he

³ The siso records show that Petitioner was in the Office for 1 hour 48 minutes on [redacted], whereas he claimed, and received pay for, 10 hours for that date. The screen shot documentation Petitioner submitted for [redacted], fails to demonstrate that he was present and worked for the 10 hours that he claimed on that date.

claimed on the days for which he presented the documents. Assuming for the sake of argument that Petitioner did perform work outside of USPTO facilities on the dates in question and then transferred the documents into the OACS system, he still would have been in violation of USPTO policy. Petitioner was a probationary employee and as such, was not authorized to work anywhere but his assigned work station.

Essentially, Petitioner's submitted documents do not weigh in favor of finding that he was at work for the dates of

; and . Instead, they tend to demonstrate that Petitioner misrepresented his hours worked, received pay for those hours, and then created documents in an effort to explain his misrepresentation. Only when he was confronted with evidence on how the technical aspects of the OACS system worked did he acknowledge that he had submitted documents that were altered in some way. Thus, for over two years Petitioner perpetuated the initial misrepresentation of being at work by committing an additional misrepresentation. Such action does not demonstrate good moral character.

B. Manager's Certification of Timesheets

Petitioner has argued that his manager, SPE , certified his timesheets, including one timesheet in which Petitioner reported attending a meeting led by SPE on . Thus, Petitioner argues that his manager corroborated that Petitioner has worked all the time that he reported. The record reveals, however, that Petitioner's manager did not corroborate Petitioner's assertions.

First, in a sworn statement, SPE attests he has no recollection of Petitioner being present in an art unit meeting nor did he keep the records for that meeting. Thus, he cannot verify that Petitioner was in attendance. Second, when a supervisor certifies a timesheet, he or she is performing a ministerial task. It is the employee, not the supervisor, who makes a statement that he or she is accurately reporting his or her hours. The manager relies on the employee's statement. If, as is the case with Petitioner, it is later discovered that the employee misrepresented the time, the supervisor is not held responsible for the employee's misrepresentation.

C. Petitioner's Productivity as a USPTO Employee

Petitioner has argued that his record of performance at the USPTO demonstrates that he was performing the job in more than satisfactory manner. He noted that the Office places an emphasis on reaching or exceeding production goals. He also stated that attendance policies were not explained to him and that his first line supervisor's attitude towards production led him to believe that he could work when and how he wanted, so long as he reached his production goals. Petitioner further points out that he exceeded his production goals for four consecutive quarters, which led him to receive a Special Achievement Award.

Petitioner's arguments regarding his performance as a Patent Examiner are not relevant. At no time has Petitioner's ability to review patent applications been called into question. Rather, both the OER and the OED investigations reviewed Petitioner's moral character as his time and attendance records contradicted his reports. The evidence

presented by Petitioner regarding his productivity does not prove that Petitioner was present at the USPTO during the dates in question.

Petitioner also seems to imply that management encouraged him to *not* follow attendance rules for the sake of meeting production. Petitioner offers no evidence of such encouragement. Moreover, even if the Agency encouraged Petitioner to meet production goals, that does not mean that Petitioner was permitted to make misrepresentations. Thus, as Petitioner has presented no evidence to demonstrate that the Office encouraged him to claim, and receive pay for, time that he did not work, or to otherwise make misrepresentations about his time and attendance, the arguments related to the Office emphasizing production at all costs are not persuasive as they are merely unsubstantiated assertions.

D. Siso System

Petitioner also argues that the siso system is inaccurate and should not be relied upon in timekeeping. Petitioner makes several arguments to demonstrate that the siso system is not a timekeeping tool. Petitioner first argues that there were times that the system did not work properly or he forgot his badge and he was allowed to enter the work area without swiping his identification badge. This argument is unpersuasive as Petitioner has presented no evidence to support these assertions. Petitioner has not presented, for example, testimony of security guards or others who could verify that he was allowed to enter the facilities without having a badge. As explained by the Agency's Director of Security and Safety, it is Office policy that if an employee has forgotten his or her work identification badge, he or she is not allowed to pass through without swiping, but must

obtain a temporary badge from the Office of Security. Without evidence to demonstrate that Petitioner was treated differently, it is assumed that had Petitioner forgotten his badge, he would have been required to obtain a temporary badge. Additionally, there is no evidence that the turnstiles that are used to swipe the badges were not operational on the days in question. Thus, it seems unlikely that Petitioner was granted entrance and exit from the premises on so many separate occasions without some record in the siso system.

Second, Petitioner argues that the USPTO change in policy regarding the lifting of the requirement to “badge out” demonstrates that the siso system is not meant to be a timekeeping system. During the time Petitioner worked for the USPTO, employees at the Alexandria headquarters were required to swipe their identification badges at the turnstiles (badge in or swipe in) when they entered the work areas of the building and swipe their badges again in order to exit the turnstiles (badge out or swipe out). The policy was later changed so that employees only had to swipe in; they were no longer required to swipe out. Petitioner submitted evidence in the form of an announcement by USPTO Director Jon Dudas regarding the change in policy, alleging that the policy was changed because the siso system was not intended to be used as “a system of entrapment” to check employees’ attendance. As this announcement demonstrates on its face, however, the change in policy was made due to changes in the security policy. The policy change was not made for reasons having any bearing on the reliability of the siso system for timekeeping purposes or on the use of the siso records in employment actions. Thus, by the evidence presented by Petitioner, his argument is unpersuasive.

Third, Petitioner points to a POPA newsletter article describing one case in which a former USPTO employee was prosecuted in criminal court for fraud and acquitted regarding the time she reported on her time sheet as compared to her siso records. The acquittal of one defendant of criminal charges fails to demonstrate that siso records are inaccurate. Petitioner has been given the opportunity to present evidence to contradict the siso reports. The evidence he provided, as discussed above, was not only not deemed credible, but also was viewed as compounding the evidence of lack of moral character.

E. Petitioner's Arguments Regarding His Character and Witness Statements

Petitioner has argued that he possesses good moral character because he has matured since his resignation from the USPTO, has attended law school, and is active in community organizations. He also submitted sworn 13 (thirteen) sworn affidavits of individuals including his current employers, a member of the clergy, colleagues, and law school classmates attesting to his good moral character.

On appeal, Petitioner states that his accomplishments and witness testimony were not considered. On the contrary, the record shows that all the evidence was considered. While evidence such as the affidavits does tend to weigh in favor of finding that Petitioner has good moral character, it is outweighed by Petitioner's actions regarding his time and attendance as a USPTO employee. Moreover, regarding the witness testimony, none of the witnesses who offered statements concerning the hours Petitioner worked at the USPTO had first-hand knowledge of Petitioner's whereabouts on the days that were the focus of the OED investigation. Other witnesses offered statements attesting to Petitioner's good character and honesty as of August 2008. However, as described

above, Petitioner misrepresented his time worked while at the USPTO, received pay for hours that he did not work, and submitted documents to OED that he modified without initially disclosing the modifications in an attempt to cover-up the initial misrepresentation of hours worked. Moreover, although Petitioner offers testimonials to argue his subsequent behavior should outweigh a misrepresentation that occurred several years ago, Petitioner's subsequent, more recent misrepresentation during the OED investigation outweighs the evidence presented in his favor and leads to affirming the finding that Petitioner does not currently possess the moral character to practice before the Office. If Petitioner wishes to reapply for registration in the future, he must present evidence demonstrating good moral character and reputation.

IV. CONCLUSION

The OED Director's decision is well supported by evidence in the file. Petitioner had ample opportunity to explain his time and attendance misrepresentation truthfully and convincingly during the OED investigation. Instead, Petitioner presented unsubstantiated arguments and modified documents. By perpetuating his initial misrepresentation of time worked, Petitioner made another misrepresentation that substantiates, rather than overcomes, OED's findings that he does not possess the requisite moral character and reputation to practice before the Office. Therefore, the OED Director's decision should be **AFFIRMED**.

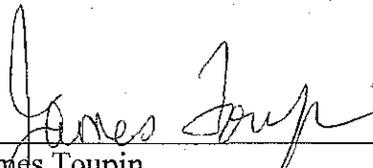
ORDER

Upon consideration of the petition to the USPTO Director for registration to practice before the USPTO in patent cases, it is ORDERED that the petition is denied.

On behalf of the Under Secretary of Commerce for
Intellectual Property and Director of the United
States Patent and Trademark Office

AUG 07 2009

Date



James Toupin
General Counsel
United States Patent and Trademark Office

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