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NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

SHAHRIAR BEHNAMIAN,
Plaintiff-Appellant

v.

**COKE MORGAN STEWART, ACTING UNDER
SECRETARY OF COMMERCE FOR
INTELLECTUAL PROPERTY AND ACTING
DIRECTOR OF THE UNITED STATES PATENT
AND TRADEMARK OFFICE, UNITED STATES
PATENT AND TRADEMARK OFFICE,**
Defendants-Appellees

2024-1139

Appeal from the United States District Court for the
Eastern District of Virginia in No. 1:21-cv-01043-RDA-
IDD, Judge Ivan D. Davis.

Decided: February 26, 2025

SHAHRIAR BEHNAMIAN, Washington, DC, pro se.

MATTHEW JAMES MEZGER, United States Attorney's Of-
fice for the Eastern District of Virginia, United States

Department of Justice, Alexandria, VA, for defendants-appellees. Also represented by JESSICA D. ABER.

Before REYNA, TARANTO, and CUNNINGHAM, *Circuit Judges*.

PER CURIAM.

Appellant Shahriar Behnamian appeals from a decision of the United States District Court for the Eastern District of Virginia, *Behnamian v. Hirshfeld*, No. 21-cv-1043-RDA-IDD, 2022 WL 1227996 (E.D. Va. Apr. 26, 2022) (“*Decision*”), *appeal transferred sub nom. Behnamian v. Vidal*, No. 22-1581, 2023 WL 8170728 (4th Cir. Nov. 6, 2023). For the reasons below, we *affirm*.

I. BACKGROUND

Mr. Behnamian worked as a patent examiner with the United States Patent and Trademark Office (“USPTO”) from January 21, 2009, until May 21, 2020. *Decision* at *1; S. App’x 42 ¶ 40.¹ In 2019, Mr. Behnamian alleges that his direct supervisor, Charles Appiah, “began randomly, without notice to [Mr. Behnamian], and without [Mr. Behnamian]’s approval issuing notices to patent applicants indicating that [Mr. Behnamian]’s last [Office Action] was vacated and a new [Office Action] would be forthcoming.” S. App’x 42 ¶ 42. Mr. Behnamian notified the Technology Center 2600 Director, Mr. Diego Gutierrez, about this issue. S. App’x 42–43 ¶ 42. Mr. Behnamian alleges that Mr. Appiah’s “behavior and tone changed in a negative manner toward [Mr. Behnamian]” after he complained to Mr. Gutierrez. S. App’x 43 ¶ 43. In 2019, Mr. Behnamian also requested leave from work to remain near his pregnant wife, *Decision* at *1; S. App’x 44 ¶ 45, but Mr. Appiah

¹ “S. App’x” refers to the supplemental appendix, ECF No. 11, filed by the Defendants-Appellees.

denied this request. *Decision* at *1; S. App'x 44 ¶ 45. Mr. Behnamian alleges that he contacted four Technology Center 2600 Directors, including Mr. Gutierrez, about this denial. *Decision* at *1; S. App'x 44 ¶ 46. Mr. Gutierrez eventually granted the leave request. *Decision* at *1; S. App'x 44 ¶ 46.

Mr. Behnamian contends that Mr. Appiah subsequently "increased his retaliation efforts." *Decision* at *2; S. App'x 44 ¶ 48. Specifically, Mr. Behnamian alleges that Mr. Appiah began scrutinizing his work and monitoring his time and attendance more closely than he had done previously. *Decision* at *2; S. App'x 44 ¶ 48. Mr. Behnamian also alleges that Mr. Appiah removed Mr. Behnamian's access to the Record Sharing Platform. *Decision* at *2; S. App'x 44 ¶ 48. On October 8, 2019, Mr. Appiah proposed suspending Mr. Behnamian for absence without leave ("AWOL") based on a finding that Mr. Behnamian was AWOL for 30 hours and 15 minutes between April 28, 2019, and June 8, 2019. *Decision* at *2 n.2; S. App'x 45 ¶ 51; S. App'x 50–51 ¶ 69. Mr. Behnamian was ordered to serve a five-day suspension beginning on March 9, 2020. *Decision* at *2; S. App'x 46 ¶ 54.

After the suspension, Mr. Behnamian resumed his job as a patent examiner. S. App'x 62–63 ¶ 97. However, during the week of May 11, 2020, Mr. Behnamian submitted a two-week notice in advance of his intended resignation from the job. *Decision* at *2; S. App'x 46 ¶ 55. On May 18, 2020, Mr. Behnamian applied to practice before the United States Patent and Trademark Office ("USPTO"). *Decision* at *2; S. App'x 99–100. Based on his status as a former USPTO employee, Mr. Behnamian sought a waiver of examination. *Decision* at *2; S. App'x 99. Part of the application for registration to practice before the USPTO contained questions regarding "[c]andor and truthfulness." S. App'x 100. Relevant here, Question 17 asked the following:

Have you ever been disciplined, reprimanded, or suspended in any job for conduct involving dishonesty, fraud, misrepresentation, deceit, or for any violation of Federal or State laws or regulations?

Decision at *2; S. App'x 100.

Mr. Behnamian responded "NO" to Question 17. *Decision* at *2; S. App'x 100. On May 21, 2020, Mr. Behnamian officially resigned from his position with the USPTO. *Decision* at *1; S. App'x 46 ¶ 55. Following the submission of his application, the Office of Enrollment and Discipline ("OED") asked for information from Mr. Gutierrez regarding Mr. Behnamian's moral character and reputation, pursuant to 37 C.F.R. § 11.8(a). *Decision* at *2; S. App'x 119; S. App'x 799. In response to the request, the OED learned of Mr. Behnamian's suspension. S. App'x 797–99. The OED sought additional information from Mr. Behnamian regarding the "nature and circumstances of [the] suspension." S. App'x 837; *Decision* at *2. Mr. Behnamian maintained that the allegation that he had been paid for hours not worked had never been proven to be true. S. App'x 852. However, Mr. Behnamian acknowledged that he never appealed his suspension. S. App'x 853. The OED found that Mr. Behnamian "did not comply with the exhortation to candor prefacing the Background Information section of the Application." S. App'x 1086; *Decision* at *2.

On January 15, 2021, the OED Director denied Mr. Behnamian's application to register to practice in patent cases before the USPTO. *Decision* at *2; S. App'x 1104–06; S. App'x 1109–15. Mr. Behnamian petitioned for review of this decision to the Director of the USPTO, who affirmed the denial of Mr. Behnamian's application on August 9, 2021. *Decision* at *2; S. App'x 430–56; S. App'x 138–53; S. App'x 459–60. On September 7, 2021, Mr. Behnamian contacted the USPTO's Office of Equal Employment Opportunity and Diversity ("OEEOD") to report the

allegedly retaliatory events that he experienced as a former USPTO employee from April 2019 through May 2020. *Decision* at *2; S. App'x 1177 ¶ 4, 1178 ¶¶ 6–8; S. App'x 1182–83; S. App'x 1186–94.

On September 10, 2021, Mr. Behnamian filed a complaint, which included allegations framed as a petition for review of the denial of his application for registration to practice before the USPTO under 35 U.S.C. § 32 and allegations of conduct for which he sought relief under Title VII of the Civil Rights Act of 1964. *Decision* at *1; S. App'x 28–87. The district court granted the Defendants' motion to dismiss Mr. Behnamian's complaint under Federal Rule of Civil Procedure 12(b)(5), concerning insufficient service of process, and granted the Defendants' motion for summary judgment. *Decision* at *1, 5, 11. The district court also dismissed Mr. Behnamian's petition for review. *Id.*

Mr. Behnamian appeals *pro se*. We have jurisdiction under 28 U.S.C. § 1295(a)(1).

II. STANDARD OF REVIEW

We review the dismissal of a complaint for improper service under the standards set by the regional circuit. *See, e.g., Mobile Acuity Ltd. v. Blippar Ltd.*, 110 F.4th 1280, 1288 (Fed. Cir. 2024); *Intel Corp. v. Commonwealth Sci. & Indus. Rsch. Organisation*, 455 F.3d 1364, 1368–69 (Fed. Cir. 2006). We also review a district court's grant of summary judgment under regional circuit law. *Syngenta Crop Prot., LLC v. Willowood, LLC*, 944 F.3d 1344, 1355 (Fed. Cir. 2019). Under Fourth Circuit law, dismissals under Rule 12(b)(5) are reviewed for abuse of discretion, *Shao v. Link Cargo (Taiwan) Ltd.*, 986 F.2d 700, 708 (4th Cir. 1993), and decisions granting summary judgment are reviewed de novo, *Villa v. CavaMezze Grill, LLC*, 858 F.3d 896, 900 (4th Cir. 2017).

“The PTO has statutory authority to suspend or exclude ‘from further practice before the Patent and

Trademark Office, any person, agent, or attorney shown to be incompetent or disreputable, or guilty of gross misconduct, or who does not comply with the regulations established under section 2(b)(2)(D) of this title.” *Bender v. Dudas*, 490 F.3d 1361, 1365 (Fed. Cir. 2007) (citing 35 U.S.C. § 32). The Administrative Procedure Act (“APA”), 5 U.S.C. §§ 702–706, governs the review of an order of the USPTO regarding a registration application under 35 U.S.C. § 32. *See Bender*, 490 F.3d at 1365–66. This court shall set aside the USPTO’s determination if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). We review the district court’s dismissal of the petition for review (a matter particular to patent law) de novo, “reapplying the [APA] standard.” *Sheinbein v. Dudas*, 465 F.3d 493, 494–95 (Fed. Cir. 2006).

III. DISCUSSION

A.

The district court did not abuse its discretion by finding that Mr. Behnamian failed to properly serve the complaint and summons. *See Decision* at *5. Rule 4(c)(2) clearly explains that a party to the underlying lawsuit may not serve the complaint and summons. Fed. R. Civ. P. 4(c)(2). However, it is undisputed that Mr. Behnamian personally served the complaint and summons on Defendants.² *Decision* at *5; Appellant’s Br. 23; S. App’x 91–93. To support his method of service, Mr. Behnamian argues that he was informed by the clerk of the court that he properly served

² Mr. Behnamian’s reliance on E.D. Va. Local Rule 83.5 is unavailing because Mr. Behnamian admits that he did not comply with the requirement to send a copy of the summons and the complaint by registered or certified mail to the agency in accordance with Federal Rule of Civil Procedure 4(i)(2). Appellant’s Br. 23.

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the complaint and summons.³ Appellant's Br. 23 (explaining that the Court's Clerk indicated that "Plaintiff-Appellant was required to either personally serve the Complaint and Summons or *have an appropriate person serve the Complaint and Summons*." (emphasis added)). Regardless of the alleged communication with the clerk, which purportedly included having an appropriate person serve the complaint and summons, Mr. Behnamian still failed to consult the applicable rules and to serve the Defendants properly. We see no abuse of discretion in the district court's determination that neither good cause nor excusable neglect applies to Mr. Behnamian's failure to effect proper service of process. Accordingly, we affirm on this ground.

B.

Despite the defects above, we also address the merits of Mr. Behnamian's petition for review. Mr. Behnamian raises several issues with the USPTO's handling of his petition. First, he argues that the OED Director violated 37 C.F.R. § 11.7(h) when evaluating his moral character by doing so in a way that deprived Mr. Behnamian of the opportunity to be heard. Appellant's Br. 32–33; *Decision* at *9. Most relevant here, this regulation applies to

³ We also grant the motion of the agency to strike pages 86 through 105 from the Petitioner's Supplemental Appendix in ECF No. 20. ECF No. 23. The agency argues that this court should strike the pages in question, or at least omit them from consideration because they were never presented to the district court below. *Id.* at 2–3. We agree and do not consider these pages because they were never presented to the district court. *See, e.g., Ballard Med. Prods. v. Wright*, 821 F.2d 642, 643 (Fed. Cir. 1987) ("An appellate court may consider only the record as it was made before the district court.").

individuals who were “disbarred or suspended from practice of law or other profession, or [who] ha[ve] resigned in lieu of a disciplinary proceeding.” 37 C.F.R. § 11.7(h)(4)(i). The district court correctly assessed that 37 C.F.R. § 11.7(h)(4) does not apply to Mr. Behnamian, who was neither disbarred nor suspended from the practice of any profession and who did not resign in lieu of a disciplinary proceeding. *See Decision* at *9.

Second, Mr. Behnamian disputes the decision of the agency to suspend him based on the charge that he was AWOL. Appellant’s Br. 33. Mr. Behnamian asserts that his suspension was based on the Telework Enhancement Act Pilot Program work agreement, which he signed after the alleged AWOL hours. *See Decision* at *9–10; Appellant’s Br. 31. Here too, the district court did not err. The suspension decision was instead based on a detailed analysis of Mr. Behnamian’s time worked and unaccounted-for time. *Decision* at *9; S. App’x 182–84.

Next, Mr. Behnamian disputes the OED’s unfavorable determination regarding his candor. Appellant’s Br. 34; S. App’x 49–69. We may only review the agency’s final order, but we discern nothing arbitrary or capricious in the determination that Mr. Behnamian lacked candor. The agency reasonably determined that, by answering no to Question 17 and not even disclosing (with an explanation) the suspension just three months earlier for being AWOL (which meant he claimed pay for hours he did not work), Mr. Behnamian at a minimum violated the exhortation to candor required by the application. *See S. App’x* 470–74. Furthermore, Mr. Behnamian faults the agency for not crediting the letters of recommendation that he submitted. Appellant’s Br. 17–18, 34. We discern no error in the agency’s handling of Mr. Behnamian’s credentials and recommendations, which the district court found are unresponsive to the issue of Mr. Behnamian’s failure to disclose his suspension. *See Decision* at *10; S. App’x 473–74.

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IV. CONCLUSION

In light of the above conclusions, we need not address the Title VII issues addressed by the district court in its grant of summary judgment. We have considered Mr. Behnamian's remaining arguments and find them unpersuasive. For the foregoing reasons, we *affirm* the judgment of the district court.

AFFIRMED

COSTS

No costs.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

SHAHRIAR BEHNAMIAN,

Plaintiff,

V.

ANDREW HIRSHFELD, *in his official capacity*
Performing the Functions and Duties of the
Under Secretary of Commerce for Intellectual
Property and Director of the United States Patent
and Trademark Office, et al.,

Defendants.

Civil Case No. 1:21-cv-1043 (RDA/IDD)

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Defendants Andrew Hirshfeld and the United States Patent and Trademark Office's ("Defendants") Motion to Dismiss (Dkt. 11) and Motion for Summary Judgment (Dkt. 12). The Court dispenses with oral argument as it would not aid in the decisional process. *See* Fed. R. Civ. P. 78(b); E.D. Va. Loc. Civ. R. 7(J). The Motions are now fully briefed and ripe for disposition. Considering the Motions together with Defendants' response to Plaintiff Shahriar Behnamian's ("Plaintiff") petition for review ("Petition") pursuant to 35 U.S.C. 32 (Dkt. 10); Defendants' memorandum in support of the Motions (Dkt. 13); Plaintiff's oppositions (Dkt. Nos. 15; 16); Defendants' reply in further support of the Motions (Dkt. 17), and Plaintiff's supplemental opposition to Defendants' response to Plaintiff's Petition (Dkt. 18), it is hereby ORDERED that Defendants' Motion to Dismiss and Motion for Summary Judgment are GRANTED and Plaintiff's Petition is DISMISSED for the reasons that follow.

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I. BACKGROUND

For purposes of considering the Motion to Dismiss, the Court accepts all facts contained within Plaintiff's Complaint as true, as it must at the motion-to-dismiss stage. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Plaintiff filed this matter in a *pro se* capacity on September 10, 2021, alleging three counts styled as: (1) a petition for review of wrongful denial of an application for registration to practice before the United States Patent and Trademark Office ("USPTO" or "Agency") pursuant to 35 U.S.C. § 32 and Local Rule 83.5;¹ (2) unlawful retaliation under Title VII of the Civil Rights Act of 1964; and (3) constructive retaliatory discharge under Title VII. *See generally* Dkt. 1. Plaintiff seeks, *inter alia*, compensatory damages, injunctive relief, and punitive damages.

Plaintiff worked at the USPTO as a Patent Examiner beginning on January 21, 2009, reached the GS-14 level as a Primary Patent Examiner in 2014, and resigned from the Agency on May 21, 2020. Dkt. 1 ¶ 40. From the summer of 2017 until the Fall of 2019, Plaintiff was enrolled in the Patent Hoteling Program ("PHP"), which allowed him to work remotely from Hawaii on a full-time basis so long as Plaintiff reported to the USPTO's headquarters in Alexandria, Virginia one hour biweekly. *Id.* ¶ 41. However, Agency policy permitted PHP participants to avoid the one-hour requirement by taking holiday or sick leave, provided it was not used on a consistent basis. *Id.*

In the spring of 2019, Plaintiff expected the birth of his second child in early April, and communicated this to his then-supervisor, Charles Appiah. In the weeks prior, Plaintiff petitioned for leave from the biweekly hour requirement to allow him to remain in Hawaii "until at least the

¹ Plaintiff's Complaint properly includes a certification pursuant to Local Rule 83.1(M). Dkt. 1 at 61.

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birth of his second child.” *Id.* ¶ 44. Mr. Appiah allegedly denied the work-leave request and instead “demand[ed]” that Plaintiff travel over the weekend back to USPTO headquarters ahead of his second child’s impending birth. *Id.* ¶¶ 45, 148. Following the denial, on March 29, 2019, Plaintiff allegedly contacted four TC 2600 Directors in his Agency division for assistance. One of the TC 2600 Directors, Diego Gutierrez, allegedly granted the work-leave request, directing Plaintiff to speak with Mr. Appiah further in the coming weeks. *Id.* ¶ 46. On April 23, 2019, Plaintiff’s second child was born. *Id.* ¶ 47.

According to Plaintiff, Mr. Appiah “increased his retaliation efforts by reducing his contact with the Plaintiff and scrutinizing the Plaintiff’s work more often.” *Id.* ¶ 48. Mr. Appiah also allegedly removed Plaintiff’s access to the Record Sharing Platform (“RSP”)—an integral component of Plaintiff’s ability to track his time working. *Id.* Plaintiff avers that the Agency then determined Plaintiff had accumulated hours absent without leave (“AWOL”) six days after Plaintiff’s second child was born. *Id.* ¶ 50. Defendants continued to allege “partial AWOL” against Plaintiff until June 5, 2019.² *Id.* Plaintiff generally avers that his supervisor “demand[ed]” he report to Alexandria, Virginia “more often.” *Id.* ¶ 147. On October 8, 2019, Mr. Appiah allegedly charged Plaintiff with AWOL. *Id.* ¶ 51. By February 27, 2020, Plaintiff received a 5-day suspension beginning on March 9, 2020, which, due to Plaintiff’s trouble accessing his work computer, he alleges effectively made his suspension 7 days.³

² An examination of the Administrative Record reveals that Plaintiff’s supervisor reviewed the timekeeping records between April 28, 2019 and June 8, 2019 and proposed a 14-day suspension upon finding that Petitioner was AWOL for a total of 30 hours and 15 minutes. *See* Dkt. 8-2 at 18.

³ Plaintiff’s director reduced the recommended 14-day suspension to five days. Plaintiff did not appeal that decision. Dkt. 7-3 at 19.

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During the week of May 11, 2020, Plaintiff submitted his two-week notice of departure and conducted an exit interview with Mr. William R. Perry III. Mr. Perry allegedly informed Plaintiff of his right to submit an application to practice before the USPTO and seek a waiver of examination, provided that he signed the application on his last day of employment at the Agency. *Id.* ¶ 55. In completing his application, Plaintiff answered “No” to each background information question, including Question 17: “Have you ever been disciplined, reprimanded, or suspended in any job for conduct involving dishonesty, fraud, misrepresentation, deceit, or for any violation of Federal or State laws or regulations.” *Id.* ¶ 57. On May 18, 2020, Plaintiff submitted his Application for Registration to Practice before the USPTO (“Application”)—three days prior to his resignation date—but post-dated for May 21, 2020, his last day of work. *Id.* ¶ 18; Dkt. 7-1 at 4.

On June 10, 2020, Plaintiff received a letter from the USPTO’s Office of Enrollment and Discipline (“OED”) stating that his Application had been approved, including his request for a waiver from examination. Dkt. 1 ¶¶ 19, 58. But on July 1, 2020, the OED allegedly requested additional information from Plaintiff related to his suspension and followed up again for clarification. *Id.* ¶¶ 59-60. And on November 13, 2020, when the OED requested Plaintiff show cause as to why his application should not be denied because he failed to demonstrate that he “presently possesses good moral character,” Plaintiff allegedly provided a fulsome response weeks later with four letters of recommendation. *Id.* ¶ 61. The OED Director issued a Final Decision and Memorandum Opinion denying the Application on January 15, 2021. *Id.* ¶ 62. The decision identified a number of reasons for the denial: (1) Plaintiff demonstrated a “lack of candor and truthfulness” by “cho[osing] not to disclose his suspension” which reflected “serious causes for concern regarding his present moral character”; (2) Plaintiff’s conduct in reporting his time

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involved dishonesty when he claimed the benefit of hours not worked; and (3) despite Plaintiff's disagreement with the characterization of his conduct, he nonetheless exhibited an "ongoing lack of acceptance of responsibility for any of his actions" which did not comply with the "exhortation to candor prefacing the Background Information section of the Application." *See* Dkt. 8-3 at 137, 139.

Plaintiff appealed the decision to the USPTO Director on February 13, 2021, arguing chiefly that the OED had "ignored the facts and reasoning provided by Plaintiff and decided to deny the Plaintiff's Application based on shaky grounds." Dkt. 1 ¶ 38. USPTO denied the Application in a Final Order on August 9, 2021 because Plaintiff's suspension was "uncontroverted" and "the inaccurate reporting of time and attendance constitutes misrepresentation." *Id.* ¶ 18; Dkt. 7-3 at 70. Furthermore, the USPTO Director concluded that Plaintiff's "work history, academic success, and letters of recommendation . . . had little probative value" especially because none of Plaintiff's recommenders acknowledged Plaintiff's suspension or his AWOL "and did not indicate any change" in Plaintiff's attitude. Dkt. 7-3 at 71. On September 7, 2021, Plaintiff contacted the Equal Employment Opportunity Commission ("EEOC") and a counselor interviewed Plaintiff the following day. Dkt. 19-1 at 19, 21.

On September 10, 2021, Plaintiff filed his Complaint. Dkt. 1. Pursuant to Local Civil Rule 83.5, on November 9, 2021, Defendants filed a response singularly addressing Plaintiff's first count seeking review of the USPTO's denial of Plaintiff's application to practice as well as a copy of the certified Administrative Record. Dkt. Nos. 7-10. The Court, in its discretion, did not require briefing on the petition for review. E.D. Va. Loc. Civ. R. 83.5. Defendants then filed a motion to dismiss and a motion for summary judgment with a Roseboro notice on November 9, 2021, paired with a single supporting memorandum. Dkt. Nos. 11; 12; 13. Plaintiff responded with an

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opposition on November 30, 2021, and appeared to file the same brief again under a separate heading. Dkt. Nos. 15; 16. Defendants filed their reply on December 6, 2021. Dkt. 17. Plaintiff then filed a sur-reply to Defendants' reply on December 13, 2021 in accordance with Local Civil Rule 7(K)(4). Dkt. 18.

II. STANDARD OF REVIEW

A. Rule 12(b)(6) Standard

A Rule 12(b)(6) motion tests the sufficiency of a complaint. *Brockington v. Boykins*, 637 F.3d 503, 506 (4th Cir. 2011). “[T]he reviewing court must determine whether the complaint alleges sufficient facts ‘to raise a right to relief above the speculative level[,]’” and dismissal of the motion is appropriate only if the well-pleaded facts in the complaint “state a claim that is plausible on its face.” *Goldfarb v. Mayor & City Council of Baltimore*, 791 F.3d 500, 508 (4th Cir. 2015) (quoting *Twombly*, 550 U.S. at 555, 570). A claim is facially plausible “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).

At the motion-to-dismiss stage, a plaintiff need only “allege facts sufficient to state all the elements of her claim,” *Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003), and “the district court must ‘accept as true all well-pled facts in the complaint and construe them in the light most favorable to [the plaintiff].’” *Dao v. Faustin*, 402 F. Supp. 3d 308, 315 (E.D. Va. 2019) (quoting *United States v. Triple Canopy, Inc.*, 775 F.3d 628, 632 n.1 (4th Cir. 2015)). Still, “[c]onclusory allegations regarding the legal effect of the facts alleged” need not be accepted. *Labram v. Havel*, 43 F.3d 918, 921 (4th Cir. 1995); *see also E. Shore Mkts., Inc. v. J.D. Assoc. Ltd. P’ship*, 213 F.3d 175, 180 (4th Cir. 2000) (“[W]hile we must take the facts in the light most

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favorable to the plaintiff, we need not accept the legal conclusions drawn from the facts Similarly, we need not accept as true unwarranted inferences, unreasonable conclusions, or arguments.”). And “[g]enerally, courts may not look beyond the four corners of the complaint in evaluating a Rule 12(b)(6) motion.” *Linlor v. Polson*, 263 F. Supp. 3d 613, 618 (E.D. Va. 2017) (citing *Goldfarb*, 791 F.3d at 508).

Mindful that Plaintiff is proceeding *pro se*, this Court liberally construes his filings. *Jackson v. Lightsey*, 775 F.3d 170, 177 (4th Cir. 2014). That a *pro se* complaint should be liberally construed neither excuses a *pro se* plaintiff of his obligation to “clear the modest hurdle of stating a plausible claim” nor transforms the court into his advocate. *Green v. Sessions*, No. 1:17-cv-01365, 2018 WL 2025299, at *8 (E.D. Va.), *aff’d*, 744 F. App’x 802 (4th Cir. 2018).

B. Rule 56 Standard

Under Federal Rule of Civil Procedure 56, “[s]ummary judgment is appropriate only if the record shows ‘that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.’” *Hantz v. Prospect Mortg., LLC*, 11 F. Supp. 3d 612, 615 (E.D. Va. 2014) (quoting Fed. R. Civ. P. 56(a)). “A material fact is one ‘that might affect the outcome of the suit under the governing law.’ A disputed fact presents a genuine issue ‘if the evidence is such that a reasonable jury could return a verdict for the non-moving party.’” *Hantz*, 11 F. Supp. 3d at 615-16 (quoting *Spriggs v. Diamond Auto. Glass*, 242 F.3d 179, 183 (4th Cir. 2001)). The moving party bears the “initial burden to show the absence of a material fact.” *Sutherland v. SOS Intern., Ltd.*, 541 F. Supp. 2d 787, 789 (E.D. Va. 2008) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). “Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists.” *Id.* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)).

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On summary judgment, a court reviews the evidence and draws all reasonable inferences in the light most favorable to the non-moving party. *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 570 (4th Cir. 2015) (quoting *Tolan v. Cotton*, 572 U.S. 650, 657 (2014)); *McMahan v. Adept Process Servs., Inc.*, 786 F. Supp. 2d 1128, 1134-35 (E.D. Va. 2011) (citing *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003)). This is a “fundamental principle” that guides a court as it determines whether a genuine dispute of material fact within the meaning of Rule 56 exists. *Jacobs*, 780 F.3d at 570. “[A]t the summary judgment stage[,] the [Court’s] function is not [it]self to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

A factual dispute alone is not enough to preclude summary judgment. “[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.” *Anderson*, 477 U.S. at 247-48. A “material fact” is one that might affect the outcome of a party’s case. *Id.* at 248; *JKC Holding Co. v. Wash. Sports Ventures, Inc.*, 264 F.3d 459, 465 (4th Cir. 2001). The substantive law determines whether a fact is considered “material,” and “[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Anderson*, 477 U.S. at 248; *Hooven-Lewis v. Caldera*, 249 F.3d 259, 265 (4th Cir. 2001). A “genuine” issue concerning a “material fact” arises when the evidence is sufficient to allow a reasonable jury to return a verdict in the non-moving party’s favor. *Anderson*, 477 U.S. at 248.

C. 35 U.S.C. §.32 Standard

Congress delegated to the USPTO “‘broad authority’ to set procedural and ethical rules for those who practice before it, and Congress’s grant of gapfilling authority necessitates that courts defer to the [USPTO’s] choices where reasonable and not contrary to law.” *Piccone v. United*

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States Patent and Trademark Office, No. 1:18-cv-307, 2018 WL 5929631, at *3 (E.D. Va. Nov. 13, 2018) (citing *Lacavera v. Dudas*, 441 F.3d 1380, 1383 (Fed. Cir. 2006)). This Court retains exclusive jurisdiction to review decisions by the USPTO Director related to the denial of an applicant to practice before the USPTO. *See* 35 U.S.C. § 32; *Franchi v. Manbeck*, 972 F.2d 1283, 1287-88 (Fed. Cir. 1992). The judicial review provisions of the Administrative Procedure Act govern this Court's review of a USPTO Director's decision. *Chaganti v. Lee*, 187 F. Supp. 3d 682, 690 (E.D. Va. 2016) (citing *Bender v. Dudas*, 490 F.3d 1361, 1365 (Fed. Cir. 2007)).

As the APA requires, this Court must therefore conduct a "highly deferential" review of the USPTO decision "with a presumption in favor of finding the agency action valid." *Chaganti*, 187 F. Supp. 3d at 690 (quoting *Ohio Valley Envtl. Coal v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009)). The petitioner must show that the USPTO's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," in order for this Court to overrule the Agency Director's decision. *Bender*, 490 F.3d at 1365-66 (quoting 5 U.S.C. § 706). If the USPTO "has considered the relevant evidence of record, drawn plausible inferences and articulated a rational basis for the decision, reversible error will be extremely difficult to demonstrate." *Cornish v. Dudas*, 715 F. Supp. 2d 56, 63 (D.D.C. 2010); *see also Manufactured Hous. Inst. v. EPA*, 467 F.3d 391, 398 (4th Cir. 2006) (explaining that a court's role is "to determine whether the record reveals that a rational basis exists for [the] decision").

III. ANALYSIS

A. Defective Service of Process

Defendants argue that Plaintiff has not properly served the Complaint and Summons pursuant to Federal Rule of Civil Procedure 4(c) and should therefore merit dismissal of the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(5). Plaintiff counters by stating that

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the Clerk of this Court “advised [him] that [he] had properly served the Defendants and the U.S. Attorney.” Dkt. 15 at 38. To further entrench his position, Plaintiff cites *Davidson v. Weltman, Weinberg & Reis*, 285 F. Supp. 2d 1093 (S.D. Ohio 2003) to argue that excusal of any defective service upon error of the court.

A plaintiff must effect service upon any defendant in full satisfaction of the Federal Rules of Civil Procedure. See *Danik v. Hous. Auth. of Balt. City*, 396 F. App’x 15, 16 (4th Cir. 2010). Federal Rule of Civil Procedure 4(c) provides that a summons must be served with a copy of the complaint and that such service must be made by “[a]ny person who is at least 18 years old and not a party” in the matter. Fed. R. Civ. P. 4(c). Relatedly, Federal Rule of Civil Procedure 4(m) requires that the summons and complaint be served within 90 days of the filing of the complaint. Courts in this circuit have found improper service when a plaintiff personally served the summons and complaint on a defendant. See, e.g., *Filloramo v. United Event Serv.*, No. 3:13-cv-348, 2015 WL 2381047, at *2 (W.D.N.C. Mar. 26, 2015), *report & recommendation adopted*, 2015 WL 24000808 (W.D.N.C.) (dismissing *pro se* litigant’s complaint without prejudice); *Pitts v. O’Geary*, No. 5:13-cv-116, 2014 WL 229350, at *4 (E.D.N.C. 2014) (same). However, upon a showing of good cause or excusable neglect, the Fourth Circuit permits courts to extend the 90-day time to serve the defendant with a summons after the filing of the complaint. See, e.g., *Hansan v. Fairfax Cty. Sch. Bd.*, 405 F. App’x 793, 793-94 (4th Cir. 2010) (per curiam); *Mendez v. Elliot*, 45 F.3d 75, 78-79 (4th Cir. 1995); Fed. R. Civ. P. 6(1)(B).

To “challenge[] the mode of delivery or the lack of delivery of the summons and complaint,” a defendant may seek dismissal pursuant to Rule 12(b)(5). *Davis v. Jobs & Adverts Online, GMBH*, 94 F. Supp. 2d 719, 721 n.5 (E.D. Va. 2000). The burden then shifts to the plaintiff to establish the validity of the manner of service and process. *Sanyal v. Toyota Motor Corp.*, No.

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1:14-cv-906, 2014 WL 4925842, at *1 (E.D. Va. Sept. 30, 2014); *O'Meara v. Waters*, 464 F. Supp. 2d 474, 476 (D. Md. 2006). Despite the “liberal construction” afforded to evaluating service of process, *Armco Inc. v. Penrod-Sauffer Bldg. Sys., Inc.*, 733 F.2d 1087, 1089 (4th Cir. 1984), “*pro se* litigants are expected to comply with time requirements and other procedural rules.” *Chien v. Grogan*, 2017 WL 1091504, at *2 (E.D. Va. Mar. 23, 2017).

This Court first recognizes that Plaintiff personally served the Complaint and Summons upon Defendants. *See* Dkt. 5. Moreover, Plaintiff does not dispute that he personally served these documents upon Defendants. However, Plaintiff represents that the Clerk advised him that his manner of service was proper. Even if such was the case, Plaintiff clearly failed to consult the applicable rules. And despite Defendants raising this issue, Plaintiff still did not take the opportunity to serve Defendants properly. This Court sees no good cause or excusable neglect in Plaintiff’s failure to properly serve Defendants; the Complaint merits dismissal without prejudice on this ground alone. Notwithstanding this Court’s finding of improper service of process, this Court turns to the substance of Defendants’ Motions and Plaintiff’s Petition.

B. Defendants’ Motion to Dismiss and Motion for Summary Judgment

“Normally, a court must convert a motion to dismiss into a motion for summary judgment if it considers documents outside the pleadings in making a ruling.” *Arnold v. Capital One Servs., Inc.*, No. 3:10-cv-244, 2011 WL 864332, at *2 (E.D. Va. Mar. 10, 2011) (citing Fed. R. Civ. P. 12(d)). But there are exceptions to this rule, including the right to consider “official public records, documents central to plaintiff’s claim, and documents sufficiently referred to in the complaint so long as the authenticity of these documents is not disputed.” *Witthon v. Fed. Ins. Co.*, 164 F. App’x 395, 396 (4th Cir. 2006) (*per curiam*). While “the Court . . . retains discretion to disregard any extraneous exhibits submitted by Defendant and to treat the motion as a standard one for failure to

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state a claim under Rule 12(b),” this Court looks to exhibits filed by Defendants in resolving this matter. *Harmon v. CB Squared Servs. Inc.*, No. 3:08-cv-799, 2009 WL 234982 (E.D. Va. Jan. 30, 2009) (citing *Bosiger v. U.S. Airways, Inc.*, 510 F.3d 442, 450 (4th Cir.2007)). Indeed, this Court may “choose among threshold grounds” to resolve this case. *Cf. Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999). Thus, this Court applies a summary judgment standard to its review of Counts II and III of the Complaint.

i. Title VII Administrative Exhaustion

Plaintiff has styled his Complaint such that Count I serves as the Petition for Review of the USPTO Director’s Final Order, while Counts II and III state separate claims under Title VII. Defendants’ Motions attack Counts II and III, arguing principally that Plaintiff has failed to adequately exhaust these Title VII claims prior to bringing them before this Court.

Plaintiff takes the position in his opposition that his Title VII claims arise under the Family and Medical Leave Act (“FMLA”), which imposes a two-year statute of limitations as opposed to a 45-day reporting deadline to an EEO counselor, from the time his suspension was either commenced or terminated. Dkt. 15 at 22.⁴ Applying that framework, Plaintiff argues he properly filed within the appropriate time period because his suspension commenced and terminated in March of 2020 and Plaintiff filed his Complaint within two years of that date.

Prior to alleging claims under Title VII before a federal district court, a plaintiff must exhaust the required administrative remedies. *Stewart v. Iancu*, 912 F.3d 693, 698-99 (4th Cir. 2019); *Smith v. First Union Nat’l Bank*, 202 F.3d 234, 247 (4th Cir. 2000); *see also* 29 C.F.R. §

⁴ This Court acknowledges that Plaintiff has filed an opposition brief well in excess of the 30-page limitation outlined in Local Civil Rule 7(F). As such, this Court only considers the argument through page 30 of the brief.

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1614.103 (imposing an exhaustion requirement for discrimination claims under Title VII). “A federal employee who wishes to pursue a Title VII suit must ‘initiate contact’ with an EEO counselor within 45 days of the date of the allegedly discriminatory conduct or the effective date of the applicable personnel action to begin the EEO counseling process.” *Figueroa-Ibarry v. Rennick*, No. 20-cv-23, 2021 WL 954843, at *4 (E.D. Va. Mar. 12, 2021) (quoting 29 C.F.R. § 1614.105(a)); *see also Guerrero v. Lynch*, 621 F. App’x 755, 756 (4th Cir. 2015). “Failure to bring a complaint to the attention of an EEO counselor within the period required is generally fatal to bringing a discrimination suit against the federal government.” *Figueroa-Ibarry*, 2021 WL 954843, at *4 (citing *Kirkland v. Mabus*, 206 F. Supp. 3d 1073, 1080 (E.D. Va. 2016)). The exhaustion requirement is, however, “subject to equitable modification,” including the doctrine of equitable tolling when the plaintiff has shown entitlement. *See Price v. Litton Bus. Sys., Inc.*, 694 F.2d 963, 966 n.2 (4th Cir. 1982) (applying the holding in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982)); *Figueroa-Ibarry*, 2021 WL 954843, at *4 (“Barring the application of the doctrine of equitable tolling, a plaintiff’s claim is subject to dismissal when she fails to abide by the applicable filing deadlines.”).

Plaintiff first sought EEO counseling on September 7, 2021. Dkt. 19-1 at 19. Counting 45 days back leaves the Plaintiff with timely raised Title VII claims for the period on or after July 23, 2021. However, the Complaint only alleges violations of Title VII that preceded July 23, 2021, and therefore Plaintiff’s Title VII claims are deemed untimely. The undisputed record reveals that Plaintiff was made aware of this 45-day requirement as part of his required training as a USPTO federal employee. Dkt. 13-1 at 78; *see also Washington v. U.S. Dep’t of Def.*, 3:07-cv-482, 2008 WL 2725810, at *2 (E.D. Va. July 11, 2008) (dismissing a Title VII complaint because plaintiff had not filed her complaint within the 45-day time limit and observing that the plaintiff was well-

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aware of the 45-day time limit as part of her EEO training). As such, dismissal of Plaintiff's Title VII claims on summary judgment is appropriate. *See Saunders v. Stone*, 758 F. Supp. 1143, 1145 (E.D. Va.), *aff'd*, 948 F.2d 1282 (4th Cir. 1991) (holding that "untimely administrative complaints must be rejected" and citing to numerous cases in this circuit dismissing on like grounds).

Plaintiff has also failed to make a case for equitable tolling. Nowhere in the Complaint or in his briefing does Plaintiff assert he was unaware of the violations at the time they allegedly occurred. Considering the dearth of evidence and the "considerable [evidentiary] burden" for imposing an equitable modification to the exhaustion requirement, this Court will not consider applying such an "extraordinary remedy." *CVLR Performance Horses, Inc. v. Wayne*, 792 F.3d 469, 476 (4th Cir. 2015). "Plaintiff is not entitled to equitable relief from [his] failure to timely comply with the time limit because [he] has not made a showing of affirmative misconduct on the part of the government." *Washington*, 2008 WL 2725810, at *2.

To be sure, this Court also addresses Plaintiff's attempt to recast its Title VII claims as FMLA claims in order to pivot away from the exhaustion requirement. It appears that Plaintiff has conflated Title VII protected activities with FMLA protected activities. *See, e.g.*, Dkt. 1 ¶ 150. Title VII states that "[a]ll personnel actions affecting employees . . . shall be made free from any discrimination *based on race, color, religion, sex, or national origin*." 42 U.S.C. § 2000e-16 (emphasis added). Title VII therefore is not concerned with providing remedies for alleged violations of purported protected family leave activities unless the basis for infringing on those activities can be traced back to discrimination on the basis of race, color, religion, sex, or national origin. *See Cooper v. Spartanburg Cty. Sch. Dist. No. 7*, 2016 WL 4491870, at *5 (D.S.C. Jun. 15, 2016) ("[T]aking FMLA leave is not protected activity under Title VII."); *Moore v. Nat'l Tire & Battery*, No. 13-cv-01779, 2013 WL 5587295, at *3 (D. Md. Oct. 9, 2013) ("However, taking

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FMLA leave is not protected activity within the meaning of Title VII; it has nothing to do with whether an employee has a reasonable belief that the employer is violating her (or someone else's) rights under Title VII or has participated in a proceeding under Title VII.”). Plaintiff makes no such argument.

ii. FMLA Administrative Exhaustion

Even if Plaintiff did abandon his Title VII claims and instead sought relief under the FMLA, Plaintiff has still fallen short of the requisite administrative exhaustion requirements. At the time of the earliest alleged protected activity in the spring of 2019, Plaintiff had worked at the USPTO for over a decade. *Compare* Dkt. 1 ¶ 43 *with id.* ¶ 40. Title II of the FMLA applies to federal employees who have “completed at least 12 months of service as an employee [] of the Government of the United States.” 5 U.S.C. § 6381(1)(B). By contrast, Title I of the FMLA “governs private sector and federal employees with less than 12 months of service.” *Chandler v. Bernanke*, 531 F. Supp. 2d 193, 201 (D.D.C. 2008); 29 U.S.C. §§ 2611-12. Here, Plaintiff would be subject to Title II of the FMLA after considering his tenure at the USPTO at the time of the earliest alleged protected activity. *See Mann v. Haigh*, 120 F.3d 34, 36 (4th Cir. 1997) (“In general, most employees of the federal government to whom the FMLA applies [] are governed by Title II of the FMLA.”); *see also* 29 C.F.R. § 825.109(a) (confirming that the USPTO does not all under any of the federal employee groups excepted from Title II). Title I therefore does not apply to Plaintiff. *See* 29 U.S.C. § 2611(2)(B)(i). And unlike Title I’s specifically enumerated private right of action, “Title II omits a similar provision creating a private right of action.” *Mann*, 120 F.3d at 36. In other words, the USPTO enjoys sovereign immunity from any potential FMLA claim by Plaintiff.

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For Plaintiff to assert a cognizable claim under Title II, he would need to present this matter before the Merit Systems Protection Board (“MSPB”) in the first instance, and any further appeals would fall within the exclusive jurisdiction of the Court of Appeals for the Federal Circuit. *See McNair v. Spencer*, No. 4:17-cv-38, 2018 WL 2147515, at *5 (E.D. Va. May 3, 2018) (denying a plaintiff’s Title II FMLA claim because only the MSPB and, upon appeal, the U.S. Court of Appeals for the Federal Circuit retain jurisdiction over such claims); *Wright v. Locke*, No. 1:09-cv-379, 2010 WL 11561698, at *1 (E.D. Va. Jan. 12, 2010) (dismissing FMLA claims because plaintiff had not “properly raised his FMLA claims before the MSPB”).

Accordingly, there is no genuine dispute as to material fact that Plaintiff did not exhaust his Title VII claims within the legally prescribed window. Therefore, Plaintiff’s Title VII claims under Counts II and III have not been properly exhausted and therefore must be dismissed on summary judgment.

C. Petition for Review of USPTO Director’s Final Order

Congress vested the USPTO with plenary authority to issue regulations “govern[ing] the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Office.” 35 U.S.C. § 2(b)(2)(D). In the administration of the USPTO’s statutory authority, the USPTO promulgated an expansive regulatory framework for the registration to practice before the USPTO. One of those regulations, which is at issue here, prohibits an individual from registering to practice before the Agency unless the OED Director is satisfied that the applicant “possesses good moral character and reputation.” 37 C.F.R. § 11.7(a)(2)(i).

To meet this exacting burden, every applicant must provide “satisfactory proof of possession of good moral character and reputation,” including disclosing “all relevant facts, dates and information; and provide verified copies of documents relevant to his other good moral

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character and reputation.” *Id.* §§ 11.7(b)(1)(iii), (g)(1). The Agency may deny any application on lack of moral character grounds if “[a]n individual[] lack[s] of candor in disclosing facts bearing on relevant issues concerning good moral character and reputation when completing the application or any time thereafter.” *Id.* § 11.7(h)(3). If the OED Director receives information that questions the applicant’s good moral character, “the OED Director shall conduct an investigation into the good moral character and reputation of that individual.” *Id.* § 11.7(g)(2)(i). The applicant is then afforded the opportunity to reply to the OED Director’s inquiry, which the OED Director must consider in making a final determination as to the applicant’s moral character and reputation. *Id.* § 11.7(j). The applicant may then seek review of the OED Director’s decision upon petition to the USPTO Director. *Id.* § 11.2(d). Only after the USPTO Director issues a final decision may the applicant file a petition for review before this Court, provided that the petition is filed “within 30 days” of the USPTO final decision. *See* 35 U.S.C. § 32; 37 C.F.R. § 11.57; E.D. Va. Local Civ. R. 83.5.

Again, Plaintiff has failed to comply with the appropriate timing requirements. The USPTO Director’s Final Order, dated August 9, 2021, informed Plaintiff of his right to seek judicial review before this Court within 30 days of the date of that decision. Dkt. 7-1 at 57-58 (citing E.D. Va. Local Civ. R. 83.5; 37 C.F.R. § 11.2(e)). Thus, Plaintiff had until Wednesday, September 8, 2021 to file his petition for review. While Plaintiff was served on August 11, 2021, that has no bearing on the running of the 30-day requirement. *See, e.g., Kroll v. Lee*, No. 1:16-cv-704, 2017 WL 2240674, at *4 (E.D. Va. May 22, 2017) (finding that a petition for review of a USPTO decision was untimely because petitioner filed his complaint 34 days after the date of the final order and that the petition “could be dismissed for that reason alone”); *Chaganti*, 187 F. Supp. 3d at 690 (same). But considering Plaintiff’s *pro se* status and that he has filed this action as a

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complaint rather than a petition for review, this Court will extend grace and consider the merits of the petition. *See Jinyang Guo v. Lee*, No. 1:16-cv-536, 2016 WL 9225029, at *1 n.2 (E.D. Va. Oct. 11, 2016) (proceeding to the merits of a petition given litigant's *pro se* status).

i. Whether the USPTO Director's Final Order was arbitrary and capricious

Plaintiff challenges the Final Order on four grounds: (1) the USPTO wrongly applied 37 C.F.R. § 11.7(h)(4)(iii)(A) in evaluating what Plaintiff argues was a violation of his due process; (2) his AWOL suspension did not constitute “dishonesty, fraud, misrepresentation, deceit, or [] any violation of Federal or State laws or regulations”; (3) the OED Director falsely questioned Plaintiff's candor in submitting his Application post-dated to May 21, 2020; and (4) the USPTO neglected to consider Plaintiff's overall performance as a USPTO employee and failed to give meaningful weight to the letters of recommendation submitted on Plaintiff's behalf. This Court takes each argument in turn.⁵

1. Application of 37 C.F.R. § 11.7(h)(4)(iii)(A)

Plaintiff submits that the USPTO Director needed to evaluate whether “such infirmity of proof establishing the misconduct [] give[s] rise to the clear conviction” that Plaintiff acted dishonestly. Dkt. 1 ¶¶ 68-69 (citing 37 C.F.R. § 11.7(h)(4)(iii)(A)). Instead, Plaintiff claims that the USPTO “ignored [his] arguments entirely and did not specifically respond to [his] analysis and arguments even once.” *Id.* ¶ 67. The crux of Plaintiff's position is that the OED Director violated 37 C.F.R. § 11.7(h) in evaluating Plaintiff's good moral character and reputation because the OED Director's procedure deprived Plaintiff of due process in having the opportunity to be heard, and

⁵ While Local Civil Rule 83.5 states that the Court “may, in its discretion, require briefing and argument prior to making a decision on the petition,” this Court never ordered briefing beyond Defendants' required response to the Petition. This Court will nonetheless proceed as if Plaintiff were authorized to file a reply considering Plaintiff's *pro se* status.

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that the OED Director’s finding would result in a “grave injustice.” But as the USPTO Director rightly identified, Section 11.7(h) applies only to instances involving individuals who have been “disbarred or suspended from practice of law or other profession, or [who] ha[ve] resigned in lieu of a disciplinary proceeding” Dkt. 7-1 at 53 (quoting 37 C.F.R. § 11.7(h)(4)(i)). In this case, Plaintiff received a suspension related to the misrepresentation of his hours to his employer. Plaintiff did not receive a disbarment or suspension from the practice of law or patent examination before the USPTO. The USPTO Director provided a rational basis as to why Plaintiff’s defenses rang hollow.

2. Plaintiff’s AWOL Suspension

Next, Plaintiff argues that the USPTO Director “incorrectly impl[ied] that Plaintiff’s previous charges are the moral equivalent of violent crimes.” Dkt. 1 ¶ 95. And while Plaintiff admits that the suspension stemmed from an accusation of AWOL, “the situation surrounding Plaintiff’s AWOL did not involve dishonesty, fraud, misrepresentation, deceit” or any other form of unlawfulness “but instead involved out-of-service technology, a personal situation that led to increased work computer logins, and more complicated accounting for time that otherwise would not have happened had all technology been functioning.” *Id.* ¶ 104. Above all else, Plaintiff argues that the Suspension Notice he received relies on the Telework Enhancement Act Pilot Program (“TEAPP”) Work Agreement Plaintiff signed on June 11, 2019. Because the alleged AWOL hours and minutes occurred between April 30, 2019 and June 8, 2019, Plaintiff argues that the Suspension Notice’s reliance on the TEAPP Work Agreement renders the “entire support for the alleged AWOL invalid.” Dkt. 15 at 26.

A review of the Administrative Record reveals that the decision to suspend Plaintiff was the result of a detailed assessment of Plaintiff’s activity working remotely using USPTO

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technology. *See* Dkt. 8-2 at 19-20. Ultimately, the USPTO supervisor flagged that Plaintiff had claimed eight hours on his WebTA time log but showed idle periods upwards of almost five hours at a time on his laptop. *Id.* at 20. Nothing in the Suspension Notice indicates that Plaintiff would *not* have been disciplined if he had *not* signed the TEAPP Work Agreement. That agreement simply imposed a new requirement that Plaintiff remain logged into the USPTO network “at the beginning and end of any period of time” for which work is claimed. *Id.* at 19. Indeed, the USPTO supervisor explicitly acknowledged that “many employees temporarily engage in activities resulting in the employee being displayed as not badged-in and/or not logged-in;” going so far as to credit a number of Plaintiff’s time lapses as time worked despite no evidence that Plaintiff was actually working. *Id.* at 20.

Considering the USPTO supervisor conducted an extensive review of Plaintiff’s “WebTA records, Universal Laptop records, building access [] records, VPN records, work reports [], and Phone and WebEx logs,” the USPTO Director’s reliance on these findings is well-founded. *Id.* at 19. The inference that Plaintiff’s periods of extensive inactivity could act as indicia of Plaintiff being AWOL is, at minimum, plausible. Taking the presumption in favor of the Agency, as this Court must, the USPTO Director’s reliance on the USPTO supervisor’s review of Plaintiff’s work activity forms a rational basis for the determination that Plaintiff’s representation of his AWOL exhibited dishonesty and misrepresentation. *See Cornish*, 715 F. Supp. 2d at 63; *Manufactured Hous. Inst.*, 467 F.3d at 398. Plaintiff has not shown that the USPTO Director’s Final Order was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Bender*, 490 F.3d at 1365-66 (quoting 5 U.S.C. § 706).

Plaintiff’s disavowal of any misrepresentation or dishonest timekeeping practice requires this Court to rely on unsubstantiated evidence. Rather, this Court defers to the USPTO Director’s

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findings, which are consistent with past Agency determinations. *See, e.g.*, Dkt. 10-1 at 15; *see also In re Manghera*, Disciplinary Proceeding No. D2009-43 (USPTO June 10, 2010) (upholding a 24-month suspension for submitting timesheets falsely claiming time not actually worked even when not compensated directly for those hours); *In re [Redacted]*, Moral_19, Decision on Petition Under 37 C.F.R. § 11.2(d) (USPTO Aug. 7, 2009) (finding an applicant to have “perpetuated the initial misrepresentation of being at work” after claiming to have worked certain hours and received pay for those hours he had not actually worked); *In re [Redacted]*, Moral_08, Decision on Petition Under 37 C.F.R. § 11.2(d) (USPTO Sept. 26, 2007) (“The OED Director correctly found that it is appropriate to deny registration to a person . . . who repeatedly engages in conduct involving dishonesty and deceit[.]”).

3. The OED Director’s Determination as to Plaintiff’s Candor

Plaintiff further seeks review of the OED Director’s conclusion that he lacked candor when he post-dated his Application for the date of his resignation rather than the date he actually submitted the Application to the USPTO. Dkt. 1 ¶¶ 98-101. Yet the USPTO Director’s Final Order did not rely on the OED Director’s determination regarding the date listed on Plaintiff’s Application and the attendant conclusion to be drawn as to Plaintiff’s candor. This Court may only provide judicial review over elements of the Agency’s final decision. *SEC v. Chenery*, 318 U.S. 80, 87 (1943) (“The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.”). Because the OED Director’s analysis of the Application date does not undergird the USPTO’s Final Order, this Court has no jurisdiction to exercise its judicial review on this issue.

4. Consideration of Plaintiff’s Past Work Performance and Letters of Recommendation

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Plaintiff avers that the USPTO discounted each of his responses to the OED Director for additional information regarding his suspension and applied no “weight to the excellent work [Plaintiff] had achieved as a Patent Examiner.” Dkt. 1 ¶¶ 111, 116. Nor did the USPTO Director afford the proper weight to Plaintiff’s four letters of recommendation, according to Plaintiff. *Id.* ¶ 120.

The USPTO Director’s Final Order turns squarely on the determination that the OED Director’s Final Decision “did not call into question [Plaintiff’s] work history or academic background.” Dkt. 7-1 at 56; Dkt. 7-3 at 18-20, 23-24. “Rather, it specifically identified the suspension and [Plaintiff’s] nondisclosure of that suspension as the basis for denying his Application.” *Id.* Non-reliance on work performance in evaluating an applicant’s “possession of honesty[,] truthfulness, trustworthiness and reliability” strikes this Court as entirely sensible. *See* 37 C.F.R. § 11.7 (defining “good moral character and reputation”). One could be the most prodigious patent examiner in the history of the USPTO and yet still suffer from questionable rectitude. The two concepts are entirely divergent. The same can be said for letters of recommendation which say nothing about Plaintiff’s suspension or, more importantly, any “change in attitude” indicative of Plaintiff’s rehabilitation. Dkt. 7-1 at 56 (quoting 37 C.F.R. § 11.7(i)). Of course, Plaintiff’s unambiguous position remains that he committed no wrongs at any time. But without extensive documentary evidence to support that view, this Court must give due deference to the Agency’s contrary findings—which come as a result of having conducted a scrupulous and extensive investigation into Plaintiff’s self-reporting work record.

Upon a rational review of the OED Director’s findings, the USPTO Director affirmed. Seeing no evidence that the USPTO Director’s affirmance came at the cost of an arbitrary or

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capricious review or application of the record, this Court is without reason to dispute the Final Order.

IV. CONCLUSION


For the foregoing reasons, it is hereby ORDERED that Defendant's Motion to Dismiss (Dkt. 11) and Motion for Summary Judgment (Dkt. 12) are GRANTED; and it is

FURTHER ORDERED that Plaintiff's Petition for Review and Complaint (Dkt. 1) are DISMISSED.

To appeal this decision, Plaintiff must file a written notice of appeal with the Clerk of Court within 30 days of the date of entry of this Memorandum Opinion and Order. A notice of appeal is a short statement indicating a desire to appeal, including the date of the order Plaintiff wants to appeal. Plaintiff need not explain the grounds for appeal until so directed by the court of appeals. Failure to file a timely notice of appeal waives Plaintiff's right to appeal this decision.

It is SO ORDERED.

Alexandria, Virginia
April 26, 2022

/s/ 
Rossie D. Alston, Jr.
United States District Judge



UNITED STATES PATENT AND TRADEMARK OFFICE

OFFICE OF THE GENERAL COUNSEL

August 11, 2021

Mr. Shahriar Behnamian
4521 Clark Pl, NW
Washington, DC 20007

CERTIFIED MAIL 7019 2970 0001 7905 6151
RETURN RECEIPT REQUESTED

PERSONAL AND CONFIDENTIAL

Re: Petition Pursuant To 37 C.F.R. § 11.2(d)

FINAL ORDER

Dear Mr. Behnamian:

Please find enclosed a service copy of a Final Order, dated August 9, 2021, and signed on behalf of the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

If you require any additional information or records, you may contact the Office of Enrollment and Discipline at 571-272-4097, or by writing to Mail Stop OED, U.S. Patent and Trademark Office, P.O. Box 1450, Alexandria, Virginia 22313-1450.

Sincerely,

A handwritten signature in cursive script, reading "Jennifer R. Seifert".

Jennifer R. Seifert
Associate Counsel
Office of General Law

Petition pursuant to
37 C.F.R. § 11.2(d)

Shahriar Behnamian (“Petitioner”) filed an “Appeal Brief Under C.F.R. § 11.2(d)” (“Petition”) with the Director of the United States Patent and Trademark Office (“USPTO” or “Office”) seeking review of the Director of the Office of Enrollment and Discipline’s (“OED Director’s”) Final Decision and Memorandum Opinion (“OED Director’s Final Decision”) dated January 15, 2021. For the reasons set forth below, the Petition is denied and the OED Director’s Final Decision is Affirmed.

BACKGROUND INFORMATION: Candor and truthfulness are significant elements of fitness relevant to practice before the United

States Patent and Trademark Office. You should, therefore, provide the Office of Enrollment and Discipline with all available information, however unfavorable, even if its relevance is in doubt with regard to the questions asked below. For each question answered "YES," provide a detailed statement setting forth all relevant facts and dates along with verified copies of relevant documents. Your responses must be updated, as necessary, prior to your registration. Any documents, evidence, or proofs previously filed in a prior application need not be resubmitted unless your response to a question must be changed. **Failure to disclose the requested information may result in denial of registration or in disciplinary proceedings, should you become registered.** See 37 CFR §§ 11.7(a)(2)(ii), 11.19, and 11.801.

Ex. 1, at 2 (emphasis added).

3. Question 17 on the Application asked applicants:

Have you ever been disciplined, reprimanded, or suspended in any job for conduct involving dishonesty, fraud, misrepresentation, deceit, or for any violation of Federal or State laws or regulations?

Ex. 1, Q. 17. In response to that question, Petitioner checked the "No" box. *Id.* Petitioner did not provide any further explanation of his "No" response in his Application. *Id.*

4. Petitioner's Application was approved on June 10, 2020 and his request for a waiver of the examination was granted. Ex. 2.

5. Thereafter, on June 25, 2020, the Office of Enrollment and Discipline ("OED") received information that it had requested from the USPTO Office of Human Resources ("OHR") and which pertained to Petitioner. Ex. 3. That information included a Notice of Proposed 14 Day Suspension for Petitioner dated October 8, 2019 for charges of being Absent Without Leave ("AWOL") over a period of 10 days, and totaling 30 hours and 15 minutes. *Id.* The term of the proposed suspension was 14 days. *Id.* The information also included discussions that occurred in January and February of 2020, between Petitioner and OHR, concerning a reduction of suspension term and an abeyance agreement with Petitioner. *Id.*

6. After receiving the information from OHR, on July 1, 2020, OED submitted a first Request for Information (“First RFI”) to Petitioner. Ex. 4. The basis for the RFI was:

You were granted a waiver of the examination for registration to practice before the [USPTO]. However, in view of your response to Question 17 of the background information section of your application concerning previous employment, we require additional information before determining whether you possess good moral character and reputation in accordance with 37 C.F.R. § 11.7(a)(2)(i).

Id. OED further explained that it “received information regarding you that potentially reflects adversely on your good moral character and reputation, and thus is conducting an investigation.”

Id. at 2 (citing 37 C.F.R. § 11.7(g)(2)(i)). The First RFI sought, *inter alia*, information concerning the circumstances of his suspension and why Petitioner did not disclose the suspension to OED on his Application. *Id.* at 2-3.

7. On July 23, 2020, Petitioner submitted his “Response to Requests for Information” (“Response to First RFI”). Ex. 5. Therein, Petitioner stated that he “was suspended for five days due to being charged with ‘Improper Conduct’ . . . which does not fall into one of the categories of ‘conduct involving dishonesty, fraud, misrepresentation, [or] deceit.’” *Id.* at 2 (alteration in original). He implied that the disciplinary charges were incorrect since he was working during those hours. Specifically, he stated he had been “printing” work and performing less electronic work, due to the birth of daughter. *Id.* He also claimed that access interruptions prevented him from logging in his hours his “usual way and inaccurately filled out [his] time sheet.” *Id.* Petitioner acknowledged he failed to use the required “back-up technology” to accurately log his work hours. *Id.*

8. With regard to his Application, Petitioner states that he answered “No” to Question 17 “because [he] was not suspended or had any other action taken against [him] during [his] time at

the USPTO for any charge relating to ‘conduct involving dishonesty, fraud, misrepresentation, [or] deceit.’” Ex. 5, at 3 (fourth alteration in original). “The issue that led to [his] suspension resulted from [his] mistakenly mis-logging [his] hours because of a problem with the USPTO technology, not from [his] being dishonest, fraudulent, untruthful, or deceitful.” *Id.*

9. Petitioner’s Response to First RFI also detailed his work ratings and employment record while working at the USPTO. Ex. 5, at 2-3. He also provided a number of documents including records related to his suspension and performance record. Ex. 5 (attachments).

10. On August 24, 2020, OED submitted to Petitioner a “Second Request For Information And Evidence Under 37 C.F.R. § 11.7(g)(2)(i)” (“Second RFI”), stating that additional information was required prior to determining whether Petitioner possessed good moral character and reputation in accordance with 37 C.F.R. § 11.7(a)(2)(i). Ex. 6. Petitioner was asked to provide complete responses and to clarify his responses to the First RFI. For example, he was asked to “[p]lease fully explain why you believe that you were not suspended for conduct involving dishonesty, fraud, misrepresentation, deceit, or for any violation of Federal or State laws or regulations.” *Id.* at 4.

11. Petitioner submitted his “Response to Second Request for Information and Evidence under 37 C.F.R. § 11.7(g)(2)(i)” (“Response to Second RFI”) on September 9, 2020. Ex. 7. In his Response to Second RFI, Petitioner spent the bulk of his response restating his arguments against the underlying disciplinary matter that were made, and not credited, by the deciding official. *Id.* He also claimed that he did not believe that he was charged with a matter that involved dishonesty, fraud, misrepresentation, deceit, or for any violation of Federal or State laws or regulations.¹ *Id.*

¹ This is not an exhaustive list of the items Petitioner raises in his Response to Second RFI.

12. On November 13, 2020, OED issued a Show Cause Requirement to Petitioner (“Show Cause Notice”). Ex. 8. That notice stated:

As discussed below, [Petitioner] has not met his burden of establishing to the satisfaction of the Director of the Office of Enrollment and Discipline (“OED Director”) that he presently possesses the good moral character and reputation required to represent applicants for patents in the presentation and prosecution of their applications before the Office. Accordingly, [Petitioner] is required to show cause why his application for registration to practice in patent matters before the Office should not be denied.

Id. at 1. The Show Cause Notice detailed his suspension while still employed as a patent examiner by the USPTO and highlighted that Petitioner was advised in the Notice of Proposed Suspension that “[w]hen reporting your time in WebTA, you affirmatively certif[ied] that the time worked and leave taken as recorded are true and correct. You also affirm[ed] that all reported time was worked and approved according to law and regulation.” *Id.* at 4 (alterations in original). However, records showed that he was “absent, without authority, from [his] required duty station” and he “claimed time, and [was] paid, for work on these dates but [his] absences were not authorized nor did [he] request leave for that period.” *Id.* at 3. Those charges were upheld by the deciding official, although the suspension was reduced to 5 days. *Id.* at 4.

13. Despite serving the 5-day suspension, “[Petitioner] chose not to disclose his suspension to OED in the Application. Ex. 8, at 6. “By such omission, he did not comply with the exhortation to candor prefacing the Background Information section of the Application. . . .” *Id.* “In addition to violating USPTO procedures, [Petitioner’s] conduct leading to his suspension from his position as a USPTO patent examiner involved dishonesty regarding the number of hours that he worked, claiming the benefit of those hours not worked, and being compensated for those hours.” *Id.* The Show Cause Notice stated that Petitioner’s answer to Question 17 of the Application appeared to be “clearly not true.” *Id.* at 7. But, regardless, “even if [Petitioner] had a

good faith doubt that his previous suspension from employment was relevant, [Petitioner] should have also answered in the affirmative on that basis or disclosed the suspension while providing an explanation with the Application.” *Id.* at 7-8. Petitioner was invited to provide a written response to the notice “to show that he presently possesses good moral character,” within 30 days of the Notice. *Id.* at 8.

14. Petitioner responded to the Show Cause Notice on December 2, 2020. Ex. 9. In that response, Petitioner spends the bulk of his 2-page written response setting forth his superior academic credentials and his performance and technical expertise at USPTO. *Id.* For example, he stated:

[a]s evidence of my good moral character, one may simply look at any one of or all of the patent applications that were examined by me and the United States Patents that were granted by me and examine their validity and worthiness, as to conclude positively that I have only done an excellent work as a Patent Examiner representing the United States Patent and Trademark Office, and that I have demonstrated nothing short of good moral character and honesty while being a Patent Examiner and representing the Patent Office of the United States of America.

Ex. 9, at 2. Petitioner also provided a contact for TC Director Mr. Diego Gutierrez, as well as provided four “moral character recommendation letters,” all of which he contended demonstrates his “moral character and quality of work performed at USPTO.” *Id.*; Ex. 9 (attachments).

15. The OED Director’s Final Decision was issued on January 15, 2021, denying Petitioner’s Application. Ex. 10. The Final Decision restated the circumstances around Petitioner’s suspension, noted that suspension was not appealed, as well as his “No” response to Question 17 of the Application, which was made less than 3 months after serving his suspension. *Id.* at 3-5. It further stated that “[i]mproper claims of time worked and lack of candor and truthfulness are serious causes for concern regarding [Petitioner’s] present moral character.” *Id.* at 5.

“[Petitioner] chose not to disclose his suspension to OED in the Application. By such omission, he did not comply with the exhortation to candor prefacing the Background Information section of the Application. . . .” *Id.* at 5. The OED Director also noted that “[i]n addition to violating USPTO procedures, [Petitioner’s] conduct leading to his suspension from his position as a USPTO patent examiner involved dishonesty regarding the number of hours that he worked, claiming the benefit of those hours not worked, and being compensated for those hours.” *Id.* at 6.

16. The OED Director’s Final Decision addressed Petitioner’s responses to the two RFIs. It noted that “[i]n the First Response, [Petitioner’s] position appeared to be that he was not required to include information regarding his suspension from employment in his Application. . . .” Ex. 10, at 6-7. The OED Director disagreed, noting that “[a]s [Petitioner] was suspended for conduct that involved dishonesty, fraud, misrepresentation, deceit, and/or a violation of Federal laws and regulations, these statements were clearly not true.” *Id.* at 7. Petitioner’s answers as noted in the RFIs, regarding his Answer to Question 17, did not comply with the “exhortation to candor prefacing the Background Information section of the Application.” *Id.* Further, “even if [Petitioner] had a good faith doubt that his previous suspension from employment was relevant, [he] should have also answered in the affirmative on that basis or disclosed the suspension while providing an explanation with the Application.” *Id.* But, even when provided the opportunity to explain his “No” answer on the Application, the OED Director concluded he “did not take responsibility for his omission.” *Id.* at 7-8.

17. Finally, as to Petitioner’s response to the Show Cause Notice, the OED Director’s Final Decision states that “[Petitioner] did not address the content of the Show Cause Requirement,” except to note that he had no prior disciplinary history. Ex. 10, at 8. Further, “[Petitioner] did not address the issue of his lack of candor to OED or whether he still maintained that his AWOL was

not misconduct. As such, [his] response has limited utility to a determination of [his] good moral character and reputation.” *Id.* Finally, the OED Director acknowledged the letters of recommendation provided by Petitioner but found that “not one of the provided letters indicated that the author was aware of [Petitioner’s] suspension from employment or [his] underlying AWOL, nor did any of the letters identify any change in the attitude of [Petitioner] whatsoever.” *Id.* at 8-9. Thus, the OED Director attributed those letters “little probative value” on the issue of Petitioner’s good moral character and reputation. *Id.* at 9. As a result, “[g]iven that [Petitioner] did not address the merits of the Show Cause Requirement in his response, the available evidence does not indicate that [Petitioner] presently possesses the requisite good moral character and reputation required for registration.” *Id.*

18. The instant Petition was filed on February 13, 2021.

II. LEGAL AUTHORITY

Congress vested the USPTO with plenary, statutory authority to promulgate regulations “govern[ing] the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Office.” 35 U.S.C. § 2(b)(2)(D); *see also Kroll v. Finnerty*, 242 F.3d 1359, 1364 (Fed. Cir. 2001) (stating that the USPTO has the “exclusive authority to establish qualifications for admitting persons to practice before it, and to suspend or exclude them from practicing before it”); *Haley v. Lee*, 129 F. Supp. 3d 377, 386-87 (E.D. Va. 2015) (noting that “Congress gave the USPTO wide latitude to govern the conduct of the members of its bar,” and “Congress also *explicitly* gives the USPTO the power to promulgate regulations related to the conduct of its members”). Accordingly, the USPTO Director has authority to regulate practice before the Office in both patent and trademark matters.

In accordance with its statutory authority, the USPTO enacted an entire regulatory scheme that sets for the process and allowances for who is permitted to practice before the Office. This includes 37 C.F.R. § 11.7, which states in relevant 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[.]

Id. § 11.7(a)(2)(i). “To enable the OED Director to determine whether an individual has the qualifications specified in paragraph (a)(2) of this section, the individual shall ... [p]rovide satisfactory proof of possession of good moral character and reputation.” *Id.* § 11.7 (b)(1)(iii). “Every individual seeking recognition shall answer all questions in the application for registration and request(s) for information and evidence issued by OED: disclose all relevant facts, dates and information; and provide verified copies of documents relevant to his or her good moral character and reputation.” *Id.* § 11.7(g)(1). “An individual’s lack of candor in disclosing facts bearing on or relevant to issues concerning good moral character and reputation when completing the application or any time thereafter may be found to be cause to deny registration on moral character and reputation grounds.” *Id.* § 11.7(h)(3). An individual seeking authorization to practice before the Office bears the burden of establishing to the satisfaction of the OED Director that he or she presently “[p]ossesses good moral character and reputation.” *Id.* §§ 11.7(a)(2)(i) and 11.9. Here, the OED Director’s determination that Petitioner did not establish that he presently possesses the requisite good moral character and reputation required for registration is affirmed.

III. DISCUSSION

A. The OED Director's Final Decision Is Affirmed.

“A party dissatisfied with a final decision of the OED Director regarding enrollment or recognition shall seek review of the decision upon petition to the USPTO Director” 37 C.F.R. § 11.2(d). This Final Order results from a review of the OED Director's January 15, 2021 Final Decision and Memorandum Opinion. *See* Petition at 1 (“This is an Appeal Brief for the appeal from the final decision and memorandum opinion issued by [the OED Director] regarding the [Petitioner's] application for registration to practice in patent cases before the [USPTO], electronically mailed on 15 January 2021.”).

In this Petition to the USPTO Director, the bulk of Petitioner's argument challenges the underlying disciplinary matter that he failed to disclose on his Application. He further states his belief that he was not required to disclose the underlying discipline and argues that the OED Director did not credit Petitioner's “excellent work” as a patent examiner and before joining the USPTO, including the letters of recommendation he provided. However, these arguments do not warrant altering the OED Director's conclusion that Petitioner does not currently possess the good moral character and reputation to practice before the USPTO. For the reasons set forth below, the OED Director's Final Decision is Affirmed.

1. Petitioner's Arguments Pursuant to 37 C.F.R. § 11.7(h)(4)(iii)(A) and (C) Do Not Provide a Foundation to Disturb the OED Director's Final Decision.

As an initial matter, Petitioner spends the first 8 pages of his argument erroneously relying on and referencing 37 C.F.R. § 11.7(h)(4)(iii)(A) and (C). Petition at 9-16. Specifically, he argues that his underlying disciplinary matter constituted a deprivation of due process and that the finding of lack of good moral character and reputation by the OED Director would result in

grave injustice. *Id.* However, 37 C.F.R. § 11.7(h)(4)(iii)(A) and (C) are not applicable here. Section 11.7(h) concerns what evidence may show lack of good moral character and reputation, to include individuals “who [have] been disbarred or suspended from practice of law or other profession, or has resigned in lieu of a disciplinary proceeding. . . .” 37 C.F.R. § 11.7(h)(4)(i). The provisions Petitioner is relying on, 37 C.F.R. § 11.7(h)(4)(iii)(A) and (C), would provide the only defenses with regard to an underlying disciplinary matter resulting in disbarment, suspension on ethical grounds, or resignation in lieu of a disciplinary proceeding. Those defenses include, upon a showing to the satisfaction of the OED Director, that “[t]he procedure in the disciplinary court was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process” and “[t]he finding of lack of good moral character and reputation by the Office would result in grave injustice.” *Id.* § 11.7(h)(4)(iii)(A) and (C). Here, Petitioner’s underlying suspension was for employee misconduct, not a suspension from the practice of law or another profession, as explained in § 11.7(h). Consequently, § 11.7(h), and the defenses identified in that section, does not apply to employee misconduct such as the type that Petitioner failed to disclose here. Petitioner’s argument pursuant to these provisions are thus both patently irrelevant and provide no foundation to disturb the OED Director’s Final Decision.

2. Petitioner Has Not Demonstrated That He Currently Possesses the Requisite Good Moral Character and Reputation to Practice Before the USPTO.

The OED Director denied Petitioner’s Application for registration to practice before the USPTO on January 15, 2021. Ex. 10. As already noted, the basis for that Final Decision was not just the fact of Petitioner’s suspension, but his “No” response to Question 17 of the Application, which was made less than 3 months after serving his suspension. *Id.* at 3-5. “In addition to violating USPTO procedures, [Petitioner’s] conduct leading to his suspension from his position as a USPTO patent examiner involved dishonesty regarding the number of hours that he worked,

claiming the benefit of those hours not worked, and being compensated for those hours.” *Id.* at 6. Noting that “[i]mproper claims of time worked and lack of candor and truthfulness are serious causes for concern regarding [Petitioner’s] present moral character,” the OED Director’s Final Decision observed that “[Petitioner] chose not to disclose his suspension to OED in the Application.” *Id.* at 5. “By such omission, he did not comply with the exhortation to candor prefacing the Background Information section of the Application. . . .” *Id.* Further, the OED Director observed that Petitioner was given two opportunities to explain his behavior but, in his responses to the two RFIs, he “did not take responsibility for his omission.” *Id.* at 7-8.

As to Petitioner’s response to the Show Cause Notice, the OED Director concluded that Petitioner did not address the content of the Show Cause Requirement, except to note that he had no prior disciplinary history. Ex. 10, at 8. Petitioner’s response was thus deemed of limited value since it addressed neither the issue of his lack of candor to OED nor whether he still maintained that his AWOL was not misconduct. *Id.* at 8. Finally, contrary to Petitioner’s argument in his Petition, the OED Director acknowledged the letters of recommendation provided by Petitioner but found that “not one of the provided letters indicated that the author was aware of [Petitioner’s] suspension from employment or [his] underlying AWOL, nor did any of the letters identify any change in the attitude of [Petitioner] whatsoever.” *Id.* at 8-9. Thus, the OED Director attributed those letters “little probative value” on the issue of Petitioner’s good moral character and reputation. *Id.* at 9. As a result, “[g]iven that [Petitioner] did not address the merits of the Show Cause Requirement in his response, the available evidence does not indicate that [Petitioner] presently possesses the requisite good moral character and reputation required for registration.” *Id.*

Here, Petitioner challenges the OED Director's Final Decision but a close reading of his Petition shows that, as with his response to the Show Cause Order, his arguments continue to be nonresponsive to the OED Director's concerns or the OED Director's Final Decision. To begin, Petitioner offers a panoply of reasons challenging or attempting to mitigate the undisclosed suspension. However, those arguments are of no value here. Petitioner had the option to challenge that suspension but he did not do so. Thus, the record of that suspension is uncontroverted. Petitioner was suspended on charges of being AWOL "that is, for falsely claiming to have worked during hours during which he did not work, and collecting pay for those hours not worked, after affirming that he had complied with all relevant procedures." Ex. 10, at 4; Petition at 20 ("The [Petitioner] acknowledges that the Charge stemmed from an accusation of AWOL."). Although Petitioner disagrees that he was required to disclose the suspension and, in his view, the charge is not one "involving dishonesty, fraud, misrepresentation, deceit or for any violation of Federal or State laws or regulations," his mere disagreement is insufficient to change the OED Director's Final Decision with regard to his Application. Petition, at 20. As the OED Director correctly noted in the Final Decision, the USPTO Director has previously determined that the inaccurate reporting of time and attendance constitutes misrepresentation. Ex. 10, at 4 n.9; *In Re* ___, File No. ___, Decision on Petition Under 37 C.F.R. § 11.2(d) (USPTO Aug. 7, 2009).² Petitioner offers no legal or factual counter whatsoever to this conclusion in his Petition.

Importantly, the OED Director notes that, even if Petitioner had a good faith doubt that his suspension was relevant, he should have answered in the affirmative on Question 17 and provided any explanatory information in the space provided on the application. Ex. 10, at 7.

² Available at https://foiadocuments.uspto.gov/oed/0594_mor_2009-08-07.pdf.

His failure to do that did not comport with the “the exhortation to candor prefacing the Background Information section of the Application.” *Id.* at 5-6; *see also* Ex. 1, at 2. Again, Petitioner did not address this in his response to the Show Cause Notice and does not do so in his appeal. He merely recites the same arguments challenging the underlying suspension and explaining why he believed he should not have been required to disclose that suspension on his Application. As noted above, those arguments have already been considered and rejected.

Petitioner’s remaining arguments—concerning his work history, academic success, and letters of recommendation—can be again be summarized as nonresponsive to the OED Director’s Final Decision. First, that Final Order did not call into question Petitioner’s work history or academic background. Rather, it specifically identified the suspension and his nondisclosure of that suspension as the basis for denying his Application. Ex. 10. Further, the letters of recommendation included with his response to the Show Cause Notice, and referenced in his Petition, did not indicate that any of the authors were aware of Petitioner’s suspension or his AWOL and did not indicate any change in Petitioner’s attitude. Ex. 10, at 8-9 (citing 37 C.F.R. § 11.7(i), which provides a nonexhaustive list of factors that may be taken into consideration when evaluating rehabilitation of an individual seeking a moral character and reputation determination, including “a [c]hange in attitude from that which existed at the time of the act of misconduct in question as evidenced by any or all of the following: . . . [s]tatements from persons familiar with the individual's previous misconduct and with subsequent attitudes and behavioral patterns” (alterations in original)). Consequently, the OED Director’s conclusion that the letters had little probative value as to Petitioner’s good moral character and reputation is correct. Petitioner’s registered

disagreement as to the relevance of the letters, or the weight given to them, does not change this conclusion.

In summary, as with his response to the Show Cause Notice, and as detailed herein, Petitioner failed to provide any relevant response to the OED Director's Final Decision. Consequently, he failed to address the OED Director's concerns over his nondisclosure of his underlying employee suspension and the OED Director's Final Decision dated January 15, 2021 is Affirmed.³

IV. CONCLUSION

As with his response to the Show Cause Notice, Petitioner did not address the merits of the OED Director's Final Decision in his Petition. Instead, he rehashed arguments concerning the merits of the underlying discipline, as well as provided other additional information that has little, if any, probative value to the OED Director's decision in the January 15, 2021 Final Order. As a result, the OED Director's Final Decision is Affirmed in its entirety.

RECONSIDERATION AND APPEAL RIGHTS

Any request for reconsideration of this decision must be filed within thirty (30) days from the date of entry of this decision pursuant to 37 C.F.R. § 11.2(d). Any request for reconsideration mailed to the USPTO must be addressed to:

³ Petitioner's remaining peripheral arguments including, *inter alia*, claims of unreasonableness in setting the "bar" for determining good moral character higher for practitioners than for primary examiner and arguments refuting accusations of post-dating the Application and providing selective quotations, are without merit and any conclusions on these issues would not, and do not, affect the conclusion in this Final Order. Petition at 17-19, 21-22.

David Berdan
General Counsel
United States Patent and Trademark Office
600 Dulany St.
P.O. Box 1450
Alexandria, VA 22314

A copy of the request must also be served on the attorney for the Director of Enrollment and Discipline:

Melinda M. DeAtley
Counsel for the Director of the Office of Enrollment and Discipline
600 Dulany St.
P.O. Box 1450
Alexandria, VA 22314

Any request hand-delivered to the USPTO must be hand-delivered to the Office of the General Counsel, in which case the service copy for the attorney for the Director shall be hand-delivered to the Office of Enrollment and Discipline.

If a request for reconsideration is not filed, and Petitioner desires further review, Petitioner is notified that he is entitled to seek judicial review on the record in the U.S. District Court for the Eastern District of Virginia under 35 U.S.C. § 32 “within thirty (30) days after the date of the order recording the Director’s action.” E.D. Va. Local Civil Rule 83.5; *see* 37 C.F.R. § 11.2(e).

IT IS SO ORDERED.

08/09/2021

Date

Users, Berdan, David, Digitally signed by Users,
Berdan, David
Date: 2021.08.09 16:53:40
-04'00'

David Berdan
General Counsel
United States Patent and Trademark Office

on delegated authority by
Andrew Hirshfeld
Performing the Functions and Duties of the
Under Secretary of Commerce for Intellectual Property
and Director of the United States Patent and Trademark
Office

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Final Order was sent to the parties below, in the manner indicated:

Via First-Class Mail and E-Mail to Petitioner:

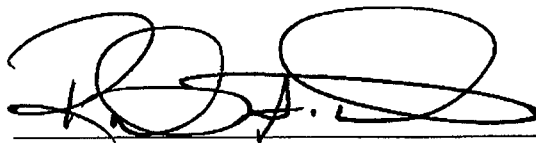
Mr. Shahriar Behnamian
4521 Clark Pl, NW
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Petitioner

Via E-mail to the OED Director:

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Counsel for OED Director

8.11.2021

Date



United States Patent and Trademark Office

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FILED: November 6, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-1581
(1:21-cv-01043-RDA-IDD)

SHAHRIAR BEHNAMIAN,

Plaintiff - Appellant,

v.

KATHERINE K. VIDAL, in her official capacity as Under Secretary of Commerce
for Intellectual Property and Director of the United States Patent and Trademark
Office; UNITED STATES PATENT & TRADEMARK OFFICE,

Defendants - Appellees.

O R D E R

Shahriar Behnamian seeks to appeal the district court's order denying relief on his complaint alleging violations of federal employment law and declining to set aside the denial of his application for recognition to practice before the United States Patent and Trademark Office. Appellees have moved to transfer this appeal to the United States Court of Appeals for the Federal Circuit. Upon consideration of Appellees' motion and Behnamian's response, we grant the motion and transfer this appeal to the Federal Circuit.

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Entered at the direction of the panel: Judge King, Judge Wynn, and Judge Heytens.

For the Court

/s/ Nwamaka Anowi, Clerk