UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

DONALD C. McGEAN v. NATIONAL LABOR RELATIONS BOARD	DOCKET NUMBER DC07528110531

OPINION AND ORDER

Appellant Donald C. McGean was removed from his position as Attorney Advisor (Labor)(Counsel to Board Member), GS-905-13, with the National Labor Relations Board (agency) based on the charges of: 1) failure to maintain a basic qualification for service in his position; and 2) unprofessional conduct. The two charges stemmed from a suspension of appellant from bar membership for one year and one day.

Appellant filed a petition for appeal with the Board's Washington, D.C. Regional Office. Although a hearing was held, appellant did not contest the facts and relied, *in toto*, upon legal arguments. In the initial decision, the presiding official found the charges supported by a preponderance of the evidence and held that appellant's removal was for such cause as would promote the efficiency of the service. In so doing, the presiding official found the Board to be without authority to review the merits of the decision of the District of Columbia Court of Appeals which had suspended appellant from membership in the District of Columbia

Bar for one year and one day.1/

Appellant filed a timely petition for review in which he makes numerous allegations which essentially raise two primary issues.

Appellant asserts that the presiding official erred because: 1) she wrongly determined that the Board was without authority to review the merits of the District of Columbia Court of Appeals decision; and 2) she incorrectly determined that appellant's continuing membership in the United States District Court for the District of Columbia did not constitute sufficient bar membership for employment qualification purposes. He also asserts that new and material evidence is available which establishes that the composition of the Board of Professional Responsibility, which considered the merits of the charges against him, constituted an illegal conspiracy.

1/ The District of Columbia Court of Appeals found that appellant had engaged in conduct which violated the following disciplinary rules:

1) DR 1-102(A)(5) -- "A lawyer shall not engage in conduct that is prejudicial to the administration of justice."

2) DR 5-101(A) -- "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests."

3) DR 5-105(A) -- "A lawyer shall decline profferred employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the profferred employment, or it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C)."

As the basis for his argument that the presiding official erroneously concluded that the Board was without authority to review the merits of the Court of Appeals decision, he asserts that the court was without subject matter jurisdiction and therefore its judgment was void and may be collaterally attacked. In support of his position, he argues that under the relevant section of the D.C. Code, D.C. Code Ann. § 11-2503(b), a member of the District of Columbia Bar may not be suspended based on charges such as those made against him, unless the charges are written, made under oath, and presented to the court. He posits that the oath requirement is jurisdictional and since it is uncontroverted that the charges made against him were not made under oath, the Court of Appeals was without subject matter jurisdiction and accordingly its decision is void.

A void judgment is one which from its inception is a complete nullity and without legal effect. Williams v. North Carolina, 325 U.S. 226 (1945); Kansas City Southern Ry. Co. v. Great Lakes Carbon Corp., 624 F. 2d 822 (8th Cir.) cert. denied, 449 U.S. 955 (1980); Lubben v. Selective Service System Local Board No. 27, 453 F.2d 645, 649 (1st Cir. 1972). Absence of subject matter jurisdiction may make a judgment void. Kalb v. Feurstein, 308 U.S. 433 (1940); Kansas City Southern Ry., supra; Lubben, supra.

However, such total absence of subject matter jurisdiction must be distinguished from an error in the exercise of jurisdiction. A court has the power to determine its own jurisdiction, and an error in that determination will not render the judgment a complete nullity. Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1940); Kansas City Southern Ry., supra; Lubben, supra. 2/

2/ For a general discussion of the issue of void judgments, see 7 Moore's Federal Practice ¶60.25[2] (2d ed. 1982).

D.C. Code Ann. § 11-2502 empowers the District of Columbia Court of Appeals to discipline attorneys who are members of the District of Columbia Bar. Therefore, the court is expressly granted subject matter jurisdiction over the issue of attorney discipline. See Ben Sager Chemicals International, Inc. v. E. Targosz & Co., 560 F. 2d 805, 812 (7th Cir. 1977); Coalition of Black Leadership v. Cianci, 570 F. 2d 12, 16 (1st Cir. 1978); 7 Moore's Federal Practice ¶60.25 at 302-303 (1982).

In the instant case, following the decision of the D.C. Court of Appeals suspending him, appellant filed a "Motion En Banc To Vacate The Court's Order of Suspension dated November 6, 1980, and to Dismiss The Specifications Of Charges Filed Herein On May 21, 1979" based on the same allegation he now makes, i.e., that the complaint was not verified as required by the D.C. Code. By per curiam Order dated April 15, 1981, the Court denied appellant's motion, finding that if there was a defect, it was not jurisdictional and that by failing to timely object appellant had waived any defect. In the Matter of D. Carroll McGean, No. M-43-83 (D.C. April 15, 1981).

Even if the Board assumes that the court's acting on an unverified complaint constituted a jurisdictional error it would only be an erroneous exercise of subject matter jurisdiction and would not constitute a court acting in absence of subject matter jurisdiction. This error would not render the judgment void and therefore subject to collateral attack as the Court of Appeals still had general subject matter jurisdiction and could decide whether the defect was jurisdictional. See Kansas City Southern Ry. Co., supra at 826. Accordingly, the Board is without authority to review the merits of that determination. District of Columbia Court of Appeals v. Feldman, No. 81-1335 (U.S. March 23, 1983).

Appellant next alleges that the presiding official erred in finding that his continuing membership in the United States District Court for the District of Columbia did not constitute sufficient bar membership for employment qualification purposes.

It is undisputed that a GS-905 attorney must be licensed and authorized to practice as an attorney under the laws of a State, Territory, the District of Columbia or the Commonwealth of Puerto Rico, and that while appellant is suspended he does not meet this continuing requirement. The presiding official correctly found that appellant's continuing membership in the United States District Court for the District of Columbia does not meet this qualification requirement and the Board has not found any reason to disturb this finding.4/

Finally, appellant contends, that based on newly discovered evidence, the decision of the Board of Professional Responsibility (affirmed as modified by the D.C. Court of Appeals), was the result of "fraud, conspiracy, corruption, and cover up," Petition for Review at 17, because two of the three members of the District of Columbia Bar Hearing Committee which initially recommended his suspension and the Chairman of the Board of Professional Responsibility were members of the same law firm.

4/ Appellant has introduced, as new and material evidence, a memorandum order dated December 1, 1982, in which the United States District Court for the District of Columbia declined to impose reciprocal discipline in that court pursuant to Local Rule 4-3(II)(d). In that order, the court found that appellant had raised substantial questions of procedural and possibly substantive due process. The court also noted that it in no way condoned appellant's conduct. In the Matter of D. Carroll McGean, Attorney Grievance Docket No. 80-11 (D.C.D.C. 1982). This decision does not, in any way, require the Board to reverse its decision, as appellant still fails to meet the qualification requirement for a GS-905 attorney.

Pursuant to 5 C.F.R. § 1201.115, the Board may grant a petition for review when an appellant shows that new and material evidence is available that, despite due diligence, was not available when the record was closed. Even assuming arguendo that this evidence could be considered material, appellant has failed to show that, with due diligence, he could not have discovered this evidence. Avansino v. U.S. Postal Service, 4 MSPB 308 (1980). Moreover, the Board finds that appellant could have, with due diligence, discovered this evidence before the closing of the record. As appellant points out in his petition, the firm to which an attorney belongs is readily determinable by looking into legal directories, the telephone book, or even asking the attorney himself. Therefore, appellant's new evidence cannot serve as a basis for granting the petition for review. Since the evidence is not new, we need not reach the question whether such evidence is material.

Accordingly, the petition for review is DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

APR 22 1983

(Date)

Washington, D.C.

Robert E. Taylor
Secretary