



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DECISION ON ORDER TO SHOW CAUSE: January 14, 2020

CBCA 4775, 5360, 6334

NVS TECHNOLOGIES, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

James S. DelSordo, Manassas, VA.

Cheryl Cathey, Chief Operating Officer, NVS Technologies, Inc., Menlo Park, CA, appearing for Appellant.

Marion Cardova and Marshall Caggiano, Office of the General Counsel, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Judges **SOMERS** (Chair), **GOODMAN**, and **ZISCHKAU**.

PER CURIAM

Pursuant to Board Rule 35 (48 CFR 6101.35 (2018)), Standards of Conduct; Sanctions, the Board issued an order to show cause to James S. DelSordo on August 23, 2019, to which Mr. DelSordo filed a response on August 30, 2019. This decision resolves the issues raised in that order by imposing sanctions upon Mr. DelSordo, and leaves issues of the unauthorized practice of law to be resolved by the jurisdictions which have suspended Mr. DelSordo's licenses to practice law.

Background

James S. DelSordo, as counsel of record, filed three appeals at this Board on behalf of appellant, NVS Technologies, Inc. (NVS). Notices of appeal were filed and docketed as CBCA 4774 on June 1, 2015; as CBCA 5360 on June 14, 2016; and as CBCA 6334 on December 18, 2018. The three appeals were docketed before a three-judge panel, with Judge Allan H. Goodman as the presiding panel judge. The appeals arose from claims submitted pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012) (CDA), to the Department of Homeland Security's (DHS) contracting officer arising from contract no. HSHQDC-10-C-00053.

CBCA 4775 and 5360 were consolidated and a hearing on the merits was held on September 12–14, 2018, with post-hearing briefing concluded on March 5, 2019.

DHS filed a motion to dismiss CBCA 6334 on January 2, 2019, to which appellant filed an opposition on March 15, 2019.

On April 26, 2019, as the result of a disciplinary proceeding, the Virginia State Bar (VSB) Disciplinary Committee found Mr. DelSordo in violation of various Virginia Rules of Professional Conduct and suspended his license to practice law in Virginia, with a direction pursuant to Part Six, § IV, ¶¶ 13-29 of the Rules of the Supreme Court of Virginia, to forthwith notify, within fourteen days (by May 10, 2019), his clients, opposing attorneys, and presiding judges in pending litigation of his suspension. Additionally, Mr. DelSordo was required to furnish proof to the Bar within sixty days of the effective day of the suspension that such notices had been timely given. The results of the disciplinary proceeding were confirmed in VSB Memorandum Order of Suspension in the Matter of James Stephen DelSordo, VSB docket no. 18-053-110776 (May 7, 2019) (Memorandum Order of Suspension).

On May 8, 2019, the Board issued an order directing DHS to file a reply to appellant's opposition to respondent's motions in CBCA 6334. On May 30, 2019, DHS replied by filing motions to withdraw its motion to dismiss and to consolidate the appeal with the other two NVS appeals.

On June 17, 2019, Mr. DelSordo's license to practice law in the District of Columbia was reciprocally suspended by the District of Columbia bar.

Appellant's responses to the Government's motions in CBCA 6334 were due on June 30, 2019. By July 29, 2019, appellant's responses to the motions were overdue. The Board therefore issued an order on that date directing appellant to respond to the motions no

later than August 16, 2019. That order was issued to Mr. DelSordo, appellant's attorney of record in the three pending NVS appeals. Shortly after the order was issued, the Board became aware of the VSB Memorandum Order of Suspension, and Mr. DelSordo's reciprocal suspension to practice law in the District of Columbia.

On July 31, 2019, this Board's counsel contacted the Clerk of the VSB Disciplinary System and inquired whether the notice requirements referenced in the VSB Memorandum Order of Suspension were limited to giving notice to presiding judges and others in Virginia. The Clerk confirmed that the notice requirement was not limited, and advised that Mr. DelSordo had filed an affidavit allegedly furnishing proof of the required notices. The Clerk forwarded a copy of Mr. DelSordo's affidavit to Board counsel, and further advised via email that no notice letters to the presiding judge in the NVS appeals, the Clerk of this Board, or NVS had been attached to the affidavit.

On August 1, 2019, this Board's counsel notified Virginia Bar counsel of Mr. DelSordo's failure to give timely notice of the suspension of his license to practice law in Virginia, and copied Mr. DelSordo on that correspondence.

On August 15, 2019, the day before appellant's response to the motions in CBCA 6334 was due, Mr. DelSordo electronically filed (e-filed) a motion entitled "Counsel's Motion to Withdraw Appearance for Appellant." That motion stated:

COMES NOW undersigned counsel and respectfully requests leave of the Board Court [sic] to withdraw his appearance as counsel for Appellant NVS Technologies, Inc., in this matter. In accordance with CBCA R[ule] 5(a)(1) Appellant will in the future be represented by one of its officers who will shortly notice their [sic] appearance. In accordance with CBCA R[ule] 5(c) Appellant will meet any existing schedule in this appeal.

On August 16, 2019, the Board issued an order granting Mr. DelSordo's request to withdraw his appearance as counsel. Several minutes later, Mr. DelSordo e-filed a notice of appearance referencing Board Rule 5(a)(1), identifying himself as a vice president of NVS, purporting to represent NVS before this Board, and using an invalid address for NVS. Attached to the notice of appearance was a document entitled "NVS Technologies, Inc. Board Resolution Appointing Officer," dated August 9, 2019, appointing Mr. DelSordo vice president of corporate affairs.

Several minutes after e-filing the notice of appearance, Mr. DelSordo e-filed a sixteen-page pleading entitled "Appellant's Response to Respondent's Withdrawal of its Motion to Dismiss and Request to Consolidate Appeals" in CBCA 6334.

On August 19, 2019, the Board received via certified, return receipt U.S. mail, a copy of a letter from Mr. DelSordo to Cheryl Cathey, Chief Operating Officer of NVS, dated August 14, 2019, referencing the three NVS appeals, which read as follows:

Pursuant to the Rules of Court, Part Six, Section IV, Paragraph 13-29, my former law partner complained to the Virginia State Bar concerning the handling the money [sic] in our firm accounts and the Virginia State Bar investigated that allegation. I am hereby notifying you that my license to practice law in the Commonwealth of Virginia was suspended, on April 26, 2019 for a period of one year and one day. Subsequently my license to practice law in the District of Columbia was reciprocally suspended based on the Commonwealth of Virginia's action. As we have discussed in accordance with CBCA R[ule] 5(a)(1) the corporation will be represented in these appeals by an officer of the corporation. By copy of this letter, I am also notifying the opposing counsel and the presiding judge of this matter.

That letter noted that copies were sent to Judge Allan H. Goodman; Rose Anderson, Esq., Office of General Counsel, Department of Homeland Security; and Davida M. Davis, Clerk of the Disciplinary System, Virginia State Bar.

Mr. DelSordo's letter did not identify himself as an officer of NVS or state that NVS intended to have Mr. DelSordo represent the company as an officer, despite the fact that Mr. DelSordo was allegedly appointed as an officer of the corporation five days before the date of the letter, on August 9, 2019. Additionally, the letter was addressed to Dr. Cathey of NVS at the same invalid physical address which Mr. DelSordo used for his notice of appearance.

On August 23, 2019, this Board issued an order to Mr. DelSordo to show cause as to why:

He should not be disqualified from representing or assisting NVS Technologies, Inc. in CBCA 4775, 5360, and 6334 in any capacity, including but not limited to representative, attorney, expert, or consultant, for his failure to timely notify this Board as required by the VSB Memorandum Order of Suspension and his violations of the ethical requirement of candor to the tribunal as detailed above; and

His continued attempt to represent NVS Technologies, Inc. before this tribunal and his preparation and filing of the pleading entitled Appellant's Response to Respondent's Withdrawal of its Motion to Dismiss and Request to Consolidate Appeals filed on August 16, 2019, is not considered to be the unauthorized

practice of law pursuant to the requirements of Virginia and the District of Columbia, in view of the fact that his license to practice law has been suspended by these jurisdictions; and

Why the pleading entitled “Appellant’s Response to Respondent’s Withdrawal of its Motion to Dismiss and Request to Consolidate Appeals” filed on August 16, 2019 should not be struck from the record.

Mr. DelSordo filed a response to the order to show cause on August 30, 2019, in which he requested leave to withdraw his appearance for appellant, and asserted that his withdrawal would render the issue of whether he should be disqualified to represent appellant in any capacity moot. He further responded to the issues raised in the order to show cause.

On September 12, 2019, the Board issued an order granting Mr. DelSordo’s request for leave to withdraw his appearance, stating that the withdrawal did not render the issue of his disqualification moot. On September 19, 2019, Cheryl Cathey, Chief Operating Officer of NVS, filed a notice of appearance as representative of appellant in the three NVS appeals, which remain pending before this Board.

Discussion

Mr. DelSordo Did Not Give This Board Timely Notice of the Suspension of His License to Practice Law in Virginia

Individuals appearing before the Board on behalf of appellants must have the legal authority to do so. Board Rule 5(a)(1). A person appearing as an attorney must be a member in good standing of a state bar and have a license to practice law. Attorneys appearing before the Board are required to abide by the rules of professional conduct and ethics of their licensing jurisdictions. Board Rule 35(a). Attorneys are therefore bound by disciplinary directives such as the VSB Memorandum Order of Suspension, which required Mr. DelSordo to give notice of the suspension of his license to practice law to clients, presiding judges, and opposing counsel in pending litigation.

In his response to the Board’s order to show cause, Mr. DelSordo asserts that he “did not believe the notice was required after April 26, 2019, as he was admitted to practice in the District of Columbia and there was no change in his status as an attorney from the Board’s perspective.” This assertion lacks merit. The VSB Memorandum Order of Suspension unconditionally required Mr. DelSordo to give notice of his suspension by May 10, 2019, and he did not do so until August 2019. He therefore violated the directive of the VSB and Board Rule 35(a) by giving untimely notice. Also, once the District of Columbia Bar suspended

his license in June 2019, Mr. DelSordo lacked an active license to practice law. By not withdrawing as counsel in these three pending appeals until August 2019, he violated Board Rule 5(a)(1) by remaining for almost two months as counsel of record without the legal authority to appear as an attorney.

Mr. DelSordo Violated the Ethical Requirement of Candor to the Tribunal

Virginia State Bar Professional Guideline 3.3, Candor Towards the Tribunal, requires that “[a] lawyer shall not knowingly . . . make a false statement of fact.” The comments to this guideline state that “[t]here are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.” The District of Columbia Bar Rules of Professional Conduct 3.3 contain an identical provision precluding false statements of fact. The comments to this rule state that “[t]here may be circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.”

Mr. DelSordo was not candid with the tribunal when he withdrew as counsel and then filed an appearance as a corporate officer. On August 15, 2019, the day before appellant’s responses to the Government’s motions in CBCA 6334 were due, Mr. DelSordo filed a motion to withdraw as counsel, stating that NVS would be represented by “one of its officers who will shortly notice their [sic] appearance.”

Board Rule 5(a)(1) allows a corporation to appear before the Board “by one of its officers,” and Rule 5(c) allows individuals who have filed an appearance to withdraw from the case:

Withdrawal of appearance. Anyone who has filed a notice of appearance and wishes to *withdraw from a case* must file a motion identifying by name, telephone number, mailing address, and email address the person who will assume responsibility for representing the party in question. The motion must state grounds for withdrawal, unless the motion represents that the party in question will meet the existing case schedule.

(Emphasis added.)

On August 16, 2019, Mr. DelSordo’s lack of candor became apparent when, after the Board granted his motion to withdraw as counsel, he immediately filed his appearance as NVS’s vice president, with documentation noting his appointment as a corporate officer prior to filing his motion to withdraw as counsel. It was therefore evident that when he filed his motion to withdraw as counsel, he intended to continue to represent NVS in another capacity, rather than withdraw from the case as required by Board Rule 5(c). He then filed

responses to the motions in CBCA 6334, in his capacity as vice president, in a sixteen-page legal memorandum. All the foregoing pleadings were electronically filed with the Board. Mr. DelSordo's lack of candor was compounded by the receipt by this Board, after his motion to withdraw as counsel and the filing of his appearance as a corporate officer, of the copy of his August 14, 2019 notice letter to his client via certified mail, informing of his suspensions to practice law in Virginia and the District of Columbia. He justifies transmitting this letter via mail because the VSB Memorandum Order of Suspension required use of the mail. However, he ignores the requirement that the notice was to be transmitted by May 10, 2019, and was therefore three months overdue.

Even though Mr. DelSordo subsequently withdrew from the case by withdrawing his appearance as an officer of NVS, this did not negate his failure to disclose his intent to continue to represent NVS when he sought to withdraw his appearance as an attorney.

We find that Mr. DelSordo failed to act with candor to the tribunal because: (a) he did not identify himself in his motion to withdraw as counsel in these three appeals, filed on August 15, 2019, as the individual who would subsequently file a notice of appearance to represent NVS; (b) he did not identify himself as an officer of NVS until after his motion to withdraw as counsel was granted; (c) he did not identify himself as an officer of NVS in his letter of August 14, 2019, to NVS, a copy of which purports to be his notice to the presiding judge in these appeals as to the suspension of his licence to practice law in Virginia and the District of Columbia; and (d) he did not transmit to this Board the copy of his letter to NVS dated August 14, 2019, advising of the suspension of his license to practice law in Virginia and the District of Columbia, in a manner to assure that it would be received by the Board before or concurrently with his motion to withdraw or his subsequent notice of appearance as an officer of appellant.

Sanctions Imposed

Board Rule 35 states the Board's authority to impose sanctions as follows:

(b) Sanctions. If a party or its representative, attorney, expert, or consultant fails to comply with any direction or order of the Board (including an order to provide or permit discovery) or *engages in misconduct affecting the Board, its process, or its proceedings*, the Board may make such orders as are just, including the imposition of appropriate sanctions. . . .

. . . .

(d) Disciplinary proceedings

(1) Sanctions. The Board may discipline individual party representatives, attorneys, experts, or consultants for violating any Board order, direction, or standard of conduct if the violation seriously affects the integrity of the Board, its process, or its proceedings. Sanctions may be public or private, and may include admonishment, reprimand, *disqualification from a particular matter, referral to an appropriate licensing authority*, or other action that circumstances may warrant.

(Emphasis added.)

Disqualification from Representation of NVS in Pending Appeals

Mr. DelSordo has failed to show good cause why he did not timely comply with the requirement of the Virginia Bar to give notice of the suspension of his license to practice law by May 10, 2019, to the presiding judge or this Board. He has failed to show good cause why he continued as counsel of record in these three appeals for almost two months after his suspension to practice in the District of Columbia. He exhibited a lack of candor to the Board as detailed above. For these reasons, Mr. DelSordo's misconduct seriously affected the integrity of the Board, its process, and its proceedings and has caused unnecessary disruption and confusion. Mr. DelSordo is therefore disqualified from representing or assisting NVS in CBCA 4775, 5360, and 6334 in any capacity, including but not limited to representative, attorney, expert, or consultant.

The Issue of the Unauthorized Practice of Law to the Licensing Authorities

The Board's order to show cause raised the issue of whether Mr. DelSordo's continued representation of NVS as a corporate officer at this Board, after he no longer had an active license to practice law, was the unauthorized practice of law. This issue may be resolved by Mr. DelSordo's licensing jurisdictions.

Striking of Appellant's Responses to the Government's Motions in CBCA 6334

Appellant's responses to the Government's motions in CBCA 6334, filed by Mr. DelSordo when he appeared as a corporate officer of NVS, have been removed from the record of the appeal, so that his licensing jurisdictions may determine if the filing of this pleading is the unauthorized practice of law. Appellant may file responses to the motions no later than ten days from the date of this order.

Jerí Kaylene Somers
JERI KAYLENE SOMERS
Board Judge

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge