UNITED STATES

DEPARTMENT OF THE TREASURY

Director, Office of Professional Responsibility,
Complainant-Appellee,

v. **Complaint No. 2005-15**

Milton G. Friedman, C.P.A.,
Respondent-Appellant.

Decision on Appeal

Basis of Authority

Under the authority of General Counsel Order No. 9 (January 9, 1991) and the authority vested in him as Assistant General Counsel of the Treasury who is the Chief Counsel of the Internal Revenue Service, through a series of Delegation Orders (most recently, an Order dated January 15, 2008) Donald L. Korb delegated to the undersigned the authority to decide disciplinary appeals to the Secretary of the Treasury filed under Part 10 of Title 31, Code of Federal Regulations ("Practice Before the Internal Revenue Service," sometimes known and hereafter referred to as "Treasury Circular 230").

Background

The initial Decision in this proceeding was entered by Administrative Law Judge Richard A. Scully (the "ALJ")[1] on July 28, 2006.[2] In his initial Decision, the ALJ considered each of the charges remaining against Respondent-Appellant, made findings of fact and conclusions of law with respect to each, and determined that, on

[1] The ALJ is an Administrative Law Judge of the National Labor Relations Board ("NLRB") who sits as the ALJ in these proceedings under an inter-agency agreement between the NLRB and the Department of the Treasury

[2] The ALJ's initial Decision appears as Attachment 1 and is incorporated in this Decision on Appeal as if fully set forth herein.

the basis of the charges where the ALJ found that Complainant-Appellee had met his burden of proof,[3] that Respondent-Appellant should be suspended from practice before the Internal Revenue Service for a period of one year, with the suspension commencing on July 25, 2005.[4]

The ALJ's initial Decision clearly and correctly describes the procedural background of both this proceeding and an earlier, related proceeding initiated by the Office of Professional Responsibility against Respondent-Appellant on September 2, 2003. That earlier proceeding commenced with the issuance of a letter by the Office of Professional Responsibility alleging that Respondent-Appellant had engaged in specified acts of "disreputable conduct" within the meaning of Treasury Circular 230. That earlier proceeding was terminated when the Director, Office of Professional Responsibility extended an Offer of Public Censure to Respondent-Appellant, which Respondent-Appellant accepted and signed on December 30, 2003. The Offer of Public Censure[5] placed conditions on Respondent-Appellant's continued practice before the Internal Revenue Service which were to remain in effect for a three year period, commencing December 1, 2003 (and ending November 30, 2006).

The instant proceeding is an expedited proceeding initiated under §10.82 of Treasury Circular 230 by the Office of Professional Responsibility. The proceeding was instituted on November 17, 2004 when the Director, Office of professional Responsibility issued a Complaint alleging that Respondent-Appellant had violated one of the conditions of the Public Censure he had agreed to on December 30, 2003. Unless a suspension is imposed under §10.82 of Treasury Circular 230, a practitioner's suspension does not commence until the later of (a) the date on which the initial decision of an Administrative Law Judge becomes final or (b) if an appeal is timely taken from an initial Decision of the Administrative Law Judge, when the Secretary of the Treasury (or his or her delegate) issues a Decision on Appeal constituting final agency action in the proceeding. §10.76(b) of Treasury Circular 230. When an expedited proceeding is commenced under §10.82 of Treasury Circular 230, however, the suspension of the practitioner commences on the date the written notice of suspension is issued and remains in effect until the earlier of the following dates: (i) the date the Director of Practice lifts the suspension after determining that the practitioner is no longer described in §10.82(b) of Treasury Circular 230, or for any other reason; or (ii) the date the suspension is lifted by an Administrative Law Judge or the Secretary of the Treasury (or his or her delegate) in a proceeding referred to in §10.82(g), and

[3] Since Complainant-Appellee initially sought to suspend Respondent-Appellant for a period of 18 months, Complainant must meet his burden of proof by clear and convincing evidence. See § 10.76(a) of Treasury Circular 230.

[4] In the initial Complaint, Complainant-Appellee had requested that Respondent-Appellant be suspended for a period of eighteen months. Complainant-Appellee had continued to request that Respondent-Appellant be suspended for eighteen months when he filed his Amended Complaint.

[5] The Offer of Public Censure appears as Attachment 2 and is incorporated as if fully set forth herein.

instituted under §10.60, of Treasury Circular 230.[6] This is such a proceeding, and I view the initial Decision of the ALJ as having been a "lifting" of the suspension of Respondent-Appellant, effective July 24, 2006.[7]

Role and Functions of the Appellate Authority

Before turning to the particular issues raised by Respondent-Appellant in his Appeal, let me briefly discuss my role and functions as the Appellate Authority in a Treasury Circular 230 proceeding.

I review the entire administrative record in a proceeding, and have done so in this proceeding.[8] I do so to determine whether the jurisdictional prerequisites establishing the Director, Office of Professional Responsibility's jurisdiction over a practitioner have been met. In this proceeding, there is no dispute that, as a Certified Public Accountant, Respondent-Appellant is authorized to practice before the Internal Revenue Service. Nor is there any dispute as to whether Respondent-Appellant has in fact practiced before the Internal Revenue Service. Indeed, the charges against Respondent-Appellant find their origin in his practice before the Internal Revenue Service.

I also examine the facts in the administrative record and the law to determine whether the Complainant has met each of his burdens of proof by the requisite evidentiary standard. As noted above, given the sanction that the Director, Office of Professional Responsibility sought to impose, the requisite degree of proof in this proceeding is clear and convincing evidence.

The Complainant's burdens of proof exist with respect to each element of proof on each specific charge that remains in issue at the time of an Appeal, as well as certain other evidentiary burdens imposed on the Complainant based on the sanction sought to be imposed. Given the sanction sought by the Director in this proceeding and the nature of the specific charges against Respondent-Appellant, the Director, Office of Professional must also show by clear and convincing evidence

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[6] On July 25, 2005, pursuant to § 10.82(g) of Treasury Circular 230, Respondent-Appellant timely requested that the Complaint forming the basis of this proceeding under § 10.60 of Treasury Circular 230 be issued by the Director, Office of Professional Responsibility.

[7] Unlike in a "normal" Treasury Circular 230 proceeding, the sanction imposed in an expedited proceeding instituted under § 10.82 of Treasury Circular 230 is effective before the actions of the Director, Office of Professional Responsibility imposing the sanction are reviewed by an Administrative Law Judge or by the Secretary of the Treasury (or his or her delegate). § 10.82(g) of Treasury Circular 230 says that either an Administrative Law Judge or the Secretary of the Treasury (or his or her delegate) may lift a sanction imposed by the Director, Office of Professional Responsibility under § 10.82 of Treasury Circular 230, and does not state that the actions of either the Administrative Law Judge or the Secretary of the Treasury (or his or her delegate) in lifting a suspension need be taken in a document constituting Final Agency Action in the proceeding. Accordingly, the fact that Respondent-Appellant chose to appeal the ALJ's initial Decision in this matter has no effect on the action of the ALJ lifting Respondent-Appellant's suspension effective July 24, 2006.

[8] The ALJ's Certification of Record in these proceedings appears as Attachment 3 to this Decision on Appeal.

that Respondent-Appellant's violations were "willful." §10.52(a) of Treasury Circular 230.

The Appellate Authority's standards of review differ depending on whether the question being reviewed is a purely factual question or a mixed question of fact and law (both of which are reviewed by the Appellate Authority under a "clearly erroneous" standard of review), or is purely a legal question (which the Appellate Authority reviews *de novo*). § 10.78 of Treasury Circular 230.

Finally, the Appellate Authority reviews the sanction imposed to determine its appropriateness in light of the charges proved and in light of other "aggravating" or "mitigating" factors. The Appellate Authority performs this function *de novo* and with the full authority of the Secretary of the Treasury and the Internal Revenue Service (the charging agency).

The Issues Raised By Respondent-Appellant on Appeal

The charges made and sustained against Respondent-Appellant are explained clearly and concisely in the ALJ's initial Decision and will not be repeated here except when necessary to give context to the issues raised by Respondent-Appellant on Appeal.

Issue # 1. **Respondent-Appellant argues that the ALJ committed reversible error by finding that Complainant-Appellee had presented clear and convincing evidence allowing the ALJ to sustain the charges he sustained in his initial Decision. Having reviewed the entire administrative record in this proceeding, I find this general contention to be without merit. I will address separately a more specific failure of proof allegation below. See discussion *of Issue #4*, at page 6, infra. I will also separately address whether the Complainant-Appellee has proved by clear and convincing evidence that Respondent-Appellant's conduct was "willful" within the meaning of § 10.52(a) of Treasury Circular 230. See discussion of "willful" at pages 7 thru 9, infra.**

Issue #2. **Respondent-Appellant argues that the length of his suspension, if a suspension was justified at all, was of unreasonable length in relation to the violations proved and should be further reduced.[9] I strenuously disagree. Indeed, if Respondent-Appellant's only misconduct was the letter he sent to Revenue Officer #1 on November 3, 2004, the one year suspension imposed by the ALJ would have been more than fully justified.[10] I fear that Respondent-Appellant continues to profoundly underestimate the seriousness of sending the November 3, 2004 letter. Let me make clear that I do not mean to suggest that Respondent-Appellant's client did not have every right to pursue whatever legal recourse may have been available**

[9] The ALJ's initial Decision had already reduced the length of Respondent-Appellant's suspension from 18 months to 1 year.

[10] The other allegations against Respondent-Appellant are described with specificity in the ALJ's initial Decision on Appeal at pages 6 thru 9.

to him. Nor do I mean to suggest that Respondent-Appellant was not free to assist his client or his client's attorney in pursuing, however inadvisably,[11] that recourse. The line that Respondent-Appellant crossed was in threatening to file suit against Revenue Officer #1 personally, and in suggesting that his client would forego doing so if Revenue Officer #1 conducted herself in the course of her official responsibilities as he would have liked her to do.[12] I find, therefore, that the Respondent-Appellant's claim is without merit.

Issue #3. **Respondent-Appellant asserts that the ALJ committed reversible error by failing to discuss that his sole goal was to "intellectually discuss a hugely complex issue of tax law with a member of District Counsel's staff." I find that fact irrelevant to the issues to be decided by the ALJ. Respondent would do well to remember the admonition that "the ends do not justify the means." He might also profit by considering that even his "ends" might not be viewed as justified. The Internal Revenue Service and the Office of Chief Counsel have a legitimate interest in preserving the attorney-client privilege. I find this claim to be without merit.**

Issue #4. **Respondent-Appellant raised a number of objections in relation to the ALJ's handling of the charges (Counts 20 thru 31) relating to the facsimiles and letters sent by Respondent-Appellant to Internal Revenue Service employees on August 17, 2004, August 19, 2004 and November 3, 2004. See discussion at pages 7 thru 9 of the ALJ's initial opinion. Respondent-Appellant first complains that the ALJ's use of the language "based on nothing but his say-so" was an affront to his professional credibility and that of the lawyer he had enlisted to help him develop his argument. I do not read the ALJ's language as an affront to Respondent-Appellant but only as a statement that the recipients of his correspondence answer to their superiors within the Internal Revenue Service, not to a private practitioner. This is hardly an error by the ALJ, let alone reversible error. Next, Respondent-Appellant contends that the lumping together of the various individual pieces of correspondence sent to Internal Revenue Service personnel (including the February 1, 2002 letter sent by Respondent-Appellant to IRS Employee #3 discussed at page 6 of the ALJ's initial Decision) and finding them relevant as establishing a "pattern of conduct" charge not contained in either the Complaint or the Amended Complaint constitutes reversible error. The requirements for what must be contained in a Complaint in this proceeding appear in § 10.62(a) of Treasury Circular 230. In**

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[11] Respondent-Appellant has stated that this proceeding is not the place to discuss the merits of any Bivins action his client may have considered filing against Revenue Officer #1. See Bivins v. Six Unknown NamedAgents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). I quite agree, but note in passing that the prospects of such a suit succeeding seem remote at best in light of the various hurdles a plaintiff would face in pursuing such a claim. See Judicial Watch, Incorporated v. Rossotti, 317 F.3d 401 (4th Cir. 2003).

[12] The same is true of the taxpayer's right to file charges against an Internal Revenue Service employee with the Office of the Treasury Inspector General for Tax Administration ("TIGTA"). Had Respondent merely assisted his client, or someone acting for his client, in filing such a complaint, both the client and Respondent-Appellant would have been totally within their rights. But when a practitioner threatens to take such action in an effort to influence an employee's conduct of her official responsibilities, and infers that the actions will not be taken if the employee acts or fails to act as he would like her to in the performance of her official duties, that is entirely inappropriate and constitutes a violation of Treasury Circular 230.

relevant part, § 10.62(a) requires that a Complaint contain a clear and concise description of the facts and law that constitute the basis for proceeding and find a complaint sufficient if it fairly informs the respondent of the charges brought so that he or she is able to prepare a defense. In essence,
§ 10.62(a) provides for "notice pleading." I do not read § 10.62(a) as in any way constraining the ALJ from conforming the charges to the proof presented at the hearing so long as that action by the ALJ has not prejudiced Respondent-Appellant in preparing his defense. I find that it has not. Moreover, I find that there are two ways in which evidence related to one charge can be relevant to another charge. One way is finding that the conduct would support a "pattern of conduct" charge. The other is in judging the credibility of the witnesses and the reasonableness of their interpretation of conduct relevant to each charge. While I do not feel I am compelled to do so, in reviewing the administrative record and the ALJ's initial Decision, I have considered the evidence supporting each charge separately except insofar as I found that evidence helpful in making a determination of witness credibility. Finally, Respondent-Appellant contends that the ALJ considered all four pieces of correspondence sent to Internal Revenue personnel to be violations even though in his testimony, Enforcement Attorney 1 said that he found that only the November 3, 2004 letter crossed the line. A fair characterization of that testimony is that Enforcement Attorney 1 found only the November 3, 2004 letter to be a clear actual threat. In contrast, the ALJ, having reviewed the Consent to Public Censure, adopted a different legal standard based on the language of that document (that the statements made in the facsimiles and letters "could be construed as offensive, threatening or insulting.") As I interpret the ALJ's initial Decision, I believe that the objective standard he applied was a "to a reasonable person" standard. As I find the November 3, 2004 letter alone to form a more than adequate basis for the suspension imposed, I find that if the inclusion of the other three pieces of correspondence was error at all, it was harmless, not reversible, error. For all of these reasons, I find these claims to be without merit.

Issue #5. **Respondent-Appellant asserts that, by taking into consideration the terms of the Consent to Public Censure, the ALJ denied Respondent-Appellant the *de novo* hearing to which he was entitled. Respondent-Appellant was accorded *de novo* review, including a full evidentiary hearing in which the Consent to Public Censure was but one piece of evidence. This claim is without merit.**

Issue #6. **Respondent-Appellant asserts that the ALJ failed in his initial Decision to state the standard he used to determine that the statements made in the four written communications he found to be threatening. The ALJ clearly indicated that he applied an objective standard of review in determining whether the communications should be viewed as threatening. No doubt, the ALJ could, and perhaps should, have expanded upon his remarks. But I have read the facsimiles and letters in question and find that at least two of the four, including the November 3, 2004 letter to Revenue Officer #1, meet the standards established in both James v. Tablerion, 363 F.3d 1352 (Fed. Cir. 2004) (a Merit Systems Protection Board case involving the dismissal of an Internal Revenue Service employee that threatened to**

have a former spouse audited and which Respondent-Appellant himself argued should be accepted as relevant precedent) and Metz v. Department of the Treasury, 780 F.2d 1001 (Fed. Cir. 1986) (a similar case involving a threat of physical harm). This claim is without merit.

***Issue #7*. Respondent-Appellant asserts that the ALJ erred by not considering his claim that two Internal Revenue Service employees, IRS Employee #4 and Revenue Officer #1, engaged in a conspiracy against him. The administrative record is devoid of evidence supporting this claim, which I find to be without merit.**

***Issue #8.* Respondent-Appellant asserts that he was merely passing along information from his client and his client's attorney to potentially affected Internal Revenue Service employees, not trying to influence them in the discharge of their responsibilities. The ALJ found Respondent-Appellant's testimony to lack credibility. Under my standards of review, I am not to disturb the decision of the ALJ on any factual matter unless I find the action of the ALJ to be "clearly erroneous." I not only find the ALJ's determination not to be "clearly erroneous," I find the ALJ's judgment to be correct. This claim is without merit.**

***Issue #9.* Respondent-Appellant asserts that he was the subject of duress when he entered into the Consent to Public Censure. I have reviewed all the relevant testimony and other evidence relating to this claim. On the basis of that review, I see no reason to disturb the ALJ's findings of fact and conclusions of law on this claim, which respectively appear at pages 2 and 3, and 9 of the ALJ's initial Decision. This claim is without merit.**

***Issue #10.* Respondent-Appellant asserts that the complexity of the case he was trying to advance for his client and Revenue Officer #1's lack of expertise should have been considered by the ALJ. As my earlier statement concerning the "ends not justifying the means" may have forecast, I find the ALJ's determination that these matters are not relevant to the charges against Respondent-Appellant to be correct. Accordingly, I do not find the ALJ's findings and conclusions on these matters to be error, let alone reversible error. This claim is without merit.**

"Willful"

As noted above, Complainant-Appellee must also establish by clear and convincing evidence that Respondant-Appellant's conduct was "willful" within the meaning of § 10.52(a) of Treasury Circular 230. This is an issue that was not discussed in the ALJ's initial Decision, but it is an issue I am prepared to address based on the evidence in the administrative record. It is also an issue I have been called upon to address before. This issue is discussed at length in the Decision on Appeal in Director, Office of professional Responsibility v. Joseph R. Banister, Complaint No. 2003-02 (Decision on Appeal issued June 25, 2004).[13] Here I will

[13] By mutual agreement of the parties, the Decision on Appeal in the Banister proceeding was made public. A copy of pages 40-52 of that Decision on Appeal appear as Attachment 4, and are incorporated herein to

provide only a brief overview of the more lengthy discussion in Banister as it pertains to this proceeding. The more lengthy discussion begins at page 40 of the Decision on Appeal in Banister. The cases I will discuss for purposes of this proceeding and the pages of the Decision on Appeal in Banister where they are discussed are Bishop (pages 40-41), Pomponio (pages 40-41) and Cheek (pages 42-44).

Following the Supreme Court's issuance of its opinion in Bishop, some lower Federal courts interpreted some of the language in Bishop to require the Government to prove "evil intent" to establish "willfulness." In Pomponio, the Supreme Court corrected that misperception, holding that to establish "willfulness," the Government need only prove that the conduct involved an intentional violation of a known legal duty.

Finally, in Cheek, the Supreme Court set forth the three prongs of the proof requirements for establishing "willfulness." First, the Government was required to show that the law imposed a duty upon the defendant. Second, the Government was required to show that the defendant knew of this duty. Finally, the Government was required to show that the defendant voluntarily and intentionally violated the duty.

In focusing on the proof required to meet the second and third prongs, the Supreme Court noted that, at the common law, the general rule was that ignorance of the law or a mistake of law was no defense. The Court went on to say that when it enacted Federal tax statutes, Congress intended to overrule the common law rule on matters involving statutory interpretations of tax statutes. On such matters, the Government would have to prove not only that the defendant's interpretation was unreasonable, but that the defendant's view of the matter was not honestly held. As to such matters, then, Cheek stands for the proposition that an honestly held but unreasonable belief is a defense against the Government's claim of willfulness. On matters not involving statutory interpretations of Federal tax statutes, on the other hand,[14] the Government need only prove that the defendant's views were unreasonable to sustain its burden of proof that the defendant's conduct was "willful."

None of the charges at issue in this proceeding involve statutory interpretations of provisions of Federal tax statutes. Accordingly, to prove "willfulness" under the second and third prongs of the analytical structure adopted by the Supreme Court in Cheek, Complainant-Appellee need only prove that Respondent-Appellant's beliefs concerning the ambit of his duties UNDER Treasury Circular 230 were "unreasonable." As to the meaning of the word "threat," I have already found that Respondent-Appellant's views were incorrect, and the same findings of fact and conclusions of law also sustain the finding that Respondent-Appellant's beliefs to the contrary, even if he honestly held, were "unreasonable."

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the extent that they pertain to the issue of whether conduct is "willful" within the meaning of § 10.52(a) of Treasury Circular 230.

[14] Such as Cheek's claim that the Federal income tax was unconstitutional.

As to the other charges against Respondent-Appellant that were sustained by the ALJ, I likewise find that conduct to have been "willful." I therefore find that Complainant-Appellant has met his burdens of proof under § 10.52(a) with respect to each of the charges remaining on Appeal.

Final Agency Action

For the reasons set forth above, I AFFIRM the initial Decision of Administrative Law Judge Richard A. Scully, including his determination to impose the suspension on Respondent-Appellant "lifted" effective July 24, 2006. This Decision on Appeal constitutes FINAL AGENCY ACTION in this proceeding.

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David F. P. O'Connor
Special Counsel to the Senior Counsel
Office of Chief Counsel
Internal Revenue Service
(As Authorized Delegate of Henry M. Paulson,
Secretary of the Treasury)

April __, 2008
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that the Decision on Appeal in Complaint No.2005-15 was sent this day by Certified Mail/Return Receipt Requested and by First Class United States Mail to the addressees listed below:

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(As Authorized Representative of Henry M. Paulson, Secretary of the Treasury)

April __, 2008
Washington, D.C.