

**UNITED STATES OF AMERICA
THE DEPARTMENT OF THE TREASURY**

DIRECTOR OF PROFESSIONAL)
RESPONSIBILITY,)

Complainant,)

v.)

Complaint No. 2003-2

JOSEPH R. BANISTER,)

Respondent.)

**MOTION TO DISMISS AMENDED COMPLAINT
AND SUPPORTING MEMORANDUM**

The respondent, Joseph R. Banister (“Banister”), by and through counsel, Robert E. Barnes, hereby moves this honorable court, to dismiss the Complainant’s Amended Complaint. The Amended Complaint fails to state a claim upon which relief can be granted, ignores the procedural requirements of the complainant’s own regulations, and violates Banister’s right to due process.

The amended complaint alleges that Banister willfully failed to file a return. However, the regulations specify that the willful failure to file cannot be the basis for this proceeding unless the practitioner so accused has already been criminal convicted of the offense. The regulations only prohibit the willful failure to make a return – a very substantial difference with different consequences attendant thereto. In addition, the procedures by which these allegations were made render this proceeding improper. Therefore, the amended complaint does not state any fact that can be the basis for this proceeding and should be dismissed.

I. The Amended Complaint Fails to State a Claim Upon Which Relief Can Be Granted Because The Willful Failure To File Cannot Be The Basis For This Proceeding Unless Banister Was Criminally Convicted of the Offense.

The regulations do not vest unfettered discretion in the complainant to disbar or suspend those authorized by law to practice before the complainant. The regulations governing this proceeding require that a “complaint shall give a plain and concise description of the allegations which constitute the basis for the proceeding.” *See* 31 C.F.R. § 10.56. In assessing whether the allegations contained in the complaint are sufficiently descriptive, the facts within the complaint must be of such specificity that the complaint “fairly informs the respondent of the charges against him so that he is able to prepare his defense.” *See id.*

The regulations also codify what allegations can constitute “the basis for the proceeding.” The alleged basis for this proceeding is Banister’s alleged “disreputable” conduct pursuant to 31 C.F.R. § 10.51 (f). The amended complaint alleges that Banister willfully failed to “file” a return and references the criminal provisions related thereto. However, the regulation only references the willful failure to “make” a return, not “file” a return. The amended complaint never alleges Banister failed to “make” a return. As the regulation clarifies,

31 C.F.R. § 10.51 (f) Willfully failing to make a Federal tax return in violation of the revenue laws of the United States, willfully evading, attempting to evade, or participating in any way in evading or attempting to evade any assessment or payment of any Federal tax, or knowingly counseling or suggesting to a client or prospective client an illegal plan to evade Federal taxes or payment thereof.

In contrast, the willful failure to file only constitutes disreputable conduct if Banister had been convicted of the crime of willful failure to file. *See* 31 C.F.R. § 10.51 (a). Again, the amended complaint nowhere alleges that Banister has been criminally convicted of willful failure to file. Hence, the amended complaint fails to allege any fact that can form the basis for this proceeding, and should be dismissed.

II. The Amended Complaint Fails to State a Claim Upon Which Relief Can Be Granted Because It Fails to Allege Sufficient Facts to Put Banister on Notice of the Specific Facts Needed to Permit Banister to Prepare a Defense.

The amended complaint alleges that Banister “was required to file a return,” but fails to state any facts that support such a contention. Indeed, the amended complaint does not state a single fact that could form the basis for such a legal claim. Alleging mere legal conclusions fails to put Banister on notice of what facts he will need to prepare his defense. The complainant must plead individual facts that give rise to the claim. Instead, the complainant merely asserts a legal conclusion. As such, the amended complaint fails to fairly inform Banister of what facts he will need to prove or disprove to prepare a defense is inadequate under the rules. *See* 31 C.F.R. § 10.56.

With no factual claims to defend against, the amended complaint gives the respondent no opportunity to prepare a defense. The regulations clearly require such facts to be plead into the complaint for that very purpose. Without such facts, the respondent cannot prepare his defense. Indeed, without such facts, the amended complaint fails to state a claim sufficient to proceed.

Thus, the amended complaint must be dismissed.

III. The Amended Complaint Fails to State a Claim Upon Which Relief Can Be Granted Because The Allegations are Not “Supplemental Charges” Which Are The Only Kind of Allegations That Can Be Amended in a Complaint.

The rules specify what kind of supplemental charges can be amended in a complaint.

31 C.F.R. Sec. 10.59 Supplemental charges.

If it appears that the respondent in his answer, falsely and in bad faith, denies a material allegation of fact in the complaint or states that the respondent has no knowledge sufficient to form a belief, when he in fact possesses such information, or if it appears that the respondent has knowingly introduced false testimony during proceedings for his disbarment or suspension, the Director of Practice may thereupon file supplemental charges against the respondent. Such supplemental charges may be tried with other charges in the case, provided the respondent is given due notice thereof and is afforded an opportunity to prepare a defense thereto.

As the rules codify, the complainant can only amend a complaint and supplement charges when those charges reflect conduct within the pending proceedings, such as false testimony. This reflects the detailed procedural provisions outlined in the regulations. These detailed procedural prerequisites protect a practitioner’s right to due process.

As outlined below, these administrative procedures require a slow, step-by-step evaluation before a complaint can ever be filed against a practitioner. This is why these supplemental charges provision is limited to conduct that takes place within the proceedings.

The amended complaint makes no allegation of misconduct within the proceedings. Thus, the amended complaint must be dismissed.

IV. The Amended Complaint Should be Dismissed Because it Violates the Administrative Procedures Required Before Such a Complaint Can Be Initiated.

The provisions of the code regulating practice employ a host of procedural protections. These provisions ensure a fair and accurate adjudication before stripping a duly authorized practitioner of their right to practice before the agency. At each step, written referrals must be made, documentation of the allegation provided, an opportunity to comply or discuss offered, and then, but only then, a proceeding into an administrative hearing.

The code utilizes the following process whenever there is an allegation of disreputable or improper conduct. First, as soon as any IRS employee receives any information or has any reason to believe a practitioner's conduct may violate the regulations, they must "promptly make a written report" of the conduct. This insures that those closest to the allegations are the ones making the report and documenting their findings.

The IRS employee with direct knowledge of the supposed violation must forward their written report to the Director of Practice. *See* 31 C.F.R. § 10.53. The Director of Practice then makes an independent review of the report. The Director can issue a mere reprimand if the Director chooses. The Director of Practice must make a finding that conduct warrants suspension or disbarment before proceeding further. Yet. Even at this later stage of the proceeding, the process provided by the regulations protect against unfair or inaccurate findings by providing another opportunity for a respondent to correct any errors or come into compliance.

If the Director of Practice chooses to pursue either suspension or disbarment, the Director must, in writing, inform the practitioner of the facts that could warrant disbarment. In addition, the director must also accord the practitioner an “opportunity to demonstrate or achieve compliance with all lawful requirements.” *See* 31 C.F.R. § 10.54. In fact, amongst these options is an administrative conference. *See* 31 C.F.R. § 10.55. The rules provide only a limited exception to this part of the process. The Director must find the alleged conduct to be willful before he evades this “notice and opportunity to comply” requirement. *See* 31 C.F.R. § 10.54.

In this case, the allegations in the amended complaint skipped every part of the process. There is no record of any written referral by an IRS employee. There is no written report from the director. There is no notice to the respondent of the alleged problem. The Director gave the respondent no opportunity to either achieve compliance. The Director never even provided a conference for the respondent to discuss the issue with the Director.

The amended complaint alleges no facts that permit this deviation from the required process. In addition, this failure to follow the required process violates Banister’s right to due process, as guaranteed by the Fifth Amendment.

The Complainant moves to disbar the respondent for allegedly violating the same rules it willfully ignored and flagrantly disregarded. Principles of constitutional law, equity and the regulations themselves require the amended complaint must be dismissed.

CONCLUSION

The amended complaint fails to state a claim upon which relief can be granted and should be dismissed due to the numerous deficiencies in the amended complaint and the secretive process that brought it about.


The amended complaint alleges Banister willfully failed to file a return, but the rules only proscribe the willful failure to make a return. Thus, the complaint alleges no facts that form the permissible basis of any action. As is, the amended complaint alleges mere legal conclusions, without stating a single fact, depriving Banister of any notice sufficient to “fairly inform” him of the facts he needs to disprove in his defense.

Furthermore, the rules do not permit such amended charges because these charges did not arise from conduct within the proceedings. Finally, the extraordinary deviation from the required procedure of the code – no notice of the charges through employee and director written referrals and no opportunity to comply or conference on the charges – invalidates this complaint and violates Banister’s right to due process.

Wherefore, the respondent moves the honorable Administrative Law Judge, William B. Moran, to dismiss the amended complaint.

Respectfully submitted this 29th day of October, 2003.

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that true and correct copies of the foregoing "Motion to Dismiss Amended Complaint and Supporting Memorandum" and "Certificate of Service" were served on counsel for the Director of Professional Responsibility, by both courtesy facsimile transmission on this very date and by placing the same in the custody of the United States Postal Service for first class delivery, postage prepaid, on October 29, 2003, addressed as follows:

Jay J. Kessler, Esquire
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