



Issue date: 09Nov2001

In the Matter of:

**ADMINISTRATOR, WAGE AND
HOUR DIVISION,**

Prosecuting Party

v.

**MOHAN KUTTY, M.D. d/b/a THE CENTER
FOR INTERNAL MEDICINE AND
PEDIATRICS, INC., et al.,**

Respondents

**Case Nos.: 2001-LCA-00010
2001-LCA-00011
2001-LCA-00012
2001-LCA-00013
2001-LCA-00014
2001-LCA-00015
2001-LCA-00016
2001-LCA-00017
2001-LCA-00018
2001-LCA-00019
2001-LCA-00020
2001-LCA-00021
2001-LCA-00022
2001-LCA-00023
2001-LCA-00024
2001-LCA-00025**

**ORDER GRANTING RESPONDENT'S COUNSEL'S REQUEST
FOR FILING UNDER SEAL AND DENYING MOTION TO POSTPONE SCHEDULE
PENDING RESOLUTION OF WITHDRAWAL ISSUE**

This matter is before me on Respondent's counsel's Notice of Intent to Withdraw as Respondent's Counsel, and the Administrator's Response to the Notice. Counsel for Respondents have indicated their intention to withdraw as counsel. The Administrator opposes the "request" to withdraw on the grounds that no reason has been provided, no supporting documentation has been filed, trial (scheduled to resume on November 26, 2001) will be disrupted, and the Administrator will be prejudiced by withdrawal of counsel if trial is delayed. On October 25, 2001, I issued an Order to Show Cause whether Counsel for Respondents Should be Permitted to Withdraw their Appearance and ordered that Respondent's counsel should not withdraw, absent an appearance from substitute counsel and without a showing in support of their Notice. Respondent's Counsel in their Reply to the Administrator's Response indicate that they are unable to disclose their reason for withdrawal because to do so would violate the attorney-client privilege. Additionally, Respondent's counsel argue that they are not required to seek permission to withdraw and that 29 C.F.R. § 18.29 does not provide a mechanism to exercise discretion to deny the notice. *See* Respondent's Counsel's Reply to Administrator's Response at 2. The Administrator filed a Response to Respondent's Counsel's Reply and Respondent's Counsel offered to submit withdrawal materials under seal for *in camera* review. In its offer, Respondent's Counsel request filing under seal and that the materials be reviewed *in*

camera because making the Administrator privy to this information would be prejudicial to the Respondents. Respondent's Counsel also filed a Motion to Postpone Schedule Pending Resolution of Withdrawal Issue.

This claim is governed by 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n) and the regulations issued thereunder. Moreover, the rules governing practice and procedure are provided for under 20 C.F.R. § 655.825(a) and part 18 of Title 29 of the Code of Federal Regulations, and the authority of an administrative law judge is provided for under 29 C.F.R. § 18.29.

Respondent's counsel contend that they do not have to seek permission to withdraw and that the procedure for the withdrawal of counsel is provided for under 29 C.F.R. § 18.34.¹ 28 C.F.R. § 18.34(g), states, in pertinent part, "[a]ny attorney of record must file prior notice in writing of intent to withdraw as counsel." However, I find that Part 18 of the Code of Federal Register must be considered as a whole as directed by the enabling regulation 20 C.F.R. § 655.825(a), which states,

Except as specifically provided in this subpart, and to the extent they do not conflict with the provisions of this subpart, the "Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges" established by the Secretary at 29 CFR part 18 shall apply to administrative proceedings under this subpart.

Therefore, in reviewing Part 18 in its entirety, I find that §§ 18.1, 18.29, 18.34, and 18.46 are applicable to the issues before me. 29 C.F.R. § 18.1 provides for the scope of the Regulations. It states,

To the extent that these rules may be inconsistent with a rule of special application as provided by statute, executive order, or regulation, the latter is controlling. The Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order, or regulation.

See 29 C.F.R. § 18.1(a). Although the section that is referred to by Respondent's Counsel mentions prior notice of intent to withdraw by an attorney, it does not specify the proper procedures in doing so. Moreover, none of the regulations in Part 18 specify the procedures for withdrawal of an attorney. Therefore, I find that, pursuant to § 18.1(a), Tennessee's Code Of Professional Responsibility and the Local Rules of the United States District Court for the Eastern District of Tennessee are controlling.² I also find that the holding in *Antoine v. Atlas*

¹Respondent's Counsel refer, in error, to § 13.34(g) in their filings.

²I also looked to other ALJ decisions and orders that referred to the local rules in deciding the procedures for the withdrawal of counsel. *See* Decision and Order Denying Plea in Abatement and Denying Withdrawal of Counsel, 1999 BLA 485 and 1999 BLA 0551 (applying

Turner, Inc. is inapplicable to the issues at hand because the local rules provide procedures with respect to the withdrawal of an attorney. *See Antoine v. Atlas Turner, Inc.*, 66 F.3d 105, 108 (6th Cir. 1995) (holding that notice of withdrawal of representation was sufficient where the local rules did not contain a provision with respect to the withdrawal of an attorney).

Under Tennessee's Code of Professional Responsibility, a lawyer should only withdraw on the basis of compelling circumstances. *See* Tenn. Sup. Ct. Rules, Rule 8, Code of Prof. Resp., EC 2-32. Rule 8 also adds that "the lawyer must comply with the rules of the tribunal regarding withdrawal." In finding that Part 18 of the Code of Federal Register does not specify the procedure for withdrawal and that § 18.1(a) instructs that the Rules of Civil Procedure for the District Courts of the United States must be applied where our regulations are silent, I find that Local Rule 83.4 of the United States District Court for the Eastern District of Tennessee is applicable.

Local Rule 83.4 provides,

No attorney shall withdraw from representation in any action or proceeding, either civil or criminal, except by leave of the court as prescribed in subsection 83.5(f) of this rule.

An attorney who seeks to have his or her name removed as counsel of record shall file a motion so requesting. The court may refuse to allow an attorney to withdraw if doing such will delay the trial or for other good reason. If the client is a corporation or other artificial person or legal entity created by statute that may only appear in court through counsel, the court, absent extraordinary circumstances, shall not allow the attorney to withdraw until the client has obtained substitute counsel.

See U.S. Dist. Ct. Rules E.D. Tenn., LR 83.4(e)-(f). Therefore, in applying the local rule to the issues before me, I find that Respondent's Counsel's Notice of Intent to Withdraw as Respondent's Counsel should be construed as a motion requesting withdrawal.

Also, I find that 29 C.F.R. § 18.29(a) is applicable to the issues before me. § 18.29(a) grants an administrative law judge "all the powers necessary to the conduct of fair and impartial hearings, including, but not limited to . . . (8) [w]here applicable, take any appropriate action authorized by the Rules of Civil Procedure for the United States District Courts, issued from time to time and amended pursuant to 28 U.S.C. 2072." This section also adds that an administrative law judge "may do all other things necessary to enable him or her to discharge the duties of the office." Therefore, in applying the general authority granted to an administrative law judge, I find that I have the authority to construe Respondent's Counsel's notice as a motion under the Local Rules of the United States District Court for the Eastern District of Tennessee.

the Local Rules of the United States District Court for the Western District of Pennsylvania and denied counsel's request for withdrawal because it would have had an adverse effect and prejudice the client).

I do, however, take note of Respondent's Counsel concerns of disclosing the reasons for withdrawal. As provided for under the Tennessee's Code of Professional Responsibility and the Local Rules of the United States District Court for the Eastern District of Tennessee, a motion for withdrawal may be granted under "extraordinary or compelling circumstances." Therefore, I will give Respondent's Counsel the opportunity to provide the court with the reasons for requesting withdrawal. Pursuant to 29 C.F.R. § 18.46, I am granting Respondent's Counsel's request for filing under seal and that the materials be reviewed *in camera*. I will not, however, rule on the appropriateness of postponing the scheduled hearing until I have had an opportunity to review the material submitted by Respondent's Counsel.

ORDER

IT IS HEREBY ORDERED that Respondent's Counsel's Notice of Intent to Withdraw as Respondent's Counsel will be construed as a request for withdrawal of representation.

It is further ORDERED that Respondent's Counsel will have 7 days from the date of this Order to file under seal materials stating the reason for counsel's request for withdrawal, which will be reviewed *in camera*.

It is further ORDERED that Respondent's Counsel's Motion to Postpone Schedule Pending Resolution of Withdrawal Issue is DENIED.

ALICE M. CRAFT
Administrative Law Judge