STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee,

v

David D. Patton, P 22846,

Respondent/Appellant,

Case No. 14-28-GA

Decided: March 24, 2016

Appearances:

Frances A. Rosinski, for the Grievance Administrator, Petitioner/Appellee
Kenneth M. Mogill, for the Respondent/Appellant

BOARD OPINION

The Grievance Administrator filed a formal complaint against respondent for failure to answer a request for investigation. Respondent failed to answer the formal complaint and a default was subsequently entered against him. Neither respondent, nor anyone on his behalf, appeared at the scheduled hearing before the panel. Based on respondent's default, Tri-County Hearing Panel #58 found that he had committed professional misconduct by failing to respond to the lawful demands of the Grievance Administrator, in violation of MRPC 8.1(a)(2); failing to answer the request for investigation, in violation of MCR 9.104(7), MCR 9.113(A), and MCR 9.113(B)(2); and violating various other rules.[1] Thereafter, the matter immediately proceeded to a sanction hearing to determine discipline. The Grievance Administrator requested an immediate interim suspension of respondent's law license, and a 180-day suspension as an ultimate result of the proceedings, based on MCR 9.115(H)(1)[2] and *Grievance Administrator v Deborah Carson,* 00-175-GA; 00-199-FA

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[1] The panel also found violations of MRPC 8.4(a) and MCR 9.104(1)–(4).

[2] MCR 9.115(H)(1) provides in relevant part: "Where satisfactory proofs are entered into the record that a respondent possessed actual notice of the proceedings, but who still failed to appear, a panel shall suspend him or her effective 7 days from the date of entry of the order and until further ordered by the panel or the board."

(ADB 2001),[3] respectively. The panel granted both requests, and respondent's law license was suspended effective May 22, 2014.

Prior to the filing of the panel's final report and order, respondent retained counsel and filed a motion to reopen the proofs. The motion was granted, but the panel declined to set aside the default, and limited respondent to presenting mitigating evidence at a specially granted sanction hearing on October 28, 2014. At the hearing, respondent presented his own testimony as well as the testimony of his treating psychiatrist, Thomas C. Zelnik, M.D., to support his request for an order of probation under MCR 9.121(C)(3). Counsel for the Grievance Administrator objected to an order of probation and reiterated her earlier request for the imposition of a 180-day suspension.

On July 23, 2015, the hearing panel's report was issued, in which the panel concluded that probation was not appropriate because respondent had not established the elements required for probation under MCR 9.121(C), and it would be contrary to the public interest to place him on probation. Instead, the panel entered an order suspending respondent's license for 180 days, effective retroactively to October 28, 2014, the date of the sanction hearing. On August 12, 2015, respondent filed a timely petition for review. The Attorney Discipline Board conducted review proceedings pursuant to MCR 9.118. For the reasons described below, we affirm the hearing panel's decision to impose a 180-day suspension.

On review, respondent asks that the Board reverse the hearing panel's decision and place him on probation pursuant to MCR 9.121(C) or reduce the suspension imposed by the hearing panel to no more than 179 days, with relevant conditions. Specifically, respondent asserts that (i) the hearing panel abused its discretion when it failed to place him on probation; (ii) even if the Board finds probation inappropriate, the 180-day suspension imposed by the panel was excessive; and (iii) the delay in issuing the hearing panel's report denied respondent his right to due process, and therefore, the panel's decision should be modified.

First, we conclude that the hearing panel's decision to decline to place respondent on probation resulted from a careful exercise of its discretion. The standard of review when a party seeks modification or reversal of a hearing panel's findings is whether or not those findings have

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[3] In *Carson,* the Board held that a suspension of 180 days, coupled with reinstatement proceedings under MCR 9.123(B) and MCR 9.124, is the minium level of discipline which should be imposed by a hearing panel when a respondent attorney fails to answer, appear or otherwise communicate with the hearing panel in response to a formal complaint, which has been properly served in accordance with MCR 9.115(C).

proper evidentiary support in the record, while at the same time allowing the Board a greater measure of discretion with regard to the ultimate conclusion. *Grievance Administrator v Irving A. August*, 438 Mich 296, 475 NW2d 256 (1991). That standard of review is the same if the question is whether respondent established his eligibility for probation by a preponderance of the evidence. *Grievance Administrator v Alexander H. Benson*, 08-52-GA (ADB 2010).

MCR 9.121(C) allows a hearing panel, the Board, or the Supreme Court to place a respondent attorney on probation for a period not to exceed three years, if it is specifically found that an order of probation would not be contrary to the public interest. The hearing panel deemed probation inappropriate in this case because respondent did not establish the elements of MCR 9.121(C)(1)(a)–(d)[4] by a preponderance of the evidence, and placing him on probation would be contrary to the public interest. Respondent argues that probation is appropriate, because the circumstances of his particular case are exactly the kind of circumstances that MCR 9.121(C) was created to address.

Beginning in 2009 and continuing into 2010, respondent suffered a series of events that led to the "unraveling of his entire personal/professional life." (Tr 10/28/14, p 33.) His home suffered

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[4] MCR 9.121(C) states:

> (1) If, in response to a formal complaint filed under subrule 9.115(B), the respondent asserts in mitigation and thereafter demonstrates by a preponderance of the evidence that:
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> > (a) during the period when the conduct that is the subject of the complaint occurred, his or her ability to practice law competently was materially impaired by physical or mental disability or by drug or alcohol addiction;
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> > (b) the impairment was the cause of or substantially contributed to that conduct;
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> > (c) the cause of the impairment is susceptible to treatment; and,
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> > (d) he or she in good faith intends to undergo treatment, and submits a detailed plan for such treatment, the hearing panel, the board, or the Supreme Court may enter an order placing the respondent on probation for a specific period not to exceed 3 years if it specifically finds that an order of probation is not contrary to the public interest.

a catastrophic flood. (Tr 10/28/14, pp 82–84.) His firm invested an immense amount of time and resources on a product liability case against General Motors, which lost the bulk of its value once GM declared bankruptcy, causing him to lay off all of his employees. (Tr 10/28/14, pp 75–81.) His mother died unexpectedly. (Tr 10/28/14, p 84.) As a result of these misfortunes, his financial situation deteriorated and he and his wife were evicted from their home. (Tr 10/28/14, pp 103–105.) Respondent became severely and clinically depressed, and it was during this period of turmoil that he failed to answer the request for investigation at issue in this matter.

Thus, respondent contends that the panel should have placed him on probation, and it was an abuse of discretion to not do so. However, respondent's argument is based on an interpretation of MCR 9.121(C) that is contrary to the plain language of the rule. MCR 9.121(C)(1)(d) states in relevant part, "[T]he hearing panel, the board, or the Supreme Court *may* enter an order placing the respondent on probation for a specific period not to exceed 3 years." (Emphasis added.) Even if the panel found that respondent satisfied MCR 9.121(C)(1)(a)–(d), which they did not, there is nothing in the rule that obligates them to place respondent on probation. Although respondent's misfortunes are lamentable, the decision to place a respondent attorney on probation is ultimately discretionary.

In addition, MCR 9.121(C)(1)(d) requires a specific finding that placing a respondent attorney on probation would not be contrary to the public interest. Here, the panel deemed respondent unfit to practice law based on testimony presented at the hearing, and concluded that placing him on probation—rather than suspending his law license—would put the public at risk. We agree with the Grievance Administrator that probation is generally appropriate for an attorney who is fit to practice law, but requires oversight and accountability to ensure that the public is protected. The undisputed evidence in this matter is that respondent was not fit to practice law, and he had no detailed treatment plan as of the date of the sanction hearing. Applying the applicable standard of review, we find that the hearing panel did not err in reaching its conclusion that respondent did not establish, by a preponderance of the evidence, his eligibility for probation given the specific facts and circumstances of this matter.

Second, we consider respondent's argument that the imposition of a 180-day suspension is excessive in light of the nature of his misconduct. In exercising our overview function to determine the appropriate sanction, the Board possesses "a greater degree of discretion with regard to the ultimate result." *Grievance Administrator v August, supra.* The panel concluded that a 180-day

suspension, requiring reinstatement pursuant to MCR 9.123(B), was necessary to ensure public protection. We agree. The testimony provided by Dr. Thomas C. Zelnik, respondent's treating psychiatrist since 2013, and respondent's own testimony, demonstrated that he lacked the mental capacity to practice law.

Dr. Zelnik testified unequivocally that respondent was unfit to practice law due to his severe depression and bipolar disorder. (Tr 10/28/2014, p 43.) Although he acknowledged that respondent was an "earnest patient," he indicated that there were substantial obstacles he would have to overcome to regain his mental health and become a "fully-functioning attorney." (Tr 10/28/2014, p 44.) Respondent agreed with Dr. Zelnik's prognosis, and testified that he believed he was unfit to practice law in his current state. (Tr 10/28/14, p 91.) He explained that he was experiencing severe depression resulting from various hardships and stresses in his life. (Tr 10/28/14, pp 78–91.) He further opined that practicing law in his current state would not be "in the best interest of the client." (Tr 10/28/14, p 91.) Although respondent sought medical help and planned on continuing treatment with Dr. Zelnik in the future, there was no detailed treatment plan in place at the time of the hearing. (Tr 10/28/14, p 124.)

Importantly, a 180-day suspension requires respondent to petition for reinstatement under MCR 9.124. To be eligible for reinstatement, he must prove that he is fit to practice law by establishing the elements set forth in MCR 9.123(B) by clear and convincing evidence. Through this process, respondent will have the opportunity to demonstrate that he has regained his mental and emotional capacities, and that he can "safely be recommended to the public, the courts and the legal profession as a person fit" to practice law. MCR 9.123(B)(7).

Finally, we find that the time it took for the panel to issue its report does not merit modifying the discipline imposed by the panel. Notably, respondent was eligible to file a petition for reinstatement immediately following the issuance of the hearing panel report on July 23, 2015, and to date, has not done so. Respondent did not present any evidence to support his contention that his due process rights were violated, that he was prejudiced, or that during that time frame he became, or is even now, fit to practice law.

For the foregoing reasons, we accept the hearing panel's assessment that a 180-day suspension was appropriate and affirm the hearing panel's order of suspension.

Board members Louann Van Der Wiele, Lawrence G. Campbell, Dulce M. Fuller, Rosalind E. Griffin, M.D., and Michael Murray concur in this decision.

Board members James A. Fink and John W. Inhulsen were absent and did not participate.