STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Timothy A. Stoepker, P 31297,

Respondent/Appellee,

Case No. 13-32-GA

Decided: July 7, 2015

Appearances:

Robert E. Edick and Dina P Dajani, for the Grievance Administrator, Petitioner/Appellant
Donald D. Campbell, Colleen H. Burke, and Trent B. Collier, for the Respondent/Appellee

BOARD OPINION

Petitioner filed this petition for review and argues that Kent County Hearing Panel #3 erred in granting respondent's motion for involuntary dismissal, and in denying petitioner's subsequent motion for additional findings, which asked the panel to amend its decision. We conclude that the panel committed no error and affirm the order of dismissal entered below.

Respondent was initially charged in a formal complaint with: (1) violating the criminal law, specifically, the Michigan Campaign Finance Act, MCL 169.254 (prohibiting corporate contributions to campaigns and providing that an agent's actions in violation of this provision shall constitute a felony), contrary to MCR 9.104(5) and MRPC 8.4(b); and, (2) alleging that answers given by respondent while testifying as a witness during a deposition in a civil action were "intentionally and knowingly false and misleading," contrary to MRPC 8.4(b). Respondent successfully challenged

the criminal conduct charge prior to hearing.[1] The case then proceeded to hearing on the allegations of an amended formal complaint regarding only respondent's testimony at the deposition.

Respondent came to be deposed in a civil action for malicious prosecution as a result of his representation of Meijer, Inc., which sought to open a store in Acme Township, Michigan. The Township Board granted a special use permit, then, after the Board's composition changed as a result of this action, it took actions to slow or halt the development of "big box" stores in the township. Citizen's groups were formed, litigation, a referendum, and a recall election ensued. The allegations of the amended formal complaint most pertinent to the panel's decisions and this review proceeding are as follows:

> 28. In or about April of 2007, H. William (Bill) Boltres, the then-treasurer of Acme Township, filed a counterclaim against Meijer in the Grand Traverse Circuit Court alleging malicious prosecution and abuse of process.
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> 29. On or about October 1, 2007, during discovery in the Boltres lawsuit, Respondent was deposed by Boltres's lawyer, Grant Parsons.
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> 30. During the deposition, Mr. Parsons asked the following two questions and Respondent gave the following two answers:
>
> Q. Can you tell me how big a role Meijer took in the election, referendum or moratorium election up there?
> A. I have no knowledge of that at all.
> Q. Do you know what contributions Meijer Corporation made to local political supporters of Meijer in the Acme area?
> A. I have no knowledge.
>
> 31. Respondent's answers to these questions posed to him at his deposition were intentionally and knowingly false and misleading given Respondents

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[1] Respondent moved for dismissal of the criminal conduct charge in light of *Citizens United v FEC*, 558 US 310; 130 S Ct 876; 175 L Ed 2d 753 (2010), which overruled *Austin v Mich State Chamber of Commerce*, 494 US 652; 110 S Ct 1391; 108 L Ed 2d 652 (1990) (holding that application of § 54(1) of the Michigan Campaign Finance Act in that case was constitutional because the provision was narrowly tailored to serve a compelling state interest). The hearing panel denied the motion, and the Attorney Discipline Board denied respondent's application for interlocutory review of the panel's order. Respondent filed an action for superintending control with the Michigan Supreme Court, which held that the portions of the formal complaint alleging attorney misconduct premised on violations of Section 54 of the Michigan Campaign Finance Act, MCL 169.254, were moot in light of *Citizens United*. *Stoepker v Atty Discipline Bd*, 495 Mich 870; 837 NW2d 277 (2013)

> representation of Meijer and its agents regarding the referendum and recall elections. [Amended Formal Complaint, p 5.]

The hearing panel's Decision Regarding Motion for Involuntary Dismissal (attached) summarizes the evidence submitted by the Administrator. The testimony of three individuals was heard: Kent A. Rozycki, Ken Petterson, and Mr. Stoepker. Four exhibits were admitted: (1) a contract signed by Mr. Stoepker; (2) a contract that Mr. Petterson signed; (3) Acme Taxpayers for Responsible Government's articles of incorporation; and, (4) Dickinson Wright billing records from 2005. At the conclusion of petitioner's proofs, respondent moved for involuntary dismissal pursuant to MCR 2.504(B)(2), and petitioner argued in opposition. The panel took the motion under advisement, reviewed the transcripts and other evidence, and issued its written decision finding, as to the allegation that respondent's answer to the first question set forth in paragraph 30:

> Respondent asserts that the deposition question at issue asked for an "opinion" of Mr. Stoepker as to how big a role Meijer played in the election. Mr. Stoepker testified, and admitted, what he did on behalf of Meijer and what his fellow attorneys did, but denied knowing what other persons or entities did regarding the election or related events, and thus he could not compare ("how big a role") what Meijer did to what anyone else did, making his answer truthful. The panel concludes that based on the testimony provided to us, there is no evidence to contradict such a conclusion. [Decision Regarding Motion for Involuntary Dismissal, p 9.]

With respect to the second question set forth in paragraph 30 of the amended formal complaint, the panel found that "the record is devoid of evidence to support a claim that Mr. Stoepker was untruthful in his answer to the second question." (*Id.*, p 10.)

The Administrator then filed a motion for additional findings, essentially asking that the panel reconsider and amend its findings as to the first question. The crux of the Administrator's argument was that "it was dishonest for Respondent, who had some knowledge about how big a role Meijer played in the moratorium referendum election, to testify that he had no knowledge at all." The panel reviewed the record again in light of the Administrator's motion and the response by Mr. Stoepker and found no reason to amend its findings.

The Administrator filed a petition for review, arguing that "the hearing panel's decision to grant the motion for involuntary dismissal is not supported by the evidence," and asking this Board to reverse the panel's order and remand the matter.

We are governed by the following standard of review in this case:

> In reviewing a hearing panel decision, the Board must determine whether the panel's findings of fact have "proper evidentiary support on the whole record." *Grievance Administrator v August*, 438 Mich 296, 304; 475 NW2d 256 (1991). See also, *Grievance Administrator v T. Patrick Freydl*, 96-193-GA (ADB 1998). "This standard is akin to the clearly erroneous standard [appellate courts] use in reviewing a trial court's findings of fact in civil proceedings." *Grievance Administrator v Lopatin*, 462 Mich 248 n12 (2000) (citing MCR 2.613(C)).
>
> Because the hearing panel has the opportunity to observe the witnesses during their testimony, the Board defers to the panel's assessment of their demeanor and credibility. *Grievance Administrator v Neil C. Szabo*, 96-228-GA (ADB 1998); *Grievance Administrator v Deborah C. Lynch*, No 96-96-GA (ADB 1997). See also *In re McWhorter*, 449 Mich 130, 136 n 7 (1995).
>
> In short, "it is not the Board's function to substitute its own judgment for that of the panels' or to offer a de novo analysis of the evidence." *Grievance Administrator v Carrie L. P. Gray*, 93- 250-GA (ADB 1996), lv den 453 Mich 1216 (1996). [*Grievance Administrator v Robert E. Jones*, 05-09-GA (ADB 2007), p 4, quoting *Grievance Administrator v Edgar J. Dietrich*, 99-145-GA (ADB 2001), p 2.]

The clearly erroneous standard is specifically applicable to fact-finding in bench trials, and, therefore, applies to motions for involuntary dismissal, which require findings of fact by the trial judge or adjudicators. MCR 2.613(C); *Douglas v Allstate Ins Co*, 492 Mich 241, 256-257; 821 NW2d 472 (2012); *Marderosian v Stroh Brewery Co*, 123 Mich App 719; 333 NW2d 341 (1983).

"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Beason v Beason*, 435 Mich 791, 802; 460 NW2d 207 (1990). Under this standard, the reviewing court cannot reverse if the trial court's view of the evidence is plausible. *Id.* at 805.

The Administrator's brief limits the argument on review to whether there was proper evidentiary support for the panel's finding that Mr. Stoepker's answer to following question was not false:

> Q: I must be getting - I'm losing track. I'm sorry. All right. Can you tell me how big a role Meijer took in the election - the referendum or the moratorium election up there?
>
> A: I have no knowledge of that at all.[2]

The Administrator urges us to conclude that the panel "uncritically adopted Mr. Stoepker's explanation of his deposition testimony," which was also self-serving, and further states that a trier of fact may reject uncontradicted evidence, and the "testimony of an interested party is always considered to be controverted." We see no basis to conclude that the panel uncritically accepted any evidence, assertions, or positions in this matter. And, none of the legal truisms offered by petitioner on review alter the fact that he was obliged to prove misconduct by a preponderance of the evidence (MCR 9.115(J)(3)) or the standard by which this Board reviews a panel's decision as to whether there is evidentiary support for the panel's decision.

It is undisputed that Mr. Stoepker had knowledge of some of Meijer's efforts to overturn the big box moratorium ordinance through the referendum his firm was retained to work on. Respondent admitted that he acquired such knowledge through his own work, the work of his associates with whom he conferred, and his review of the billing records.

Respondent argued below that he was not in a position to say "how big a role" Meijer played in the election. The Administrator takes issue with respondent's theory and the panel's agreement with it because "[t]he incompleteness of Mr. Stoepker's knowledge in no way precludes a finding

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[2] The second exchange giving rise to a charge of dishonesty was this:

> Q: Do you know what contributions Meijer Corporation made to local political supporters of Meijer in the Acme area?
>
> A: I have no knowledge. [Amended Formal Complaint, ¶ 30; Exhibit 5, p 47.]

Petitioner does not take issue with the panel's decision that there was insufficient evidence to prove that respondent's answer to this question constitutes misconduct.

that his deposition testimony was dishonest."[3] The essence of the Administrator's argument may be found on page 8 of his brief: "The [unmistakable] impression produced by Mr. Stoepker's deposition testimony was that he had 'no knowledge... at all' as to how big a role Meijer played in the election. That impression was false because Mr. Stoepker had some knowledge about Meijer's role."

We are not persuaded that the panel's findings were clearly erroneous, for at least two reasons. First, to prove the falsity of an answer disclaiming knowledge as to "how big a role" Meijer played in an election, it would have to be established that the person answering had complete knowledge of Meijer's activities *and* "the role" those activities played in the election. We agree with the hearing panel that the proofs were inadequate to the task.

Also, we agree with Mr. Stoepker that the task would be almost impossible to accomplish. The question asks for an opinion or a judgment, not really a verifiable response. The questioner asked *whether Mr. Stoepker could tell* the questioner "*how big a role*" Meijer played. The questioner did not ask "what do you know about Meijer's involvement in the referendum?" or even "what do you know about the role Meijer played?" These are not nitpicking distinctions. The question actually asked matters greatly when it is alleged that the answer is false.

Finally, we do understand that that the answer "no knowledge at all" may be considered too broad or categorical a response. But, even if one could interpret the ill-formed question as if it were actually phrased so as to require the answerer to begin to recount what the answerer knows of Meijer's activities, not everyone would hear it that way, and there is clearly adequate support in the record for a finding that respondent's answer was not shown to be dishonest, i.e., intentionally and knowingly false and misleading, as alleged in the amended complaint.

There being proper evidentiary support for the panel's decision, we will affirm the order of dismissal.

Board members Craig H. Lubben, Sylvia P. Whitmer, Ph.D., Rosalind E. Griffin, M.D., Carl E. Ver Beek, Dulce M. Fuller, and Louann Van Der Wiele concur in this decision.

Board Member James M. Cameron, Jr., was absent and did not participate.

Board members Lawrence G. Campbell and Michael Murray were recused.

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[3] Petitioner's brief on review, p 5.

Attorney Discipline Board

Grievance Administrator, Michigan Attorney Grievance Commission,

Petitioner, **ADB Case No. 13-32-GA**

vs.

Timothy A. Stoepker, P31297,

Respondent.
_____/

DECISION REGARDING MOTION FOR ADDITIONAL FINDINGS

The Grievance Administrator filed a Motion for Additional Findings pursuant to MCR 2.517(B) dated June 11, 2014, along with a Brief in Support. The Motion "requests the hearing panel to make additional findings of fact and to amend its decision accordingly". The "decision" referred to by the Grievance Administrator is the Decision Regarding Motion for Involuntary Dismissal dated May 21, 2014, wherein the panel granted respondent's motion for involuntary dismissal of the Amended Formal Complaint. Timothy A. Stoepker's Response To Grievance Administrator's Motion For Additional Findings was filed on June 25, 2014. The panel members have reviewed the recently-filed motion, response, briefs, as well as portions of the transcript of the May 5, 2014 hearing, and the exhibits introduced at the hearing.

Counsel for Mr. Stoepker contends that this panel has no authority to take any further action regarding this case after entering the order dismissing the Amended Formal Complaint. The members of the panel disagree. MCR 9.115(A) states which

court rules apply to a proceeding before a hearing panel, and the panel believes that includes MCR 2.517B. Therefore, the panel has considered the Motion filed by the Grievance Administrator.

The panel having reviewed the aforementioned documents have not found any reason to amend or change in any way the findings or conclusion set forth in the May 21, 2014 Decision. The Brief in Support filed by the Grievance Administrator does not provide the panel with reason to change its previously-stated findings, to make new findings, or to change the decision to grant the motion for involuntary dismissal. As was true during the hearing on May 5, 2014, the Grievance Administrator failed to set forth one thing that Meijer did with regard to the election in question, or one thing Meijer did to support those opposed to the moratorium, and more importantly, that Mr. Stoepker had knowledge of such actions by Meijer.

While the panel believes the Motion for Additional Findings is without any merit, perhaps, it is appropriate to set forth the two answers by Mr. Stoepker to questions asked of him during his October 1, 2007 deposition that the Grievance Administrator alleges were untruthful. The questions and answers were:

> Q. I must be getting – I'm losing track. I'm sorry. All right. Can you tell me how big a role Meijer took in the election – the referendum or the moratorium election up there?
>
> A. I have no knowledge of that at all.
>
> Q. Do you know what contributions Meijer Corporation made to local political supporters of Meijer in the Acme area?
>
> A. I have no knowledge. (Deposition transcript p. 47).

The Grievance Administrator refers to the billing records of Dickinson Wright as the basis for establishing the misconduct of Mr. Stoepker under MRPC 8.4(b). The billing records establish what certain Dickinson Wright lawyers, including Mr. Stoepker, did on behalf of Meijer, but the billing records do not establish what role Meijer took with regard to the election in question, or what Meijer contributed, if anything, to supporters of Meijer, let alone that Mr. Stoepker had knowledge of such activity by Meijer. The billing records, alone, prove nothing. The Grievance Administrator states that the panel did not discuss the billing records in the Decision of May 21, 2014. It is true that the billing records were not specifically discussed. However, the panel stated in the Decision "That the exhibits do not support the allegations." The "exhibits" included the billing records. The Grievance Administrator does not cite any specific entry in the billing records that he contends support the allegations against Mr. Stoepker.

At the end of the Brief in Support, the Grievance Administrator suggests that Respondent's invocation of the attorney-client privilege and the work-product privilege 13 different times during the deposition testimony of Mr. Stopeker is somehow significant. The Grievance Administrator then sets forth 5 issues or questions to which a privilege was asserted. None of the 5 issues or questions has anything to do with the "role Meijer took in the election", or what "contribution Meijer Corporation made to local political supporters of Meijer". The panel is at a loss to understand how this argument by the Grievance Administrator supports any of his allegations against Mr. Stoepker.

In the Amended Formal Complaint, the Grievance Administrator alleged that Meijer paid more than $46,000 to support the referendum campaign. Yet, during the May 5, 2014 hearing, there was not one word of testimony, or one exhibit offered, to

support this allegation. The same is true regarding what role Meijer took in the election. Such proofs are necessary if there is to be any success in the case presented against Mr. Stoepker by the Grievance Administrator.

For the reasons set forth herein, the Motion for Additional Findings is denied.

ATTORNEY DISCIPLINE BOARD
Kent County Hearing Panel #3

By: William S. Farr / by KLP w/permission
William S. Farr, Chairperson

DATED: July 8, 2014