STATE OF MICHIGAN

Attorney Discipline Board

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v Case No. 20-63-GA

ANONYMOUS ATTORNEY,

Respondent.
_____/

ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION AND DENYING RESPONDENT'S MOTION TO STRIKE PETITIONER'S REPLY

Issued by the Attorney Discipline Board
333 W. Fort St., Ste. 1700, Detroit, MI

Petitioner filed a motion seeking reconsideration of the Attorney Discipline Board's November 30, 2021 order granting respondent's petition for interlocutory review, dismissing the formal complaint without prejudice, and granting respondent's motion to permanently seal record. Respondent requested and received permission from the Board to file a response to the motion for reconsideration, and his response was filed on January 11, 2022. Petitioner filed a reply on January 19, 2022, and thereafter, respondent filed a motion to strike petitioner's reply. The Board has considered the motions together with the responses filed by both parties, and is otherwise fully advised. We deny both motions for the reasons set forth below.

In this Board's November 30, 2021 order dismissing the formal complaint without prejudice, we found that the Grievance Administrator improperly referred to nonpublic information in the formal complaint. We determined that, under MCL 769.4a, the information was nonpublic and should not have been set forth in the formal complaint.

On reconsideration, the Grievance Administrator argues that we ignored *Grievance Administrator v Murdoch Hertzog*, 06-76-JC, 06-77-GA (ADB 2009). In *Hertzog*, the respondent entered a guilty plea on March 29, 2001, and was formally convicted on May 7, 2001. That conviction remained on his record for five years. During that five-year period, Respondent Hertzog repeatedly failed to report his conviction on his State Bar of Michigan license renewal applications.

On July 11, 2006, after the Attorney Grievance Commission learned of Respondent Hertzog's conviction, a notice of filing a judgment of conviction and formal complaint for failing to report the conviction was filed. Thereafter, on July 24, 2006, Hertzog successfully had his 2001 conviction expunged, making the record of his conviction nonpublic. On July 21, 2008, the hearing panel issued an order suspending Hertzog's license for 120 days.

The hearing panel held that it was proper for the Grievance Administrator to file a certified copy of the judgment of conviction and refer to Hertzog's conviction in the formal complaint, and the Board agreed. The Board relied on *People v Van Heck*, 252 Mich App 207; 651 NW2d 174 (2002), which distinguished the legal effects of a pardon in Connecticut and an expungement in Michigan, and determined that while a pardon removed the legal disabilities flowing from the conviction, an expungement does not:

> "In contrast, an expungement under MCL 780.621 does not fully relieve an individual of the legal disabilities flowing from the conviction. For example, expungement pursuant to MCL 780.621 does not relieve a felony sex offender from the continuing duty to register pursuant to the provisions of the Sex Offenders Registration Act, MCL 28.721 et seq. See MCL 780.622(3). More generally, the Department of State Police is required to retain a record of expunged convictions and their associated sentences, which may be accessed and used by a number of state authorities for a variety of reasons, including denial of employment or a professional license and enhancement of a sentence for a later felony conviction. MCL 780.623(2) (footnote omitted)." *Van Heck*, 252 Mich App at 215. [*Hertzog, supra* at 9-10.]

The *Van Heck* court went on to explain the difference between a pardon and an expungement:

> Given such continuing legal disabilities, we conclude that the Connecticut pardon granted defendant in this matter is not akin to a Michigan expungement. Instead, it is like a gubernatorial pardon granted pursuant to Const 1963, art 5, § 14. As our Supreme Court has observed, such an act of clemency "'reaches both the punishment prescribed for the offense and the guilt of the offender. It releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense.'" *People v Stickle*, 156 Mich 557, 564; 121 NW 497 (1909), quoting *People ex rel Forsyth v Court of Sessions of Monroe County*, 141 NY 288, 294-295; 36 NE 386 (1894). In light of the sweeping manner in which the Connecticut statutes erase a conviction upon pardon, the pardon granted defendant similarly blots out of existence his guilt, so that under the law he is considered to have never committed the pardoned offenses. [*Van Heck, supra* at 215-216.]

Similarly, we find that a no contest plea under MCL 769.4a, which defers the proceedings until after probation is complete and then actually dismisses the criminal charge, is not akin to an expungement. Here, there was never a conviction; therefore, under the law, respondent is considered to have never committed the offense. Accordingly, we find that *Hertzog* is not applicable here.

Furthermore, the expungement statute referenced by the Grievance Administrator contains a licensing exception, whereas the statute involved here does not.[1] MCL 769.4a is structured and operates differently. It does, however, allow certain information to be available to prosecutors, but the statute could not be clearer that the record of the proceedings "must be closed to public inspection" and that dismissal of the proceedings under the statute "must be without adjudication of guilt." Here, the Grievance Administrator ignored this plain language, and instead published this information in a formal complaint – a document that is open to the public under MCR 9.126(C).

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[1] MCL 780.623 provides that records made nonpublic under the expungement statute "shall be made available only to a court of competent jurisdiction, an agency of the judicial branch of state government, the department of corrections, a law enforcement agency, a prosecuting attorney, the attorney general, or the governor upon request and only for the following purposes: (a) Consideration in a licensing function conducted by an agency of the judicial branch of state government . . . ."

The parties here also disagree as to the date the information became nonpublic. The Grievance Administrator asserts that respondent's criminal case did not become "nonpublic" until March 15, 2019, the date of the sentencing hearing, while respondent asserts that his criminal case became nonpublic on January 25, 2019, when he entered his no contest plea under MCL 769.4a. When the information first became nonpublic is irrelevant here, however, because either way, it was nonpublic on August 27, 2020, the date the formal complaint was filed. The Grievance Administrator should have known that he could not disclose the details or even the existence of respondent's criminal case in a public document.

There is no denying that respondent's alleged conduct here is serious, and perhaps incompatible with the standards governing lawyer conduct in Michigan. However, the burden is on the Grievance Administrator to prove his case with *admissible* evidence. Despite a strong argument that the Grievance Administrator's conduct here may warrant dismissal of the formal complaint with prejudice, we balanced the competing concerns and narrowly concluded that the interest of the public, the courts, and the profession would be best served by allowing the Grievance Administrator to proceed in accordance with the law, and prove, if he can, misconduct. This means the Grievance Administrator will have to allege and introduce into the record, admissible evidence of violations of the Michigan Rules of Professional Conduct and/or rules defining misconduct as set forth in subchapter 9.100 of the Michigan Court Rules. We recognize that victims of intimate partner violence sometimes choose not to testify or cooperate in criminal prosecutions or other proceedings. However, the legislature has clearly and unambiguously provided for certain proceedings leading to deferred sentencing and the ultimate dismissal of criminal charges, and has declared all of the information relating to those proceedings nonpublic. Here, a judge has determined that respondent was eligible for proceedings and dismissal under the statute. As we have said, this does not preclude the petitioner from alleging and proving that the acts constituted misconduct. However, we may not bend the rules or ignore statutes, even in the face of acts we may consider abhorrent. Finally, in light of the District Court's dismissal, pleading this information is not only a violation of the statute, it is also insufficient to establish misconduct.

NOW THEREFORE,

IT IS ORDERED that petitioner's motion for reconsideration is **DENIED**. A motion which merely presents the same issues ruled on by the Board will not be granted. MCR 2.119(F)(3). Here, the issues raised were already presented to and considered by the Board. Furthermore, petitioner has failed to demonstrate a palpable error by which the Board has been misled or to otherwise demonstrate that the November 30, 2021 decision of the Board was entered erroneously.

IT IS FURTHER ORDERED that respondent's request to strike petitioner's reply to respondent's response to the motion for reconsideration, dated January 21, 2022, is **DENIED**.

ATTORNEY DISCIPLINE BOARD

By: _____
Michael B. Rizik, Jr., Chairperson

Dated: April 18, 2022

Board Members Michael B. Rizik, Jr., Linda Hotchkiss, M.D., Rev. Dr. Louis J. Prues, Karen D. O'Donoghue, Michael S. Hohauser, Peter A. Smit, Linda M. Orlans, and Jason M. Turkish concur in this decision.

Board Member Alan Gershel recused himself and did not participate.