STATE OF MICHIGAN

Attorney Discipline Board

In the Matter of the Reinstatement Petition
of David S. Feinberg, P 42854,

Petitioner/Appellee.

Case No. 08-70-RP

Decided: March 25, 2010

Appearances:
Kenneth M. Mogill, for Petitioner/Appellant
Cynthia C. Bullington, for the Grievance Administrator

BOARD OPINION

Petitioner's license to practice law was suspended for two years in two separate orders effective March 31, 2005, arising from four consolidated cases involving his 2002 representation of a law student in a school disciplinary hearing while under the influence of drugs; two 2005 convictions, one for possession of cocaine and another for violation of his probation; and various other misconduct, including neglect of client matters. Petitioner was licensed to practice law in Michigan in 1989. According to his testimony, respondent's addiction to cocaine commenced in 1992. He participated in in-patient treatment for his addiction to substances several times over the years. After a relapse and treatment in 2002, he maintained sobriety for 2 and ½ years, but relapsed in 2004 when he was arrested for possession of cocaine.

Petitioner initially sought reinstatement in February 2007, and that petition was denied in July 2007, by Ingham County Hearing Panel #3. The petition for reinstatement in this case was filed on May 8, 2008, and was denied by Livingston County Hearing Panel #1 on April 2, 2009. Petitioner has filed a petition for review of the second order denying reinstatement. We affirm the order denying reinstatement.

Livingston County Hearing Panel #1 found that petitioner failed to prove by clear and convincing evidence that he met the following requirements of MCR 9.123(B):

> (4) he or she has complied fully with the order of discipline;
> (5) his or her conduct since the order of discipline has been exemplary and above reproach;
>
> * * *

> (7) taking into account all of the attorney's past conduct, including the nature of the misconduct which led to the revocation or suspension, he or she nevertheless can safely be recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence, and in general to aid in the administration of justice as a member of the bar and as an officer of the court;

The panel in this matter made it clear that while several specific things troubled them, they were making their decision based upon "all of the attorney's past conduct." HP Report, p 5, citing MCR 9.123(B)(7). As we have explained:

> Subrule 7 requires the clear conclusion that the petitioner can safely be recommended as a person fit to be consulted in matters of trust and confidence. MCR 9.103(A) defines the license to practice law as "a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters and to aid in the administration of justice." To affix such a proclamation of safety, or "stamp of approval," [*Grievance Administrator v August*, 438 Mich 296, 311; 475 NW2d 256 (1991)], upon someone who has committed serious misconduct would seem to require a searching inquiry into the causes for the conduct resulting in discipline and the most convincing showing that a genuine transformation has occurred. [*In Re Reinstatement of Arthur R. Porter, Jr.*, 97-302-RP (1999).]

We review a hearing panel's factual findings for "proper evidentiary support on the whole record." *Grievance Administrator v Lopatin*, 462 Mich 235, 247-248 n 12; 612 NW2d 120 (2000); *Grievance Administrator v T. Patrick Freydl*, 96-193-GA (ADB 1998). This standard is applicable in reinstatement proceedings. *In Re Reinstatement of Leonard R. Eston*, 94-78-RP (ADB 1995); *Grievance Administrator v August*, 438 Mich 296, 304; 475 NW2d 256 (1991). We review decisions on questions of law de novo. *Lopatin, supra*; *Grievance Administrator v Jay A. Bielfield*, 87-88-GA (ADB 1996); *Grievance Administrator v Geoffrey N. Fieger*, 94-186-GA (ADB 2002). However, the questions presented on review in reinstatement matters are sometimes not factual, and are rarely truly legal, but often call for the exercise of the panel's considered judgment. As we said in *Porter, supra*:

> Taken together, subrules (5)-(7) require scrutiny of the reinstatement petitioner's conduct before, during, and after the misconduct which gave rise to the suspension or disbarment in an attempt to gauge the petitioner's current fitness to be entrusted with

> the duties of an attorney. Our Supreme Court has recognized that application of MCR 9.123(B) involves "an element of subjective judgment." *August*, 438 Mich at 311. [*Porter, supra*, p 10.]

Petitioner's brief cites cases for the proposition that there is an implicit assumption that a suspended lawyer will be reinstated, and that the running of the time period in a suspension order establishes a *prima facie* case of eligibility for reinstatement. This is not the law, as the Board recently said in *In Re Reinstatement of William Leo Cahalan, Jr.*, 04-129-RP (2006), rejecting arguments citing the same authorities offered here:

> Relying upon decisions of this Board and an opinion of Justice Levin, petitioner argues "'the implicit assumption of a suspension, whether or not indefinite, is that the disciplined lawyer will ordinarily be reinstated at the end of the suspension.'" *Grievance Administrator v Kalil*, ADB 44/85 (ADB 1986), citing *Petition of Albert*, 403 Mich 346, 358 (1978) (opinion of Levin, J.). See also *In Re Reinstatement Petition of James W. Daly*, ADB 277-88 (ADB 1989) ("an attorney who has completed a fixed term of suspension and has established, prima facie, his or her eligibility in accordance with the criteria enumerated in MCR 9.123(B)(1)-(9), should not be denied reinstatement in the absence of factual evidence tending to demonstrate his or her continued unfitness").
>
> Justice Levin's opinion in *Albert* was signed by only one other Justice. When it revisited a reinstatement case in *Grievance Administrator v August*, 438 Mich 296, 304 (1991), the Court expressly considered again Justice Levin's objections to reinstatement rules and procedure but instead once more embraced a reading of those rules calling for individualized factual determinations in each case, and the exercise of "an element of subjective judgment" by panels, the Board and the Court. *August* also clearly rejected the notion that a presumption of fitness or entitlement to reinstatement is raised once an attorney passes the "temporal milepost" of five years from disbarment (entitling one to petition for reinstatement).
>
> As for decisions of this Board, such as *Kalil* and *Daly*, they must be squared with the plain language of Rule 9.123(B). To the extent that they state or suggest that the burden of a petitioner for reinstatement may be shifted, lessened, or aided by a presumption, such cases must be subordinated to the rule itself. The state of the law on this point today is accurately reflected in our decision in *In re Reinstatement of Arthur R. Porter, Jr.*, 97-302-RP (ADB 1999), pp 8-9:

> "The passage of time, by itself, is not sufficient to support reinstatement." *In Re Reinstatement of McWhorter*, 449 Mich 130, 139; 534 NW2d 480 (1995). Although this pronouncement was made in a case involving reinstatement following disbarment, MCR 9.123(B) also applies to reinstatement following suspensions of 180 days or more. Subrule 2, requiring the passage of certain minimum periods before reinstatement, is but one of several prerequisites to reinstatement.
>
> We have previously underscored the fact that the passage of the time specified in a discipline order or court rule, does not, in light of the other reinstatement requirements, raise a presumption that the disciplined attorney is entitled to reinstatement because she has "paid her debt" or he has "served his time." In *In Re Reinstatement of James DelRio*, DP 94/86 (ADB 1987), this Board held:
>
> > Under the rules governing reinstatement proceedings, the burden of proof is placed upon the petitioner alone. While the Grievance Administrator is required by MCR 9.124(B) to investigate the petitioner's eligibility for reinstatement and to report his or her findings in writing to the hearing panel, there is no express or implied presumption that a petitioner is entitled to reinstatement as long as the Administrator is unable to uncover damaging evidence. In this case, our finding that petitioner DelRio has failed to meet his burden of establishing eligibility for reinstatement by clear and convincing evidence would be the same if the record were devoid of evidence tending to cast doubt upon his character and fitness since his suspension. [*Cahalan, supra.*]

Petitioner also argues for more consistency in reinstatement decisions. Again, this is not the reinstatement scheme set forth in the court rules or caselaw. As the Board said in *Porter, supra*:

> Discipline matters are fact sensitive inquiries to be decided on the particular facts of each case. *Grievance Administrator v Deutch*, 455 Mich 149, 166; 565 NW2d 369 (1997). Accordingly, there can be no formula for reinstatement. The evidence necessary to establish compliance with MCR 9.123(B)'s requirements clearly and convincingly will vary depending on the circumstances of the individual petitioner. *August*, 438 Mich 309-310, 312 n 9. [*Porter, supra*, p 10.]

We conclude that there is proper evidentiary support for the panel's decision to deny the petition for reinstatement. The misconduct for which petitioner was suspended involved appearing under the influence of substances at a hearing, neglect of client matters, and criminal convictions for possession of cocaine (which was in violation of a criminal court's probation order). Thus, respondent's recovery and rehabilitation from his addiction to substances was one key area of inquiry at the hearing below. However, the panel also noted other conduct that had not been the subject of a formal complaint and may not be related to substance abuse, such as the failure to fully recompense the estate of a former client who deposited with petitioner a substantial sum of money (the Wittenberg estate), and petitioner's "apparent misrepresentation to a magistrate in the 54A District Court."

Petitioner was a party to a matter pending in the 54A District Court. A hearing in that court was scheduled to take place on the same day a hearing in this reinstatement matter had been noticed. The hearing in these discipline proceedings was adjourned, but petitioner never informed the magistrate of this. Instead, he appeared before the magistrate, who had requested that he put his request for adjournment in the district court matter on the record, and tendered the notice of hearing in these proceedings as evidence of conflicting hearing dates. He did this even though the reinstatement hearing had been adjourned. Petitioner testified below that he had other things to do on the day of the 54A hearing and had already requested time off of work. Asked why he did not file a motion to adjourn the district court hearing that recited the actual basis for the request instead of relying on a superseded notice of hearing in these proceedings, petitioner testified:

> Because I only had two weeks and I had been speaking to her on the phone. Filing a motion, I mean it's the same thing as me appearing at the time of the hearing. She already told me she was going to grant it, *because of the fact that there was a conflict.* She said, just come in and we'll put it on the record. . . . [10/28/2008 Tr, pp 26-27.]

Clearly, this conduct provides evidentiary support for the panel's conclusion that petitioner has not met his burden of establishing compliance with MCR 9.123(B)(5) and (7) by clear and convincing evidence.

The hearing panel also made reference to petitioner's unpaid obligations to the Wittenberg estate. As the July 30, 2007 panel report denying petitioner's first petition for reinstatement explains, Donald B. Wittenberg, now deceased, filed a civil action against petitioner in 2007 alleging

breach of contract, fraudulent misrepresentation, legal malpractice and breach of fiduciary duty. The panel report summarizes some of the factual bases for the claims:

> In the Wittenberg lawsuit, Mr. Wittenberg claimed that he inherited a substantial sum of money and wanted legal advice as to what best to do with the money. On March 7, 2005 Mr. Wittenberg received a receipt from the "Feinberg Law Offices" signed by Mr. Havis, which indicates that $2,500 was received as a "retainer" and $108,710 was "in IOLTA" (Respondent's Exhibit 3). Petitioner indicated at the hearing that this money never went into an IOLTA account. He indicated that instead, Mr. Havis drafted an Investment Payment Agreement (Petitioner's Exhibit D) that provided for the money to be invested with a company named "Feinberg Investments, P.C." Petitioner asserted that the intention was for the investment agreement to be with his investment company, "Feinberg Investments, LLC."
>
> Petitioner indicated that some of the money received from Mr. Wittenberg, ostensibly through Feinberg Investments, LLC, was to be used to purchase real property for investment purposes on Cavanaugh road in Lansing, Michigan. The plan was for the property to be leased back to Mr. Wittenberg, or to some other party. Petitioner indicated that he was paid a fee of $15,000 in connection with the real estate transaction, which he did not disclose to Mr. Wittenberg. When first asked about this at the hearing on his Petition for Reinstatement, petitioner indicated that he did not think he had to disclose anything to Mr. Wittenberg. . . . However, after further questioning, he acknowledged that he should have . . . . *[In Re Reinstatement of David S. Feinberg*, 07-45-RP (HP Report 7/30/2007), p 3.]

The hearing panel in petitioner's first reinstatement case found, among other things, that petitioner "took some of Mr. Wittenberg's money to purchase a house that petitioner titled in his name and paid himself a fee. Neither of those acts were disclosed to Mr. Wittenberg." The panel concluded that various aspects of the transaction and subsequent events were inconsistent with the requirements of MCR 9.123(B), and the panel further found "petitioner's belated agreement to pay $20,000 over time to Mr. Wittenberg's estate . . . insignificant in light of his other conduct." In this proceeding, petitioner has acknowledged that he did not display the proper attitude toward the Wittenberg matter before the initial reinstatement panel. However, we are not convinced from this record that petitioner fully appreciates his responsibilities to clients similarly situated to Mr. Wittenberg. A full airing of the nature of the transactions and petitioner's conduct in connection therewith and evidence establishing a transformation in his attitude and conduct such that he can

now be safely recommended to the public have yet to be provided. Admittedly, this is more difficult than the business-like approach he has taken to putting it behind him: fight the claim, initially; then liquidate the damages; then make the payments. All of this is understandable and consistent with the way a lawyer should manage litigation for a client. Here, however, the record needs more elaboration to enable a hearing panel and this Board to assess (1) the nature of the improper conduct, and (2) whether petitioner has undergone a "genuine transformation"[1] such that he can be safely held out to members of the public as a Michigan lawyer.

Although we have commented on some of the bases for the panel's decision, and we agree with the panel that petitioner may yet establish his fitness before a hearing panel, we reiterate that neither the court rules nor this opinion provide a formula for reinstatement.

Finally, the hearing panel below opined that "the protection of the public demands that certain conditions be met prior to the petitioner's next appearance before a reinstatement panel." Among the seven conditions set forth were continued abstinence, participation LJAP, and participation in a support group to prevent relapse with respect to substance abuse as well as to detect and prevent ethical lapses. Although the conditions precedent suggested by the panel are quite sensible and will doubtless be important factors in a subsequent proceeding, given the deliberately indeterminate nature of MCR 9.123(B)'s requirements, we are not prepared to say that these conditions are either necessary or sufficient for reinstatement in a subsequent proceeding. For example, a hearing panel might be persuaded that petitioner has met the requirements of MCR 9.123(B) even if he remains employed as a car salesperson, or if he can show clearly and convincingly that he has maintained sobriety through participation in programs or methods other than the Lawyers and Judges Assistance Program. [2] However, the burden remains heavy and petitioner would be well advised to heed the areas of concern identified by each tribunal that has considered discipline or reinstatement matters involving him. He should, of course, also be prepared to establish that his conduct has been exemplary and reflects an understanding of, and willingness to abide by, the obligations of an attorney.

---

[1] *Porter, supra*, p 10.

[2] The LJAP director indicated to the panel that it might be appropriate for respondent to transition to another support and/or therapeutic program.

For all of the foregoing reasons, the order of the hearing panel denying reinstatement is affirmed.

Board members William J. Danhof, Thomas G. Kienbaum, William L. Matthews, C.P.A., Rosalind E. Griffin, M.D., Carl E. Ver Beek, Craig H. Lubben and James M. Cameron, Jr., concur in this decision.

Board members Billy Ben Baumann, M.D. and Andrea L. Solak did not participate.