STATE OF MICHIGAN

Attorney Discipline Board

In the Matter of the Reinstatement Petition
of Rene A. Cooper, P 30566,

Petitioner/Appellee.

Case No. 07-175-RP

Decided:

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

BOARD OPINION

Tri-County Hearing Panel #16 of the Attorney Discipline Board entered an order on June 9, 2009, granting the reinstatement petition filed by petitioner Rene A. Cooper. The Grievance Administrator has petitioned for review on the grounds that the panel erred in its findings that petitioner established all of the applicable reinstatement criteria in MCR 9.123(B) by clear and convincing evidence. Having undertaken review proceedings in accordance with MCR 9.118 and having conducted a thorough review of the record before the panel, we conclude, by a majority, that there is proper evidentiary support for the hearing panel's findings and that petitioner's reinstatement to the practice of law, subject to the conditions imposed by the panel, is consistent with the goals of these reinstatement proceedings and should therefore be affirmed.

I. Panel Proceedings

Petitioner, Rene A. Cooper, is a 55 year old attorney with a practice in Detroit, specializing in criminal defense. In October 2005, petitioner exposed himself to three women. He was arrested and charged with indecent exposure. He pleaded no contest to that offense in February 2006 and was sentenced to 18 months of probation with outpatient treatment and credit for four months of completed inpatient treatment.

At the time of that conviction, petitioner had been the subject of two prior discipline orders: a suspension of 180 days effective January 1, 1996, based upon no contest pleas to civil ordinance

violations for indecent exposure and resisting arrest (*Grievance Administrator v Rene A. Cooper*, ADB Case No. 95-156-GA, reinstated effective July 30, 1996); and a reprimand, effective March 24, 2001 (*Grievance Administrator v Rene A. Cooper*, ADB Case No. 98-141-GA). Both the prior 180 day suspension in 1996 and the reprimand with conditions in 2001 were the result of stipulations for consent discipline approved by the Attorney Grievance Commission and accepted by the hearing panel under MCR 9.115(F)(5).

The underlying suspension in this case is the result of a third stipulation for consent discipline. The 180 day suspension, approved by the Attorney Grievance Commission and a hearing panel, became effective July 6, 2006. The instant petition for reinstatement was filed in November 2007.

Thereafter, reinstatement proceedings were conducted by Tri-County Hearing Panel #16 in accordance with the procedures and criteria set forth in MCR 9.123(B) and 9.124. Following the submission of the Grievance Administrator's 227 page investigative report, the hearing panel conducted hearings in February, April and May 2008. In addition to petitioner's testimony, the panel received testimony in favor of petitioner's reinstatement from an Assistant Wayne County Prosecutor, the Chief Defender of the State Defender's Office and a Wayne County circuit judge. The panel also received testimony highly critical of petitioner based on his conduct in two specific cases from another Wayne County Circuit Judge and a United States District Court Judge. With regard to the criticism from the circuit judge, the panel received conflicting testimony from the Assistant Attorney General who prosecuted that case and who, contrary to the judge's testimony, found petitioner to have been forthcoming and honorable during the course of that trial. Finally, the panel received testimony from a psychologist at an out-of-state facility where petitioner received treatment in 2006, and from a psychiatrist with whom petitioner had treated in 2008.

In January 2009, the hearing panel issued its interim report containing its conclusion that while the petitioner had not established his eligibility for reinstatement "at this time," the panel would retain jurisdiction until April 15, 2009, during which time the panel would entertain further supplements to the record including, the panel suggested, testimony from an expert specializing in problems of the type experienced by petitioner.

At the continued hearing in April 2009, the petitioner presented further testimony from his treating psychiatrist who testified that petitioner continued to see him every two weeks and seemed "eager to continue with therapy and to stay on track with keeping his former problems out of his life." Petitioner also presented the testimony of Dennis P. Sugrue, Ph.D., a clinical psychologist in private practice. Dr. Sugrue described his forensic evaluation and his report was admitted into evidence.

Th hearing panel's order of reinstatement was issued June 12, 2009. The order contains specific conditions to be followed by petitioner for a period of at least two years, including both individual and marital therapy. At the end of the two year period, petitioner is to submit a further plan for continued treatment. The Grievance Administrator now seeks reversal of the hearing panel's order of reinstatement and raises the following questions regarding the panel's findings:

1. Did the panel err in determining that petitioner met his burden of proof in showing that his conduct since the order of discipline was exemplary and above reproach as required by MCR 9.123(B)(5)?

2. Did the panel err in determining that petitioner met his burden of proof by showing that he is now willing and able to conform his conduct to the standards required of members of the state bar, as required under MCR 9.123(B)(6)?

3. Did the panel err in determining that petitioner met his burden of proof by showing that he can now safely be recommended to the public, as required under MCR 9.123(B)(7)?

In two recent opinions affirming hearing panel orders denying reinstatement, *Matter of the Reinstatement of Philip E. Smith*, Case No. 08-165-RP (ADB 2010), and *Matter of the Reinstatement of Gregory Wilkins*, Case No. 08-139-RP (ADB 2010), we noted that,

> The question before the Board in [a reinstatement] this review proceeding is not whether there is evidentiary support in the record for [reinstatement] petitioner's argument that he met his burden of proof under MCR 9.123(B)(4), (5), (6) and (7). Rather, it is well settled that in reviewing a hearing panel's decision, the Board must determine whether or not the *hearing panel's* decision has proper evidentiary support in the whole record. *In Re Reinstatement of Arthur R. Porter*, Jr., Case No. 97-302-RP (ADB 1999), citing *In Re Reinstatement of Leonard R. Eston*, 94-78-RP (ADB 1995), and *Grievance Administrator v August*, 438 Mich 296, 304; 475 NW2d 256 (1991).

The fact that this review proceeding involves the Grievance Administrator's challenge to a hearing panel order granting reinstatement does not alter the Board's standard of review with regard to the hearing panel's factual findings.

After a lengthy hearing during which it had multiple opportunities to assess the evidence presented, including petitioner's own testimony, the hearing panel found that petitioner Cooper had, in fact, established the criteria in MCR 9.123(B)(5), (6) and (7) by clear and convincing evidence. During the course of the four days of hearings, the panel received testimony that was, at times, in conflict. For example, the Assistant Attorney General, who was opposing counsel in a criminal matter defended by petitioner, and the circuit judge who presided over that trial offered quite different opinions as to petitioner's conduct and his underlying character. On review, the Grievance Administrator asks that the Board to draw certain adverse inferences from such testimony. It is also argued that petitioner's testimony that he can and will conform his future conduct to the standards required of members of the bar cannot be taken for more than nominal lip service to achieve his goal of reinstatement.

On review, the Board does not conduct a *de novo* review of a panel's factual findings nor does it substitute its own judgment for the judgment and credibility determinations of the panel. *Grievance Administrator v George T. Krupp*, Case No. 96-287-GA (ADB 2002). The issue before the Board is not whether the hearing panel could have drawn certain negative inferences or conclusions but whether or not there was evidentiary support in the record for the inferences and conclusions ultimately articulated by the panel. Based upon our review of the entire record, we believe that such evidentiary support is present here.

However, while the applicable standard of review entails a certain deference to a hearing panel's factual findings, it is also uncontroverted that the Board possesses a measure of discretion with regard to the ultimate decision. *In Re Daggs*, 414 Mich 304, 318-319; 307 NW2d 66 (1981). Taken together, the three subrules in MCR 9.123(B) at issue here, namely subrules (5)-(7), require scrutiny of petitioner's conduct before, during and after the misconduct which gave rise to the instant suspension in an attempt to gauge the petitioner's current and future fitness to be entrusted with the duties of an attorney. That is the ultimate decision in this case and our Supreme Court has recognized that application of MCR 9.123(B) involves "an element of subjective judgment." *August*, 438 Mich at 311. As the Grievance Administrator appropriately points out, no single factor or

criteria under MCR 9.123(B) is conclusive, but, rather, "each must be evaluated in light of the others." *In Re Reinstatement of McWhorter*, 449 Mich 130, 138 (1995).

The Grievance Administrator has argued that the numerous and strenuous conditions imposed on petitioner militate against reinstatement and that the Board should not allow petitioner to be reinstated because of his extensive need to be supervised. Taking into account all of the factors considered by the panel, we believe that the hearing panel reached an appropriate result in this case by finding that petitioner established the criteria in MCR 9.123(B) but also by taking extra steps, as contemplated under MCR 9.124(D), in attaching detailed supervisory conditions which are both relevant to petitioner's prior personal conduct and appropriate to ensure the integrity of the profession.

To be sure, respondent's prior conduct, resulting in several disciplines, is extremely concerning. There should be no doubt that if a panel had imposed a suspension of several years instead of the 180 day suspension entered by consent in 2006, we might not have considered that discipline excessive. But that is not what happened - by consent respondent was suspended for 180 days, and he has been out of practice for well over three years now.

The psychiatrist's and forensic psychologist's testimony was not rebutted, and the panel's acceptance of that, and other testimony, cannot be criticized. The conditions imposed by the panel are appropriately demanding. Given the foregoing, we cannot say that the panel erred in reaching its conclusion.

We believe that the record amply demonstrates that petitioner has taken appropriate steps to deal with his personal issues. We hope that petitioner appreciates that a similar recurrence of such conduct in the future may well result in his removal from the profession.

Board members William J. Danhof, Thomas G. Kienbaum, Carl E. Ver Beek, and Rosalind E. Griffin, M.D. concur in this decision.

Board Members Andrea L. Solak and Sylvia P. Whitmer, Ph.D. did not participate.

Board members William L. Matthews, Craig H. Lubben, and James M. Cameron, Jr. dissent:

We agree with our colleagues that it is not the Board's proper function as a reviewing body to conduct a *de novo* analysis of the evidence presented. Like the majority, we are satisfied that the hearing panel properly considered the evidence as it applied to each of the applicable criteria in MCR 9.123(B) and made reasonable factual determinations as to each of the separate criteria for

professional and judicial matters and to aid in the administration of justice." For the Board to make such a proclamation, in effect giving its "stamp of approval," *August*, 438 Mich at 311, to someone who has engaged in the same criminal behavior on multiple occasions, "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." *Reinstatement of Arthur Porter, supra*, p 9. We are not without sympathy for petitioner and we do not question his efforts to understand and conquer his behavioral issues. Yet, notwithstanding that sympathy, our decision in a case like this must be based on more than a guess and a hope that a transformation has occurred. In order to ensure protection of the public, the courts, and the profession, the decision to reinstate under the circumstances presented in this case should be based on a level of confidence which the record has not instilled in this case.