STATE OF MICHIGAN

FILED
ATTORNEY DISCIPLINE BOARD
September 29, 2020

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee,

v

Josephine S. Miller, P 32014,

Respondent/Appellant,

Case No. 19-28-RD

Decided: September 29, 2020

Appearances:

Sarah C. Lindsey, for the Grievance Administrator, Petitioner/Appellee
Josephine S. Miller, In Pro Per

BOARD OPINION

This case involves a reciprocal discipline matter. On November 26, 2018, the Superior Court, Judicial District of Danbury, Connecticut issued a memorandum of decision in a matter titled Office of *Chief Disciplinary Counsel v Josephine Smalls Miller*, DBD CV17-6022075-S (2017), finding by clear and convincing evidence that respondent had violated the Rules of Professional Conduct as set forth in the four-count complaint and suspending respondent from the practice of law for a total effective period of one year.[1]

On April 2, 2019, the Grievance Administrator filed a reciprocal discipline action pursuant to MCR 9.120(C). Respondent filed an objection on April 23, 2019, asserting that she was not afforded due process because the Connecticut disciplinary authorities selectively enforced attorney discipline rules based on race. On May 14, 2019, the Grievance Administrator filed a reply to respondent's objection, stating that respondent was provided ample due process, and that the issues raised here in Michigan have already been litigated and rejected by the Connecticut Superior Court. The Grievance Administrator also argued that respondent failed to meet her burden of demonstrating that an order of suspension would be clearly inappropriate as contemplated by MCR 9.120(C)(1).

[1] Specifically, the court ordered the following suspensions to run concurrently: thirty days as to count one, six months as to count two, one year as to count three, and one year as to count four.

This matter was scheduled for hearing on July 16, 2019. Respondent appeared at the hearing by telephone. After consideration of the pleadings filed by both parties and the arguments presented at the hearing, the hearing panel found that the Grievance Administrator had provided satisfactory proof of an adjudication of misconduct in a Connecticut disciplinary proceeding, and thus reciprocal discipline was appropriate. The panel further concluded that respondent was afforded due process of law in the course of the original proceedings. On the issue of the appropriate level of discipline, the panel ordered the suspension of respondent's license to practice law in Michigan for a period of one year, finding that such a suspension in Michigan is comparable to the one-year suspension in Connecticut.

On February 4, 2020, respondent filed a timely petition for review, but did not petition the board for a stay. As a result, respondent is currently suspended under the hearing panel's order imposing reciprocal discipline. The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118, including review of the record below, consideration of the briefs filed by the parties, and the oral arguments presented to the Board at a virtual review hearing held on June 17, 2020. For the foregoing reasons, we affirm the hearing panel's order of suspension.

Under MCR 9.120(C)(1), a certified copy of a final adjudication of a disciplinary proceeding determining that an attorney has committed misconduct "shall establish conclusively the misconduct" for purposes of a proceeding brought under subchapter 9.100. Therefore, pursuant to this rule, the Grievance Administrator is empowered to initiate a disciplinary proceeding against a lawyer that has been disciplined in another jurisdiction. The issues to be considered in such a proceeding are limited to (1) whether the attorney received due process in the original proceeding, and (2) whether the imposition of comparable discipline in Michigan would be "clearly inappropriate." MCR 9.120(C)(1). Under MCR 9.120(C)(5), the "burden is on the party seeking to avoid the imposition of comparable discipline . . . to demonstrate that it is not appropriate for one or more of the grounds set forth in paragraph (C)(1)."

On review, respondent asserts that she did not receive due process during the Connecticut proceeding because the court did not address her constitutional claims of racial discrimination, retaliation and selective enforcement. There are two types of due process: procedural and substantive. Procedural due process requires notice and a meaningful opportunity to be heard before an impartial decision-maker. *In re Rood*, 483 Mich at 73, 92 (2009). The essence of a substantive

due process claim is the arbitrary deprivation of liberty or property interests. *AFT Michigan v State*, 297 Mich App 597, 622 (2012). Ultimately, due process requires fundamental fairness. *In re Rood*, 483 Mich at 92. The Administrator's brief succinctly summarizes some of our holdings:

> Due process in disciplinary proceedings generally requires reasonable notice, reasonable opportunity to be heard, and the opportunity to present evidence in defense. *Grievance Administrator v Devers*, 99-97-RD, at 3 (ADB 2002) (citing *Missouri ex rel. Hurwitz v North*, 271 US 40, 42 (1926). See also *Grievance Administrator v Knight*, Case No. 02-100-RD, at 5 (ADB 2003) (citing right to notice of charges, right to confront accuser, and right to present evidence in defense as due process rights in disciplinary proceedings); *Grievance Administrator v Cook*, Case No. 03-10-RD, at 6 (ADB 2004) (citing with approval panel's recitation of due process rights, including notice of time and place of hearing, reasonably definite statement of charges against her, an opportunity to be heard and present a defense, and fair consideration of the evidence with due regard to the nature of the proceedings). [AGC brief on review, p 8.]

After a careful review, we find no violation of respondent's due process rights.

On review, respondent's substantive and procedural due process arguments also seem to merge with assertions of selective enforcement (although no application of relevant legal principles, under the equal protection clause or otherwise, is provided) and a generalized fairness argument regarding the potential impact reciprocal discipline here on her ability to practice in her home state of Connecticut (discussed below). Respondent asserts: "Numerous other examples of disparate treatment by Connecticut state and federal courts allowing retroactive or no discipline could be cited," and provides brief summaries of three cases to establish "obvious engagement in [s]elective enforcement." However, the argument offered fails to meet the

> heavy burden of establishing . . . (1) that while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against [respondent], [s]he has been singled out for prosecution, and (2) that the government's discriminatory selection of [her] has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of his constitutional rights. [*Fieger v Thomas*, 872 F Supp 377, 387 n 8 (ED Mich, 1994), remanded on other grounds, 74 F3d 740 (CA 6, 1996).]

Under MCR 9.120(C)(1), the Connecticut decision is conclusive proof of misconduct unless respondent can show that the Connecticut decision was the result of a fundamental denial of due process. Here, respondent has not identified a fundamental right of due process which was violated during the disciplinary hearing. In addition, there is no question respondent was given notice and an opportunity to be heard. The Connecticut court issued a very thorough and comprehensive 40-page Memorandum in which it examined at length the evidence presented by both parties at a three-day hearing and in post-trial briefs, as well as discussed the applicable Connecticut Rules of Professional Conduct (RPC). The court also thoroughly analyzed the appropriate discipline, relying on the American Bar Association's Standards for Imposing Lawyer Sanctions (ABA Standards), the same Standards used to impose discipline by hearing panels in Michigan. As such, the hearing panel properly concluded respondent was afforded due process.

Respondent also argues that, even assuming discipline is warranted, the hearing panel should have retroactively applied her suspension. First, respondent has waived this argument because she failed to raise this issue at the hearing panel level. *Napier v Jacobs*, 429 Mich 222, 227-228; 414 NW2d 862 (1987) (a general rule of practice is that the failure to timely raise an issue waives review of that issue on appeal); *Spencer v Black*, 232 Mich 675; 206 NW 493 (1925) (issue raised for the first time on appeal not properly before the court on review). Nevertheless, respondent has no valid argument in support of a retroactive application of her suspension, and is unable to cite to any Michigan cases to support her claim that the suspension here should be retroactive. To the contrary, under MCR 9.120(C)(5), "comparable" discipline "does not mean that the dates of a period of disqualification from practice in this state must coincide with the dates of the period of disqualification, if any, in the original jurisdiction." Finally, to the extent that respondent argues that the failure of the Connecticut courts, or the hearing panel, to order "retroactive discipline," i.e., a suspension not really requiring suspension, amounts to a violation of the due process or equal protection clauses, or is somehow unfair, this argument lacks merit.

In her brief on review, respondent argued that "[i]n all likelihood Connecticut will now attempt to utilize the forward looking reciprocal discipline ordered by this panel as a basis for exacting a further period of suspension from practice in Connecticut under the claim that Respondent is still subject to discipline in another jurisdiction." (Respondent's brief, p 7.) In response, the Administrator argues:

> But there is no authority for such a circular claim. This action is based on reciprocal discipline because of the Connecticut action. Thus, Connecticut cannot impose another order of suspension as reciprocal for the Michigan order, which was reciprocal for the original Connecticut order. If Respondent's arguments were correct, jurisdictions would enter a continual loop of reciprocal discipline. [AGC brief on review, p 13.]

At the review hearing, respondent offered a variation or refinement of this argument, stating that if she were to be suspended in Michigan she would be unable to attest, in a Connecticut reinstatement proceeding, that she is "no longer the subject of any pending disciplinary proceedings or investigations," as is required by Connecticut Practice Book, Section 2-53(d). Respondent is currently suspended in Michigan and has been since February 4, 2020, the effective date of the hearing panel's January 13, 2020 order suspending respondent for one year in accordance with MCR 9.115(J)(3) ("The order [of discipline] shall take effect 21 days after it is served on the respondent unless the panel finds good cause for the order to take effect on a different date."). When this review proceeding is concluded, there will be no pending proceedings in Michigan. (And had this review proceeding not been initiated, proceedings would have concluded in February.) Despite this plain reading of the language in the Connecticut Practice Book, in an abundance of caution and an effort to be fair to respondent, this Board sought confirmation of its reading and requested supplemental briefing from the parties. Both parties submitted letters. Respondent's correspondence recited the Connecticut rule once more, but provided no authority for the proposition that once discipline proceedings are concluded in a jurisdiction other than Connecticut, respondent will be barred from seeking reinstatement in Connecticut, even if she is still serving a suspension. Therefore, respondent's argument in this regard is not persuasive.

For all of the foregoing reasons, we will enter an order affirming the hearing panel's order of suspension.

Board members Jonathan E. Lauderbach, Michael B. Rizik, Jr., Barbara Williams Forney, James A. Fink, Karen O'Donoghue, Linda S. Hotchkiss, M.D., Michael S. Hohauser, and Peter A. Smit concur in this decision.

Board member John W. Inhulsen was absent and did not participate.