STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellee,

v

Travis W. Ballard, P-32805,

Respondent/Appellant,

Case Nos. 02-19-AI; 02-25-JC

Decided: May 4, 2004

Appearances:
Patrick K. McGlinn, for Grievance Administrator, Petitioner/Appellee
Michael Alan Schwartz, for the Respondent/Appellant

BOARD OPINION

The respondent, Travis W. Ballard, was suspended for 15 months effective March 8, 2002.[1] The Attorney Discipline Board now considers the respondent's "Petition for Mandatory Vacatur of Suspension Pursuant to MCR 9.120(C)" filed March 3, 2004. The motion is based upon an unpublished opinion of the Michigan Court of Appeals dated November 25, 2003 in the matter of People v Travis W. Ballard, COA 241583. In that opinion, the Court of Appeals affirmed the respondent's misdemeanor conviction of entry without permission and his felony conviction of carrying a concealed weapon. However, the Court of Appeals reversed the respondent's conviction of breaking and entering with intent to commit larceny (a felony) and remanded to the lower court for entry of a judgment for the lesser included offense of breaking and entering without permission.

Based upon the respondent's criminal convictions in the Livingston County Circuit Court, Washtenaw County Hearing Panel #3 conducted discipline proceedings under the procedure

[1] See Grievance Administrator v Ballard, 02-19-AI; 02-25-JC (ADB 2003); lev. den. ___ Mich ___ (2003). The Board's opinion, which includes a summary of the hearing panel proceeding, may be found at www.adbmich.org.

described in MCR 9.120 and entered an order on September 17, 2002 suspending the respondent's license to practice law in Michigan for a period of 15 months. The panel's order included a requirement that any petition for reinstatement be accompanied by his affidavit concerning his continued regimen of medication and counseling. The respondent's appeal of his criminal convictions was pending before the Court of Appeals when the respondent and the Grievance Administrator filed separate petitions for review with the Attorney Discipline Board in September 2002.

The respondent petitioned for review by the Attorney Discipline Board on the grounds that the discipline imposed by the hearing panel was excessive. The Grievance Administrator filed a cross-petition for review on the grounds that the hearing panel imposed insufficient discipline. On February 21, 2003, the Board issued its order affirming the fifteen month suspension ordered by the panel. The Grievance Administrator's application for leave to appeal was denied by the Michigan Supreme Court in an order entered September 29, 2003.

The 15-month suspension ordered by the hearing panel in this case was not stayed during the review proceedings before the Board and has been in effect since March 8, 2002, the date of respondent's automatic suspension on conviction of a felony. See MCR 9.120(B)(1). The respondent has petitioned for reinstatement and a reinstatement hearing in accordance with MCR 9.124 has been scheduled.

The instant petition for vacatur of suspension is based upon MCR 9.120(C) which states:

> (C) Pardon; Conviction Reversed. On a pardon the board may, and on a reversal the board must, by order filed and served under MCR 9.118(E), vacate the suspension. The attorney's name must be returned to the roster of Michigan attorneys and counselors at law, but the administrator may nevertheless proceed against the respondent for misconduct which had led to the criminal charge.

The respondent's petition presents the Board with a case of first impression. In the only previously reported case involving the reversal of an attorney's criminal conviction, the respondent's discipline was based upon a single conviction. In that case, Grievance Administrator v Theodore Forman, 94-109-JC, the respondent attorney was disbarred in June 1994 as the result of his conviction for criminal contempt in the United States District Court for the Eastern District of Michigan. In December 1995, Forman's conviction was reversed by the Court of Appeals for the Sixth Circuit and the order of revocation was vacated by operation of MCR 9.120(C). In subsequent

criminal proceedings on remand, Forman was convicted of theft of government property less than $100. Respondent Forman and the Grievance Administrator then stipulated to a consent order of discipline for a two year suspension effective February 2000.

Unlike that case, in which the respondent's original discipline under MCR 9.120 was based upon a single conviction, the instant matter was based on the respondent's conviction of three separate criminal convictions - the misdemeanor offense of entering without breaking; the felony of carrying a concealed weapon; and the felony of breaking and entering with intent to commit larceny. In its unpublished opinion, the Court of Appeals declined to disturb the first two convictions. With regard to the conviction for breaking and entering with intent to commit larceny, the Court of Appeals found that there was no evidence, circumstantial or otherwise, that the respondent entered another attorney's office with the intent to take anything other than boxes of files which had been removed from his office by his wife/secretary earlier that day. The Court of Appeals concluded:

> Here, although defendant [Ballard] is correct that there is insufficient evidence that he had the intent to commit larceny when he entered Noe's office, defendant does not dispute that there was evidence supporting the breaking and entering without permission elements of the offense. Therefore, we remand to the trial court for entry of judgment for breaking and entering without permission, MCL 750.115, and for re-sentencing. [People v Ballard, COA No. 241583, 11/25/03, pp 5-6.]

Respondent Ballard has not asked that the Board vacate his suspension in toto. Rather, the respondent requests that the Board vacate only that portion of the suspension which is attributable to the reversed felony conviction for breaking and entering with intent to commit larceny. Specifically, the respondent seeks a reduction in discipline to a suspension of 90 days.[2]

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[2] Because the suspension previously affirmed by the Board was greater than 179 days, he is currently subject to the reinstatement requirements of MCR 9.123(B) and MCR 9.124 which include the filing of a detailed personal history affidavit; publication of a notice in the Michigan Bar Journal, the filing of a written investigative report by the Grievance Administrator; and a public hearing before a hearing panel at which the respondent will be required to present evidence as to his eligibility for reinstatement under the criteria set forth in MCR 9.123(B)(1)-(9). If discipline is now reduced to a suspension of 179 days or less, the respondent will be eligible immediately for automatic reinstatement under MCR 9.123(A).

In our February 21, 2003 opinion affirming the hearing panel's decision to impose a suspension of 15 months, we noted "[I]t is clear from the panel's report that the panel was most troubled by the fact that a lawyer would enter another lawyer's office without permission." Grievance Administrator v Ballard, supra, p 5. We emphasized in that opinion that while the Grievance Administrator had unquestionably offered conclusive proof of the respondent's commission of the enumerated criminal offenses, the hearing panel and the Board were nevertheless under an obligation to consider the respondent's actual conduct, as established in the record, in analyzing the appropriate level of discipline under the American Bar Association's Standards for Imposing Lawyer Sanctions:

> When it adopted the Standards on an interim basis, our Court explained: 'The ABA Standards will guide hearing panels and the ADB in imposing a level of discipline that takes in account the unique circumstances of the individual case, but still falls within broad constraints designed to ensure consistency.' Grievance Administrator v Lopatin, 462 Mich 235, 246; 612 NW2d 120 (2000).
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> Thus, even when the technical elements of a theft are shown, this Board and '[T]he hearing panels are not absolved of their critical responsibility to carefully inquire into the specific acts of each case merely because the Administrator initiates disciplinary proceedings by filing a judgment of conviction under MCR 9.120(B)(3).' Grievance Administrator v Deutch, 455 Mich 149, 169 (1997). [Grievance Administrator v Ballard, supra, p 4.]

The Attorney Discipline Board has now had an opportunity to review its prior decision in light of the Court of Appeal's unpublished opinion which modified one element of one of respondent's three criminal convictions. Based upon that review of the hearing panel's report and our earlier opinion, we are not persuaded that a reduction in the level of discipline is warranted or appropriate. The essential nature of the respondent's conduct in this case has never been in dispute. The respondent, who testified to the hearing panel, readily admits that he entered another attorney's office, after hours and without permission. When this Board first reviewed respondent's conduct, we questioned the assertion that the hearing panel should have undertaken a mechanistic application of the ABA Standards based upon the respondent's conviction of a crime which involved an "intent" to commit larceny when there appeared to be no evidence, at least in the record before

the panel, that respondent intended to take anything or that he actually took anything other than his own files. We noted,

> It seems relevant to us that the items which Mr. Ballard removed from Ms. Noe's office had, in fact, been removed without permission from his office earlier that day and they were his files. There is no finding in the record that he removed property belonging to anyone else. [Ballard, supra, p 5.]

In ruling on the respondent's appeal of his criminal convictions, the Court of Appeals reached essentially the same conclusion:

> A rational juror could assume that defendant believed there was chance that [his wife] had taken the boxes of files to Noe's office, and that the defendant had entered Noe's office with the intent to retrieve those files.
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> However, even if defendant entered Noe's office with the intent to retrieve the boxes of files, such intent does not constitute intent to commit larceny if the files belonged to him and he had the right to their possession. 'Larceny requires an intent to take away and carry away someone else's property without that person's consent.' [People v Ballard, COA No. 241583, p 2.]

In short, the action by the Michigan Court of Appeals in reversing the respondent's conviction for breaking and entering with intent to commit larceny and remanding to the lower court for sentencing on the lesser-included offense of breaking and entering without permission does not significantly alter the nature of respondent's conduct for purposes of determining whether the hearing panel arrived at an appropriate level of discipline consistent with a proper application of the ABA Standards.

Furthermore, the ruling by the Court of Appeals does not alter the aggravating and mitigating factors which were an important component of our previous decision. In our earlier review, we found that two mitigating factors were particularly relevant: The existence of personal or emotional problems suffered by the respondent [ABA Standard 9.32(c)] and the evidence presented to the hearing panel that the respondent suffered from a mental disability which caused the misconduct where: 1) the respondent was shown to be in recovery; 2) the misconduct had been arrested and 3) recurrence was unlikely. [ABA Standard 9.32(i)]. The Board's consideration of the hearing panel's decision to impose a suspension of 15 months was inextricably intertwined with its consideration

of the protection to the public and the legal profession provided by the accompanying conditions imposed by the panel. In its order of September 17, 2002, the hearing panel not only directed the respondent to continue his regimen of medication and counseling but specifically directed that the respondent should not be eligible to file a petition for reinstatement unless the petition was accompanied by the respondent's affidavit regarding his treatment during the period of his suspension. We are certainly not persuaded that modification or elimination of that important requirement would be appropriate simply because the Court of Appeals has downgraded one of respondent's three criminal convictions from a felony to a misdemeanor.

For all of these reasons, we decline to modify the discipline imposed by the hearing panel and we deny the respondent's petition for vacatur of suspension under MCR 9.120(C).

Board members Theodore J. St. Antoine, William P. Hampton, George H. Lennon, Billy Ben Baumann, M.D. and Lori M. Silsbury concur in this decision.

Board members Marie E. Martell, Ronald L. Steffens, Rev. Ira Combs, Jr., and Hon. Richard F. Suhrheinrich did not participate.