GRIEVANCE ADMINISTRATOR
v
FREDERICK B. GOLD,
Petitioner.

File No. DP 137/84

Argued November 8, 1985
Decided: December 23, 1985

OPINION OF THE BOARD

Petitioner stipulated to a suspension of three years and one day in 1981 after being charged with improper sexual advances to a female client and female prospective employees, making false representations in his answer to a request for investigation, and inducing a Complainant with monetary payment not to cooperate with a grievance investigation. In reinstatement proceedings testimony was taken from Petitioner and from Elliott Luby, M.D., a psychiatrist who had been appointed by the Discipline Board. Reinstatement was denied by a majority of the panel, principally due, to psychiatric evidence suggesting a continued personality disorder and the apparent need for continued psychotherapy. Certain of Petitioner's statements in evidence were also cited by the panel majority as partial basis for denying the petition.

We disagree with the hearing panel majority conclusion and will issue an Order of Eligibility for Reinstatement; a final order of reinstatement will be entered after recertification by the Board of Law Examiners and payment of costs and dues.

I.

Reinstatement is governed by MCR 9.123(B), which states in relevant part:

> (B) An attorney whose license to practice law has been revoked or suspended for more than 119 days is not eligible for reinstatement until the attorney has petitioned for reinstatement . . . and has established by clear and convincing evidence that:
>
> > (5) his or her conduct since the order of discipline has been exemplary and above reproach;
> >
> > (6) he or she has a proper understanding of and attitude toward the standards that are imposed on members of the bar and will conduct himself or herself in conformity with those standards;
> >
> > (7) he or she 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 . . .

A majority of the panel were not satisfied that these criteria had been met, although the Panel observed (as we do) that these three standards are "very subjective."

Petitioner testified that he received unspecified psychological "counseling" from 1978, the time of the misconduct, through 1981, although no report from a therapist was entered into evidence. When asked if similar misconduct might occur, Petitioner said: "Absolute guarantees don't exist . . . I believe that as a result of counseling, . . . time that I have spent contemplating what my conduct was . . . as a learning process and . . . [given] Dr. Luby's conclusions and prognosis, I think that probabilities of the conduct happening again are minute."

There was no evidence of improper conduct of any kind since Petitioner's suspension. Dr. Luby testified that he examined Petitioner on one occasion. He found no evidence of a major mental disturbance, but thought Petitioner had a "personality disorder": a mixed behavior pattern characterized by a tendency to exploit or use others for one's own purposes. Dr. Luby also noted Petitioner's "smoothness and pretentiousness of manner," but nevertheless concluded that what happened was an isolated case of misconduct, and not a manifestation of an enduring pattern.

A majority of the panel did not think Petitioner had met his burden of proof by clear and convincing evidence. Specifically mentioned in the panel report were the following points: (1) Dr. Luby's apparent equivocation in assessing Petitioner's readiness to resume practice; (2) Dr. Luby's statements that Petitioner had not been open with him during the interview; (3) Dr. Luby's suggestion of continued psychotherapy for Petitioner; (4) Petitioner's previous psychological therapy did not seem to do him much good; and (5) Petitioner's testimony that he committed the misconduct because he was "stupid and foolish," did not show a proper self-understanding end attitude.

II.

The Michigan Supreme Court has determined that a denial of reinstatement by a panel must be supported on review by a preponderance of the evidence after examination of the whole record. In <u>In re: Freedman</u>, 406 Mich 256, 277 NW2d 635, 637 (1979).

We find that there is adequate evidence that Petitioner's conduct since the order of discipline "has been exemplary and above reproach." Petitioner was apparently less than completely open during his single psychiatric interview, possibly as the result of nervousness or uneasiness given the nature of his offense. He testified that the misconduct was committed due to stupidity and foolishness; we do not find this to be an improper self-observation or one that suggests a potential for recidivism. Any weaknesses in Petitioner's testimony are overcome by the whole record. The record supports a conclusion that he, at the present time, has a "proper understanding of and the attitude toward the standards . . . imposed on members of the bar and will conduct himself . . . in conformity with those standards."

Finally, Dr. Luby's testimony that Petitioner would benefit from continued psycho therapy is not inconsistent with his expressed conclusions that Petitioner is fit to reenter practice immediately, and that the misconduct was an isolated event. While even an unchallenged expert witness may be disregarded by the trier of fact, Grievance Administrator v Prebenda, No. DP 165/80 (1981), we have no evidence of a present psychological infirmity. Petitioner, who will have been suspended for almost five years after stipulating to a suspension of three years, did carry his burden to show by clear and convincing evidence that he should be readmitted.

III.

We note, in conclusion, that the Grievance Administrator has taken the position of a neutral investigator throughout the panel and Board proceedings and has not entered a recommendation in opposition to reinstatement.

Because of the lengthy extension of the stipulated term of suspension, resulting from the reinstatement proceedings, we recommend to the Board of Law Examiners that Petitioner's recertification be expedited. Notwithstanding the gravity of Petitioner's misconduct, he has met his burden and his total period of suspension served should be considered in the continued processing of this matter. In re Ziskie, No. DP 92/82 (1983) [the Sup. Ct. reversed, denying reinstatement on other grounds.].

[Although unable to attend the review hearing, Member, Hanley Gurwin, participated in the decision of this case.]