STATE OF MICHIGAN

Attorney Discipline Board

In the Matter of the Reinstatement Petition
of David M. Dean, P 30903,

Petitioner/Appellant,

Case No. 00-194-RP

Decided: September 5, 2001

BOARD OPINION

This is a reinstatement case. The petitioner, David M. Dean, has been suspended from the practice of law in Michigan since July 18, 1997, the effective date of an order suspending his license for 30 days. Although eligible for automatic reinstatement under MCR 9.123(A), the petitioner did not file an affidavit of compliance until June 11, 2001 and that suspension remained in effect, running concurrently with suspensions ordered in subsequent proceedings to wit: a 180 day suspension effective February 20, 1998, a 180 day suspension effective August 19, 1998 and an 18 month suspension effective February 16, 1999.

In accordance with MCR 9.123(B), petitioner filed a petition for reinstatement with the Clerk of the Supreme Court on October 2, 2000.[1] Following the procedure outlined in MCR 9.124(A)-(D), the Attorney Discipline Board assigned the petition to a hearing panel in St. Clair County which conducted a public hearing on the petition for reinstatement on February 16, 2001. The hearing panel entered an order granting petition for reinstatement, with conditions, on March 30, 2001. The petitioner filed a petition for review on the grounds that the hearing panel erred in its ruling that he is subject to the recertification requirement of MCR 9.123(C). The Grievance Administrator filed a cross-petition for review on the grounds that the hearing panel erred in finding that the petitioner had established the criteria in MCR 9.123(B) by clear and convincing evidence.

On review, we affirm the hearing panel's conclusion that the petitioner is subject to the recertification requirement of MCR 9.123(C). However, we are unable to find evidentiary support in the record for the hearing panel's conclusion that petitioner has complied fully with the order(s) of discipline as required by MCR 9.123(B)(4). We therefore reverse the hearing panel's order of reinstatement.

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[1] Under MCR 9.123(A), a suspension of 179 days or less may be terminated by the filing of an affidavit. Longer suspensions are subject to MCR 9.123(B) and remain in effect until the suspended attorney has established his fitness to the satisfaction of a hearing panel, the Attorney Discipline Board or the Supreme Court following a public hearing as described in MCR 9.124.

I. Disciplinary History

Petitioner was suspended for 30 days, effective July 18, 1997, in the matter of Grievance Administrator v David M. Dean, No 97-61-GA.[2] The panel found that respondent prepared and delivered a check in the amount of $25.00 payable to a process server at a time when he knew or should have known that there were insufficient funds on deposit in his account to honor the check. Respondent also admitted that he failed to answer the request for investigation. The petitioner was directed to pay costs of $250.52 and he was ordered to comply with three probationary conditions for a period of one year:

> a. [To] successfully complete a one-year outpatient alcohol treatment program. The program may be through respondent's prior substance abuse counselor or limited licensed psychologist, Margaret Haggerty. Respondent shall be responsible for making arrangements for his treatment program and submitting them within thirty days of the effective date of this order, and prior to filing an affidavit of compliance with MCR 9.123(A) to effectuate his automatic reinstatement to the practice of law. Respondent shall follow any and all recommendations made by his counselor/psychologist, including but not limited to attendance of Alcoholics Anonymous meetings . . .
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> b. Respondent shall be subject to random alcohol urinalysis testing during the one year period, to be determined by his counselor/psychologist. The results of the testing shall be submitted to the Grievance Administrator and the Attorney Discipline Board . . .
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> c. Respondent shall file . . . monthly reports, with the Grievance Administrator and the Attorney Discipline Board, which demonstrate that he is in the program and is successfully completing the program.

Petitioner filed an affidavit of compliance under MCR 9.123(A) in that matter on January 11, 2001.

During the intervening years, Petitioner was the subject of three additional orders of suspension, each of sufficient length to trigger the reinstatement process described in MCR 9.123(B) and MCR 9.124.

In Grievance Administrator v David M. Dean, No. 96-157-GA; 96-173-FA, petitioner was

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[2]This was not petitioner's first public discipline. Petitioner was suspended for 60 days effective March 13, 1993, Grievance Administrator v David M. Dean, Nos. 92-178-GA; 92-203-FA. According to the Board's Notice of Suspension in that case, the hearing panel found, by default, that "respondent purchased cocaine, or provided funds to another person who would purchase it on his behalf; plead guilty to using cocaine; and made a false statement in his answer to the request for investigation." Petitioner's license was automatically reinstated effective May 18, 1993.

suspended for 180 days effective February 20, 1998 as the result of a hearing panel finding that he neglected his obligations to his client in a bankruptcy action and failed to either withdraw or take appropriate legal action necessary to protect the interest of his client. The hearing panel ordered a suspension of 180 days which was to remain in effect until petitioner met the reinstatement requirements of MCR 9.123(B) and MCR 9.124, and until respondent complied with all of the terms and conditions set forth in the order of suspension with conditions entered in Case No. 97-61-GA. (Grievance Administrator's exhibit 1, page 19)

In Grievance Administrator v David M. Dean, No. 98-48-GA, petitioner was charged with violating the July 18, 1997 30 day suspension by failing to notify a client of that suspension and by filing a false affidavit on August 1, 1997 which averred that he was in compliance with the notification requirements of MCR 9.119. At the disciplinary hearing in that case, petitioner admitted the misconduct. The hearing panel entered a consecutive 180 day suspension, effective August 19, 1998. Petitioner was ordered to pay $300.00 in restitution and the panel specified that the 180 day suspension would continue until he:

> Complies with all of the terms and conditions set forth in the orders of suspension with conditions entered in Case No. 97-61-GA and Case Nos. 96-157-GA; 96-173-FA. (Grievance Administrator's exhibit 1)

Finally, in the matter of Grievance Administrator v David M. Dean, No. 98-169-GA, the petitioner was suspended for 18 months, effective February 16, 1999. In that case, the hearing panel determined that the petitioner violated prior orders of suspension by holding himself out as an attorney and rendering advice to a client on or after February 20, 1998; by accepting a $250 fee from a client on February 24, 1998; and by drafting and filing pleadings on his client's behalf while his license was suspended.

II. Panel Proceedings

The petitioner filed his petition for reinstatement on September 28, 2000. At the time that he filed that petition, petitioner had not paid the costs, totaling $3,199.82, which had been assessed in three prior discipline orders and he was therefore unable to assert in the petition that he had fully complied with those orders. Instead, his petition for reinstatement stated that he had submitted a request to the Board for permission to make arrangements for the payment of those costs. His first request to make payments over an extended period was rejected. The Board subsequently approved a plan which called for an immediate payment of $1,500.00 with balance to be paid within one year. That issue having been resolved, the Board issued a notice setting a hearing on the petition for

reinstatement for February 16, 2001 before a hearing panel in Port Huron.

At that public hearing, the petitioner presented the testimony of eight witnesses who testified as to his general character and his eligibility for reinstatement: Elaine Mann, a former client and the owner of an office furniture company for whom petitioner was employed as a truck driver and office manager; Robert Reihl, a former client; Linda Zavar, a property manager for whom petitioner was employed as a leasing agent; Carl Zavar; Troy David Dean, petitioner's son; and Linda Rogstad, Clarence Cooper and Elaine Scandalito, friends or neighbors. These witnesses testified generally that they were aware of his past disciplinary and substance abuse problems but, as far as they knew, he no longer had those problems.

Petitioner testified on his own behalf and was questioned by both the Grievance Administrator's counsel and members of the hearing panel. In answer to those queries, petitioner admitted a period of cocaine use for approximately one and one-half years during a period of great personal and financial difficulties between approximately 1988 and 1991. He denied ever experiencing problems with alcohol use, however, and he stated his view as to the imposition of alcohol treatment conditions in the discipline orders:

> Mr. Dean: I was not having any [difficulties with alcohol]. Back on this case . . . I appeared before the panel. And if you look at my notes of that, it was in their conclusion, they had asked, well, would you have any difficulty – they had asked me if I ever drank, and I said yes. I mean, this was just after the holidays or something. I said, yes, I had some drinks. That was for the twenty-five dollar check that was later paid after a year or so.
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> But anyway, there was nothing to do with alcohol. But what he asked, he said, "Would you have any objection of going to AA or counseling?" And I said – I would have said anything, you know, if I thought I would get my license back. And I said no. And so they put that in there, and ever since it's just been carried along. There's never ever been any reference to me having an alcohol problem. There's never anything in my record that shows I've ever had one. (Transcript 145 - 146)

Counsel for the Grievance Administrator presented two witnesses, Patrick McGlinn, Associate Counsel, Attorney Grievance Commission and Roger Schutter, an Attorney Grievance Commission investigator. Both individuals testified unequivocally that the Attorney Grievance Commission's files and records contain no evidence that petitioner submitted to random urinalysis, that the results of such tests were submitted to the Grievance Administrator or that petitioner filed

monthly reports demonstrating his compliance with the conditions imposed in the discipline orders. (Transcript 184, 223).

At the conclusion of the hearing, the hearing panel entertained closing arguments. The petitioner argued that he had shown his compliance with the outstanding suspension orders and had otherwise established his fitness to return to the practice of law by meeting each of the criteria in MCR 9.123(B). As for his failure to abide by conditions relating to participation in AA, random urinalysis and submission of regular reports to the Attorney Grievance Commission, petitioner explained that any drug or alcohol related problems were "over" prior to the entry of the 30 day suspension, with conditions, in July 1997. Petitioner expressed his further view that while he may have told the hearing panel that he was willing to comply with the conditions, he was never actually ordered to abstain from the use of alcohol and he subsequently came to the conclusion that it would be hypocritical for him to attend AA meetings while continuing to consume alcohol on a social basis.

The Grievance Administrator's counsel pointed out in her argument that, notwithstanding petitioner's apparent conclusion that the terms and conditions relating to alcohol treatment in monitoring in three separate discipline orders were permissive rather than mandatory, the facts remained that petitioner had not petitioned for review of those conditions nor had he sought modification of those conditions. He simply decided, unilaterally, that those conditions were no longer relevant in his case.

The hearing panel requested supplemental briefs from the parties on the issue of whether or not the petitioner was subject to the recertification requirement of MCR 9.123(C). The hearing panel entered its report and order granting the petition for reinstatement on March 30, 2001. In addition to recertification by the State Board of Law Examiners under MCR 9.123(C), the panel conditioned the petitioner's reinstatement upon his obtaining malpractice insurance and his agreement to enter into a mentoring relationship with another attorney for a period of two years.

III. Discussion

In 1998, the Attorney Discipline Board issued an opinion in In re Reinstatement of Arthur R. Porter, Jr., No. 97-302-RP (ADB 1998), finding that the petitioner in that case had not established compliance with MCR 9.123(B) and that the matter should be remanded to the hearing panel for further proceedings. In that opinion, the Board re-emphasized the burden of proof placed upon a reinstatement petitioner. While professional misconduct must be established by the Grievance Administrator by a preponderance of the evidence, an attorney seeking reinstatement must establish compliance with the relevant criteria under MCR 9.123(B) under the more stringent standard of

"clear and convincing" evidence. As the Board re-emphasized in Porter, the mere passage of time does not raise a presumption that the disciplined attorney is entitled to reinstatement nor is the petitioner entitled to reinstatement if the Grievance Administrator is unable to uncover any damaging evidence. The Porter opinion, and the cases cited in it, focused on the somewhat subjective criteria in MCR 9.123(B)(5)-(7). Under those subrules, a petitioner for reinstatement must demonstrate by clear and convincing evidence that:

> (5) his or her conduct since the order of discipline has been exemplary and above reproach;
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> (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;
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> (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.

In his petition for review, the Grievance Administrator does not concede that petitioner established the criteria under those subrules, but argues that reinstatement must be denied because the petitioner did not and could not establish compliance with the somewhat more objective criteria of MCR 9.123(B)(3)(4) which require a demonstration by the petitioner that:

> (3) he or she has not practiced or attempted to practice law contrary to the requirement of his or her suspension or revocation;
> (4) he or she has complied fully with the order of discipline.

With regard to petitioner's compliance with Rule 9.123(B)(3), it could be argued that it would be unduly punitive to now deny reinstatement solely on the basis of an act of misconduct for which petitioner has been sanctioned. We need not address that issue at this time, however. Nor do we need to delve into the question of whether or not petitioner demonstrated his compliance with MCR 9.123(B)(5-7). Rather, it is the petitioner's unquestionable failure to demonstrate that he has "complied fully with the order[s] of discipline" which requires the denial of this petition for reinstatement.

On review, the Board must determine whether or not a hearing panel's findings have proper support in the whole record. In re Reinstatement of Arthur R. Porter, Jr., 97-302-RP (ADB 1998),

citing In re Reinstatement of Leonard R. Eston, 94-78-RP (ADB 1995); Grievance Administrator v August, 438 Mich 296, 304; 475 NW2d 256 (1991).

In this case, the record amply demonstrates that after July 18, 1997, the effective date of the first of three orders of suspension which included the conditions described earlier in this opinion, petitioner did not complete a one year course of treatment with a counselor or psychologist nor did he submit a treatment plan for the approval of the Grievance Administrator (T 129). Petitioner conceded that he did not complete treatment with Ralph Ceglarek, who sent a letter on November 11, 1997 that petitioner was not in compliance with the course of treatment (Administrator's Investigative Report, p 91, 137). That letter stated that petitioner had not successfully completed treatment, had sporadically attended treatment, had failed to produce a prescription for Antibuse, and had not submitted to drug testing (Administrator's Investigative Report, p 137).

Petitioner did not make himself available for urinalysis nor were the results of any urinalysis filed with the Grievance Administrator or the Discipline Board (T 129). Petitioner did not file monthly reports with the Grievance Administrator or the Discipline Board showing that he was in and successfully completing the program (T 130). Petitioner presented no rebuttal to the testimony of Attorney Grievance Commission Associate Counsel McGlinn or investigator Roger Schutter that he had failed to comply with the conditions set forth in those orders. Mr. Schutter testified to the panel that he had contact with petitioner in May 1998 regarding those conditions:

> Patrick McGlinn, the staff counsel, had asked me to make contact with him and explain and make sure that he was cognizant of the fact that we needed to be able to monitor him and to be able to know that he was complying with the order. So in response to that, I contacted him by phone on this date. He said that he understood that our office need to monitor [his] ongoing therapy/counseling as per the directive imposed by the above-mentioned discipline, which there were two disciplinary orders out at the time. He said he agreed to provide to our office sign-in sheets that would indicate his attendance at meetings, that being the AA meetings which were ordered by the order. Respondent stated that - he stated the record keeping is very informal, that all present at a meeting simply sign a log-in sheet. He said he agreed to provide all the sign-in sheets from the time that he began to attend AA until the present. He said he'd need about a week to compile those. (T 219-220)

As the record demonstrates, petitioner failed to provide the AA sheets. Investigator Schutter contacted petitioner on July 9, 1998, and he again promised to provide the proofs. Petitioner never told Investigator Schutter that he felt he did not have to comply with the conditions. Investigator Schutter verified that Petitioner never filed any results of random urinalysis or monthly reports.

In the face of this evidence, it is apparently petitioner's position now that the conditions in question were permissive not mandatory. Petitioner has failed to provide any legal or factual support

for that assertion.

In short, the petitioner was ordered to comply with certain conditions in a suspension order which became effective July 18, 1997. Those conditions were incorporated in two subsequent suspension orders which are the subject of this reinstatement proceeding. The record below is bereft of evidence that the petitioner complied with those conditions or that his compliance was excused. The petitioner has failed to establish the requirement of MCR 9.123(B)(4) that he demonstrate by clear and convincing evidence that he has complied fully with the orders of discipline.

IV. Applicability of MCR 9.123(C)

Michigan Court Rule 9.123(C) directs:

> (C) **Reinstatement After Three Years.** An attorney who, as a result of disciplinary proceedings , resigns, is disbarred, or is suspended for any period of time, and who does not practice law for 3 years or more, whether as the result of the period of discipline or voluntarily, must be recertified by the Board of Law Examiners before the attorney may be reinstated to the practice of law.

The petitioner concedes that he was suspended from the practice of law commencing July 18, 1997, the effective date of a 30 day suspension imposed in Grievance Administrator v David M. Dean, ADB 97-61-GA. The record is clear, and the petitioner also concedes, that his affidavit of compliance in accordance with MCR 9.123(A) was not filed in that case until January 11, 2001. It is also beyond dispute that the petitioner's license to practice law could not have been restored automatically with the filing of that affidavit in January 2001 because, by then, the petitioner was subject to the three additional suspensions of 180 days or more which are the subject of this reinstatement proceeding.

On its face, the recertification requirement mandated by MCR 9.123(C) is applicable in this case. The petitioner was suspended in July 1997, and he has not practiced law for three years or more. Under the terms of that rule it is irrelevant that there was a period of time between approximately August 19, 1997 and February 20, 1998 when he could have terminated the 30 day suspension by filing an affidavit of compliance.

Petitioner cannot seriously be arguing that he should escape the recertification requirement because he did, in fact, practice law in February 1998, albeit in direct violation of a suspension order. MCR 9.102(A) directs that subchapter 9.100 is to be "liberally construed" for the protection of the public, the courts and the legal profession. We must construe MCR 9.123(C) to refer only to the authorized practice of law during the period of three years or more following a suspension or disbarment. A construction of that rule which would allow an attorney to avoid recertification by

practicing law in violation of a discipline order would be repugnant.

The petitioner further argues that the panel erred in its rejection of petitioner's argument that the affidavit which he filed with the clerk of the Supreme Court on January 11, 2001 under MCR 9.123(A) should have deemed to be *nunc pro tunc* and given retroactive effect to August 18, 1997. The consent order cited by respondent in Grievance Administrator v Stephen M. Adams, 98-190-JC (HP 1999), involved unique circumstances which are not present here. The petitioner's argument that his affidavit should be given retroactive effect to a date more than three years prior to its actual entry is not persuasive.

Finally, we note that MCR 9.123(C), effective March 1, 1985, adopted the language of the predecessor rule, GCR 1963, 972.3. The current language is the result of an amendment to the prior rule which became effective April 22, 1983. The cases cited by petitioner[3] were decided prior to 1983 and are not applicable in light of that amendment.

CONCLUSION

For the foregoing reasons, the hearing panel's order granting the petition for reinstatement is vacated and the petition for reinstatement is denied. Petitioner's eligibility to file a new petition is subject to MCR 9.123(D)(4). The petitioner's eligibility for reinstatement in this or any future proceeding is subject to the recertification requirement of MCR 9.123(C).

Board members Wallace D. Riley, Theodore J. St. Antoine, Grant J. Gruel, Ronald L. Steffens, Marsha M. Madigan, M.D., and Marie E. Martell concur in this decision.

Members Diether H. Haenicke, Michael R. Kramer, and Nancy Wonch did not participate.

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[3] State Bar Grievance Administrator v Theodore Albert, No. 34422-A (1979); In the Matter of Arthur R. Reibel, No. DP-141/80 (1981); Schwartz v Goldbert, No. DP-2/80 (1981).