Grievance Administrator,

Petitioner/Appellant,

v

Arthur C. Kirkland, Jr., P 27551

Respondent/Appellee.

98-236-GA

Decided: June 8, 1999

BOARD OPINION

The Grievance Administrator petitioned for review of a hearing panel order reprimanding respondent for his admitted failure to answer a request for investigation. Based upon our review of the whole record, the aggravating and mitigating circumstances presented and respondent's apparent continued indifference to the nature and consequences of these proceedings, we conclude that a suspension of respondent's license for 30 days is warranted.

PANEL PROCEEDINGS

The formal complaint in this matter is based solely upon respondent's failure to answer a request for investigation (hereafter referred to as the "RI") served on him by regular mail on January 15, 1998. When respondent failed to answer that request within 21 days as required by MCR 9.113(A), the Grievance Administrator served a copy of the RI by certified mail on February 11, 1998 accompanied by a final notice which advised him that his failure to answer by February 21, 1998 would subject him to formal charges. When the Grievance Administrator received further information from the complainant, an additional letter was sent to respondent giving him until March 1, 1998 to address the additional allegations.

Respondent had failed to answer either the RI or the additional inquiry when he appeared personally at the office of the Attorney Grievance Commission on October 1, 1998. He was provided a copy of the RI and he promised to file an answer. Respondent had not filed an answer when this complaint was filed on December 2, 1998, almost 11 months after service of the original RI.

Respondent did file an answer to the formal complaint which admitted the essential charges and he appeared before the panel at a hearing in January 1999. Respondent testified, in mitigation, that he was moving his office when the initial RI was mailed, that he was involved in a bankruptcy case at about the same time, that between May and September 1998 he spent a substantial amount

of time tending to his ailing father in South Carolina and that his law practice was virtually destroyed during that period. By way of aggravation, the Administrator's counsel elicited in cross-examination that respondent had been suspended for 119 days in 1990 and was not entirely unfamiliar with the grievance process and that at no time from January to December 1998 had respondent taken the time to advise the Attorney Grievance Commission of his personal or professional difficulties or request an extension. These factors, both aggravating and mitigating, were cited in the written report which accompanied the hearing panel's order of reprimand. The panel further directed that respondent complete a course in legal ethics or professional responsibility offered by a law school, the Institute for Continuing Legal Education (ICLE) or the State Bar of Michigan within nine months and that he file written proof of his completion of such a course.

REVIEW PROCEEDINGS

The Administrator petitioned for review on the grounds that the hearing panel erred and abused its discretion in failing to impose a 30-day suspension in this case. In accordance with the procedure outlined in MCR 9.118(B), the Board issued an order to show cause on March 5, 1999 (1) which directed the parties to appear before the Board on April 15, 1999 at 9:30 a.m.; (2) ordered the party seeking review to file a supporting brief no later than March 22, 1999; and (3) directed that a party wishing to file a responsive brief should do so no later than April 5, 1999. The Administrator's subsequent motion to modify the order to show cause was granted. On March 17, 1999, notice was mailed to the parties that the review hearing before the Board had been adjourned to Thursday, May 20, 1999 at 9:30 a.m. and that the briefing scheduled had been modified. This notice was mailed to respondent by certified mail and he signed the return receipt March 18, 1999. The Grievance Administrator's brief in support of the request for increased discipline was filed April 6, 1999. Respondent did not file a reply brief.

When respondent had not appeared at the Board offices by approximately 9:45 a.m. on May 20, 1999, a Board employee was instructed to telephone respondent. He returned the call before 10:00 a.m., implying that he had either forgotten or failed to record the notice of hearing but that he could be at the Board's offices in 45 minutes to an hour. (Respondent's registered address is within the City of Detroit. The Board's offices are in downtown Detroit.) Respondent failed to appear when the review hearing was called more than an hour after that telephone conversation and more than one and one-half hours after the time listed in the order to show cause. By the time respondent arrived at the Board's office at approximately 11:30 a.m., the review hearing had been concluded.

STANDARD OF REVIEW

In the petition for review and supporting brief, the Administrator urges a finding that the hearing panel in this case abused its discretion by failing to impose a 30-day suspension for respondent's failure to answer a request for investigation. We must acknowledge that the Board itself has occasionally been careless in its use of the term "abuse of discretion" with regard to its review of hearing panel's decisions, implying by its use of that phrase that "abuse of discretion" is the standard of review employed by the Board in its review of hearing panel decisions. It is not.

That issue was decided by our Supreme Court in 1981 in Matter of Daggs, 411 Mich 304; 307 NW2d 66 (1981). In that case, the Court affirmed an abuse of discretion standard for its review of Attorney Discipline Board decisions and concluded that the Board acted properly in reducing the suspension imposed by a hearing panel from two years to one year. However, with regard to the Board's review of a panel's decision, the Court said:

> Finally, the administrator challenges the standard of review employed by the board. The administrator contends that abuse of discretion should be the appropriate standard and that the consequence of the existing standard is exemplified by the instant case where the board substituted its judgment for that of the panel.
>
> While not inconsistent with the powers granted in GCR 1963, 967.4 [now MCR 9.118(D)], an abuse of discretion standard would operate to prevent the board from effectively carrying its overview function of continuity and consistency in discipline imposed. [State Bar Grievance Administrator v Williams, supra, p 15, 228 NW2d 222.] Hearing panels meet infrequently and are exposed to a relatively small number of discipline situations. The board suffers from no such disadvantage. [Matter of Daggs, supra, 307 NW2d at p 71]

Rather, in discussing its discretion to modify a hearing panel's decision to impose a certain level of discipline, the Board has said:

> Where the ultimate issue to be reviewed is the appropriate sanction, the Board's review is not limited to the question of whether there is proper evidentiary support for the panel's findings. In exercising its overview function on questions of discipline, the Board has a greater degree of discretion with regard to the ultimate result. [Grievance Administrator v Eric S. Handy, 95-51-GA; 95-89-GA (ADB 1996), citing Grievance Administrator v August, 438 Mich 296, 304; 475 NW2d 256 (1991).]

LEVEL OF DISCIPLINE

Under MCR 9.118(D), the Board may, after the hearing on an order to show cause, "affirm, amend, reverse or nullify the order of the hearing panel in whole or in part or order other discipline." We exercise that authority in this case by increasing discipline from a reprimand with conditions to a suspension of 30 days. We retain the condition imposed by the panel regarding completion of a course in legal ethics or professional responsibility. However, recognizing the difficulty in

identifying available courses through ICLE or the State Bar, we add as an alternative condition that respondent take and pass the Multi-state Professional Responsibility examination. We further modify this condition by directing that the respondent complete the course in legal ethics or pass the Multi-state Professional Responsibility exam within one year of the effective date of this order.

In reaching this decision, we note that this case illustrates the difficulties which would be presented if our review of a panel-imposed sanction was conducted under a strict abuse of discretion standard. In fact, the panel's decision to impose a reprimand with conditions in this case was clearly not an abuse of discretion as that term has been defined in our state's jurisprudence.[1]

The Board's "overview function" which allows it to order other discipline is to be exercised after the hearing on the order to show cause. See MCR 9.118(D). The fact that a show cause hearing under MCR 9.118(C)(1) is a significant stage of these proceedings is underscored by the requirement in that sub-rule that "The respondent shall appear personally at the review hearing unless excused by the board. Failure to appear may result in denial of any relief sought by the respondent, or any other action allowable under MCR 9.118(D)." (emphasis added)

While we agree with the hearing panel's observation that respondent's prior discipline 1990 is somewhat remote in time and carries little weight as an aggravating factor in and of itself, the Administrator's point is also well taken that respondent's prior experience as a respondent undercuts his claims that he was unfamiliar with the investigative process and that he mistakenly believed that he could not file an answer to the RI until he was able to submit an exhaustive, detailed response.

We are more concerned, however, by respondent's seemingly indifferent attitude toward these proceedings. We are not sure what respondent's problem is. By not participating in the review process, either by filing a responsive brief or by appearing in person at the appointed time of the hearing, respondent not only failed to avail himself of the opportunity to provide information to the Board but actually heightened our concern. We consider an attorney's unexplained, unexcused failure to make a timely appearance, either personally or by counsel, at a show cause hearing conducted under MCR 9.118 to be an additional aggravating factor which may be considered by the Board in its assessment of an appropriate sanction. Regrettably, respondent's pattern of conduct throughout this proceeding suggests to us that a reprimand is insufficient and that the next level of discipline, a 30-day suspension, is warranted.

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[1] A commonly cited explanation of the abuse of discretion standard appears in Spalding v Spalding, 355 Mich 382 (1959):

> The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an "abuse" in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. [Spalding, supra, 384-385]

Board Members Elizabeth N. Baker, C. H. Dudley, Albert L. Holtz, Michael R. Kramer, Roger E. Winkelman and Nancy A. Wonch concur in this decision.

Board Members Barbara B. Gattorn, Grant J. Gruel and Kenneth L. Lewis did not participate in this decision.