Grievance Administrator,

Petitioner/Appellee,

v

Gregory A. Bishop, P 23301,

Respondent/Appellant.

95-142-GA

Decided: September 10, 1998

BOARD OPINION

Tri-County Hearing #31 found that respondent falsely represented to his client that he had instituted an action to quiet title and otherwise failed to seek his client's legal objectives. The respondent admitted that he failed to answer the request for investigation as alleged in count 3, but asserted that he was unable to answer as the result of a psychiatric disability. In its report on discipline, the panel noted the mitigating effect of respondent's medical condition, his efforts to obtain treatment for that condition, his prior unblemished record and the lack of financial harm to the complainant. The panel ordered that respondent should be suspended for 120 days with the condition that his affidavit for automatic reinstatement under MCR 9.123(A) must be accompanied by a medical affidavit from a physician. Respondent petitioned for review. We affirm the suspension ordered by the panel but vacate the requirement for the filing of a medical affidavit.

The Panel's Findings of Misconduct

Respondent concedes that the testimony of respondent and the complainant were diametrically opposed on several important issues and that the panel resolved those disputed findings of fact against respondent. Respondent argues, however, that the hearing panel's report was fatally deficient because the panel failed to make

specific findings of fact or to comment specifically on the credibility of individual witnesses.

The standard of review to be observed by the Board is whether, upon the whole record, there is proper evidentiary support for the findings of the panel. Grievance Administrator v August, 438 Mich 296, 304 (1991); State Bar Grievance Administrator v DelRio, 407 Mich 336, 349 (1979). It is true that detailed findings of fact and discussions of credibility are of great assistance to a reviewing tribunal. However, it is the Board's responsibility to undertake a careful review of the whole record in every case involving a challenge to the panel's findings, no matter how detailed or conclusory those findings are. The absence of detailed findings do not necessarily invalidate a panel's ultimate findings and conclusions on the charges of misconduct.

In this case, it is abundantly clear that there is evidentiary support for the panel's findings of misconduct as to counts 1 and 2. In particular, the testimony of complainant Cooper Ferguson was consistent and credible. Mr. Ferguson testified, among other things, that he directed respondent to proceed with filing the quiet title action and that respondent agreed to do so (Tr. Vol. 1, p. 22); that respondent told him in the fall of 1992 that he had filed an action to quiet title (Tr. Vol. 1, pp. 31-32, 61, 69-70, 77); that in response to an inquiry regarding the status of the case in February 1993, respondent replied "there was a long wait in Wayne County Circuit. . .they're just backed". (Tr. Vol. 1, pp. 29, 71; and that respondent first admitted to his client in May 1994 that "he had not started the case". (Tr. Vol. 1, pp. 35-36).

Count 3 of the complaint charged that respondent failed to answer a request for investigation served on him by mail on October 7, 1994 despite an additional demand ("final notice") served by certified mail on November 19, 1994. In his answer to the complaint, respondent admitted his failure to answer the request for investigation but asserted as an affirmative defense that he was suffering from acute depression and was therefore

"psychiatrically disabled." At the hearing on April 7, 1997, the panel considered the respondent's argument that his failure to answer the request for investigation could not constitute actionable misconduct if it were established that respondent was suffering from a mental illness which prevented him from responding. Following that hearing, the panel requested and received briefs from the parties on this issue. In its report, the panel adopted the Grievance Administrator's legal argument set forth in his memorandum of law. However, the panel also stated:

> Further, irrespective of petitioner's legal position referenced above, this panel finds that respondent failed to prove by a preponderance of the evidence that he suffered a mental incapacity during the period of time permitted to respond to the request for investigation. (HP Report on Misconduct, 11/10/97, p. 5).

We decline to reverse the panel's ruling that respondent failed to establish a sufficient causal connection between his alleged depression and his admitted failure to answer the request for investigation. We cannot say that Dr. Goss' testimony was necessarily persuasive, let alone conclusive, on this point. Furthermore, we cannot accept the argument that the panel was required to rule in respondent's favor on this issue in the absence of rebuttal testimony.

The Level of Discipline

The hearing panel ordered that respondent should be suspended for 120 days with an additional requirement that his affidavit in support of automatic reinstatement required by MRC 9.123(A) should be accompanied by a medical affidavit from a physician stating that respondent has followed his physician's treatment recommendations concerning his depression and has not suffered a relapse. We have reviewed the discipline imposed by the panel in light of respondent's claim that the hearing panel failed to consider the substantially mitigating effect of respondent's psychological

condition, the absence of prior discipline and the weight of the evidence of misconduct.

First, the hearing panel properly recognized the serious nature of respondent's misconduct. In its report on discipline, the panel stated:

> In particular, we hold that the numerous misrepresentations made to Mr. Ferguson by the respondent about the status of Mr. Ferguson's law suit and his failure to file the quiet title action require a suspension of some length. We believe that the 120-day suspension we have ordered represents an appropriate balance of the aggravating and mitigating factors relevant to this matter. In this regard, we note that even if Mr. Bishop's medical condition did not exist, we would impose a suspension of less than 180 days. (HP Report on Discipline, 4/13/98, p. 3).

The panel specifically drew attention to its decision not to impose a suspension of 180 days, the level of discipline which triggers the reinstatement process described in MCR 9.123(B) and MCR 9.124. However, the panel's reference to a 180-day suspension may also be read as an indirect reference to the benchmark level of discipline which has been considered by the Board where deliberate misrepresentations to a client are not accompanied by substantial mitigation. In cases such as Grievance Administrator v Ann Beisch, DP 122/85 (1988), for example, the Board has ruled that an attorney's deliberate misrepresentations to a client can be expected to warrant a suspension of sufficient length to require reinstatement. In this case, the panel appears to have given substantial weight to those factors which it considered in mitigation.

Furthermore, Respondent's argument that the hearing panel failed to consider certain mitigating factor is belied by the plain language of the panel's report. Respondent argues, for example, that the hearing panel "apparently neither considered nor employed" respondent's mental illness as a mitigating circumstance. It is difficult to see how the panel could have been more direct on this issue in its report on discipline:

> Indeed, it is undisputed from the evidence in this record that respondent is currently undergoing medical treatment and has been for some time. We believe that respondent's medical condition, and his efforts to obtain treatment for it, are mitigating factors which we have considered in determining the appropriate discipline. (HP Report on Discipline, p. 3).

Similarly, the panel stated clearly in its report that it had considered the mitigating effect of respondent's lack of prior discipline. With regard to respondent's claim that the Grievance Administrator improperly attempted to introduce evidence of certain confidential admonishments, the record discloses that it was respondent who testified that he had two prior admonishments in response to a question from the panel chairperson and that it was the Grievance Administrator's counsel who immediately interjected that respondent had no prior discipline (including admonishments) as far as her office was concerned. (Tr. Vol. III, pp. 42-43).

Finally, we have considered and reject respondent's argument that the panel failed to give substantial mitigating weight to the fact that there was "substantially conflicting evidence of misconduct or the lack thereof". As we have already noted, the record amply supports the panel's conclusion that the charges of professional misconduct were established by a preponderance of the evidence. Once that conclusion was reached, the panel undertook the separate and distinct task of determining the appropriate level of discipline in light of the nature of the misconduct and all of the aggravating and mitigating factors which appear in the record.

For all of the reasons discussed above, we believe that the hearing panel discharged its duty appropriately and we decline to modify the suspension ordered by the panel. We do, however, modify the order of discipline by vacating the requirement that respondent obtain and file a separate medical affidavit as a condition of reinstatement. The issue of respondent's mental incapacity to engage in the practice of law (as opposed to the separate question of whether a mental illness constituted a defense to his failure to answer a request for investigation in 1994) was raised in Count 4

of the Grievance Administrator's amended complaint. That issue was withdrawn by the Grievance Administrator following review of the independent evaluation submitted by the physician appointed by the Board.

Board Members Elizabeth N. Baker, C. H. Dudley, Barbara B. Gattorn, Grant J. Gruel, Albert L. Holtz, Michael R. Kramer, Kenneth L. Lewis, Nancy A. Wonch.

Board Member Roger E. Winkelman did not participate in this decision.