Grievance Administrator,

Petitioner/Appellant,

v

Paul A. Van Assche, P 39116,

Respondent/Appellee.

97-30-GA; 97-49-FA

Decided: November 6, 1998
Corrected: November 12, 1998

MEMORANDUM OPINION

The Grievance Administrator petitioned for review of a hearing panel order granting reconsideration and dismissing this formal complaint. Respondent was arrested in May 1995 in the State of Florida for operating a motor vehicle while under the influence of intoxicating liquor (OUIL). He was convicted of that offense in July 1996. The Grievance Administrator filed a complaint in accordance with MCR 9.115(B) in February 1997. The complaint alleged that respondent's OUIL conviction in Florida violated certain Michigan rules, including MRPC 8.4(b). The complaint did not allege a violation of MCR 9.104(5)[1] and was not based upon the filing of a judgment of conviction under MCR 9.120(B)(3). The panel concluded that respondent's 1996 OUIL conviction in Florida did not constitute professional misconduct under any of the court rules or rules of professional conduct charged in the formal complaint, including MRPC 8.4(b) which maintains that it is professional misconduct for a lawyer to engage in conduct in violation of the criminal law "where such conduct reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer."

With regard to the charge in the complaint that this was respondent's third alcohol related driving conviction, the panel reported:

> Although the formal complaint charges, in

[1] The differences in scope and intent between MCR 9.104 and MRPC 8.4(b) are discussed in the opinion by Justice Weaver, joined by Justices Brickley and Riley, in Grievance Administrator v Deutch, 455 Mich 149, 163-166 (1997).

> paragraph 6, that respondent's OUIL conviction in Florida was his third alcohol related driving conviction, no evidence in support of this allegation was offered to the panel during the misconduct phase of the proceeding and the hearing panel moved to the discipline phase without objection by either party. During the discipline phase, the Administrator's counsel did elicit the following information:
>
> Q. Mr. Van Assche just briefly [I] would like to ask a question regarding a prior misdemeanor in 1987 of attempted OUIL in St. Clair Shores. Do you recall that fact.
>
> A. Yes.
>
> Q. That's true?
>
> A. That's true.
>
> Mr. Campbell: Thank you, I have no further questions for this witness.
>
> Even if we find that the evidence established that respondent was convicted of two alcohol related driving offenses in a nine-year period, (not three as alleged in the complaint), we reiterate the findings in our original report that we have been presented with no evidence that the respondent's use or abuse of alcohol has affected his practice of law or his ability to render services to clients. Nor have we been presented with any evidence suggesting that the sentence imposed in Florida in July 1996 (fine, costs, probation, AA, no use of alcohol and community service) is insufficient to protect the public, the courts and the legal profession or the interests of society in general. [HP Report 2/6/98, pp 5 and 6.]

The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118. This included the Board's review of the record before the panel, consideration of the briefs submitted by the parties and oral arguments conducted before the Board. MCR 9.118(C)(2) authorizes the Board to refer a case to a hearing panel

or a master if the Board believes that additional testimony should be taken. We exercise that authority in this case because of the following concerns.

As noted in the excerpt from the panel report cited above, the panel was presented with information regarding respondent's OUIL conviction in Florida in 1996 and his acknowledged 1987 conviction of "attempted OUIL" in St. Clair Shores, Michigan. There was no mention in the record of any other alcohol related offenses. Nevertheless, the Grievance Administrator's petition for review is grounded upon the assertion that "The panel erred in their determination that a third drunk driving incident was not a violation of MCR 9.104 (1)-(4) and MRPC 8.4(a)-(c)." (GA Brief 4/21/98 p 7, emphasis added.)

At the review hearing conducted before the Board on May 21, 1998, the Grievance Administrator's counsel was unable to cite any reference in the record to a third alcohol related driving offense. Counsel pointed out, however, that the formal complaint alleged in Count Six that this was respondent's third alcohol driving conviction and that respondent had admitted the first six paragraphs of the complaint.

At a later point in the review hearing before the Board, respondent shed further light on this question:

> For 12 years of practice, I think the record does speak for itself. Yes, I was convicted of two DUILs and one attempt. I do not deny that. Mr. Campbell tried to, this morning, make issue of the three convictions for drinking and driving. Yet in the transcript he was referring to, in his brief, he says, "And he was also previously convicted of two drinking and driving offenses." Panel Transcript 14, 15 and 17. And that's on page ten of his brief.
>
> Yes, there was a third drinking related offense attempt. I believe that was even admitted to on the record before the panel. There was no attempt on my part to conceal any of that. The panel asked regarding the convictions; two of them that were for straight DUIL convictions were while I was on

> vacation; one in the State of Florida, one in the State of Maine.
>
> I have not practiced in either state. I have not maintained an office. I've not maintained an office in neither [sic] state. Yes, I did use some very poor judgment. Yes, I should have not been behind the wheel drinking and driving. However, I was on vacation both times. And people, when they go on vacation, often do engage in drinking. Unfortunately, you should not be engaged with driving. I've learned a lesson the very hard way. [Tr 5/21/98, pp 23-24.]

Acting upon the evidence in the record before it, the panel concluded that two alcohol related driving offenses in a nine-year period did not necessarily constitute evidence that respondent's use or abuse of alcohol affected his practice of law or his ability to render services to clients. We do not disagree with that conclusion. However, we do not believe that we can overlook the unanswered questions raised by respondent's admission that he was also convicted of an alcohol related driving offense in the State of Maine.

There is currently nothing in the record which sheds any light on the circumstances surrounding the offense in Maine. For that matter, there is scant evidence regarding the circumstances surrounding respondent's arrests in Michigan and Florida. At the very least, the record in this case should be supplemented to include the date of respondent's alcohol related driving offense in Maine. Was that event widely separated in time from the other two arrests? Was respondent arrested in Maine at a time when he was subject to probation in either Michigan or Florida? Conversely, did the incident in Maine result in probationary conditions and, if so, did respondent comply with them?

Our concern in this regard is magnified by respondent's disclosure in his testimony to the hearing panel that one of the conditions imposed as a result of the Florida conviction was a 30-day inpatient program. (Although it is not entirely clear, it appears from the record that respondent had not yet complied with that condition when he appeared before the hearing panel in August

1997.) There is currently nothing in the record which assists us in evaluating the circumstances which prompted that requirement.

In a recent opinion affirming the entry of an order imposing "no discipline" for an attorney's conviction of the offense of impaired driving, the Board stated, "We can easily envision many cases in which the circumstances leading up to or surrounding an alcohol related driving conviction may establish that professional discipline is necessary or even useful to the protection of the public, the courts or the profession." Grievance Administrator v Deutch, 94-44-JC (ADB 1998).

Without further information in the record concerning respondent's OUIL conviction in Maine and the circumstances leading to the inpatient treatment requirement imposed in the State of Florida, we are unable to complete our review in this case. We therefore remand this matter to a master, pursuant to MCR 9.118(C)(2), to take additional testimony and make a supplemental report to the Board. In addition to the specific information referred to in this opinion, the master may consider relevant evidence from either party which bears upon the issue of whether or not respondent's OUIL conviction in Florida in July 1996 constitutes a violation of those provisions of the Michigan Court Rules and Michigan Rules of Professional Conduct charged in the formal complaint.