In the Matter of the
Reinstatement Petition of:

Petitioner, N. C. Deday La Rene, P 16420,

Appellee,

v

Grievance Administrator,

Appellant.

96-286-RP

Decided: February 11, 1998

BOARD OPINION

This is a reinstatement matter. Petitioner was suspended for thirty-three months following his conviction of a federal felony. The Grievance Administrator has petitioned for review of the hearing panel's decision to grant reinstatement. Citing In re Reinstatement of Callanan, 440 Mich 1207 (1992) and In re Mc Whorter, 449 Mich 130 (1995), the Administrator argues that petitioner was required, as a matter of law, to wait an additional period of time outside the supervision of federal parole authorities, beyond the term of suspension, before he could be eligible for reinstatement. We conclude that Mc Whorter does not establish a per se rule that an attorney whose license has been suspended for a fixed term following a criminal conviction must necessarily spend time outside the supervision of parole authorities in order to meet the requirements of MCR 9.123(B)(6) and (7). The hearing panel in this case appropriately exercised its judgment that respondent had satisfied all of the applicable criteria of MCR 9.123(B) by clear and convincing evidence. We affirm the hearing panel's decision.

Petitioner N. C. Deday La Rene was automatically suspended from the practice of law in Michigan on May 4, 1994, the date of his conviction by guilty plea in the United States District Court for the Eastern District of Michigan on charges of conspiracy and

income tax evasion. The Grievance Administrator instituted show cause proceedings under MCR 9.120 on May 9, 1994. On August 17, 1994, the hearing panel issued its order suspending petitioner for thirty-three months effective May 4, 1994. Grievance Administrator v La Rene, 94-82-JC. The Grievance Administrator petitioned for review. In review proceedings before the Board, the Administrator argued that petitioner's offense warranted revocation of his license to practice law but that in no event should petitioner be eligible to petition for reinstatement earlier than July 5, 1997, the date which would mark the end of his sentence to one year imprisonment followed by two years probation. On August 24, 1995, the Board issued its opinion affirming petitioner's thirty-three month suspension. Addressing the argument that petitioner should not be eligible to file a petition for reinstatement prior to the expiration of his probation, the Board said:

> We are mindful of the Supreme Court's recent decision in Matter of the Reinstatement of Robert A. Mc Whorter, 449 Mich 130 (1995) in which the Court ruled that a disbarred attorney seeking reinstatement could not petition for reinstatement until five years had elapsed from the end of his federal parole. Mc Whorter does not establish a rule that every criminal conviction resulting in "supervision," including probation, must also result in a suspension of the individual's license to practice law for a period at least equal to the period of probation. [Grievance Administrator v N. C. Deday La Rene, 94-82-JC (ADB 1995), p 8 (emphasis in original).]

The Grievance Administrator's application for leave to appeal was denied by the Supreme Court. Grievance Administrator v La Rene, 452 Mich 1202 (1996).

Petitioner filed this petition for reinstatement on December 12, 1996 in accordance with MCR 9.123(D)(1) which allows the filing of a petition for reinstatement up to fifty-six days before a term of suspension has fully elapsed. At the conclusion of the public hearing conducted on March 14, 1997, the hearing panel announced its intention to grant the petition subject to the issuance of a written opinion and final report as required by MCR 9.124(D). The

panel issued an interim order of reinstatement on March 27, 1997. Upon his compliance with the terms of the interim order, petitioner's license to practice was reinstated effective April 1, 1997. The hearing panel issued its opinion and order granting petition for reinstatement on September 22, 1997. The Grievance Administrator filed a timely petition for review.

At the reinstatement hearing counsel for the Grievance Administrator argued that even if petitioner otherwise established all of the objective and subjective criteria of MCR 9.123(B) by clear and convincing evidence, the hearing panel was powerless, as a matter of law, to grant reinstatement until an unspecified period of time had elapsed following the termination of petitioner's federal probation.

> MEMBER BURDICK: Aren't you saying that you agree generally that--and I made some notes that you don't challenge his professional skills or the fact that he's learned from his mistakes, or the fact that he understands--
>
> MR. EDICK: Right. Well, just so it's clear, I don't want to be understood as stipulating, because I think it would be inappropriate. It would certainly be stepping on this panel's toes to say I stipulate that there's been clear and convincing evidence.
>
> I'm in the position of saying that I have no evidence to contradict his showing in that area, number one. Number two, and my position is, though, that in addition to that showing that has been made, that because of the fact that there's this active supervision, that there has to be some additional record made that would include post-supervision conduct. And without that, that as a matter of law this panel could not find by clear and convincing evidence elements six and seven of 9.123(B); that there has to be--what that period is, I've indicated my opinion, nine to 12 months. [Transcript of 3/14/97 Hearing Panel proceedings ("Tr") pp 106-107.]

As the above passage suggests, it was the Grievance Administrator's position at the panel level that, notwithstanding the expiration of the period of suspension ordered by the Board, a minimum of an additional nine to twelve months after the end of

petitioner's term of federal probation must elapse before he could be considered for reinstatement (Tr 99-101, 106-107). At the same time, counsel acknowledged that no specific period outside of supervision could be applied in all cases.

Petitioner testified that he was sentenced to one year in prison for the conspiracy count and that he was actually incarcerated at a federal prison camp for seven months. That was followed by two months in a half-way house with the remainder of the sentence waived for good behavior, (Tr p 30-31). On the second count, non-reporting of income, petitioner was sentenced to two years probation. Petitioner testified that he could be characterized as a "relatively low maintenance probationary" subject to a requirement that he submit a written report every month with information about his financial status, address, whether or not he had contact with persons with criminal records and other basic information, (Tr p 33). He testified that the term of probation was scheduled to end April 19, 1997.

The Administrator's request for a reading of Mc Whorter and Callanan requiring a per se "out of supervision" period was rejected by the panel:

> It is clear from the evidence presented (as well as the lack of evidence to the contrary from the Administrator) that there has never been an allegation made against Petitioner of corruption of the judicial system, as there had been in the Callanan or August cases, cited in arguments by the Administrator, or of participation in conduct inherently dangerous to the safety and welfare of the public, such n [sic] drug manufacturing, drug dealing, kidnapping and extortion, as in the Mc Whorter case.
>
> Similarly, Mc Whorter, Callanan and August were all revocation cases, where this is a case in which a specifically defined suspension was imposed.
>
> The Administrator's sole argument is that the Mc Whorter case mandates that, not only in cases of revocation (which Mc Whorter was), but also in cases of suspension, there must be a certain period of time during which an individual petitioning for reinstatement of

> licensure will not have been under any type of supervision for that individual to be considered eligible to show that he meets the standard of the Court Rule regarding reinstatement.
>
> * * *
>
> The Grievance Administrator all but acknowledges that the evidence presented now shows petitioner's fitness under the rule, yet he seeks an additional nine to twelve months of time before the panel (or the Board) should be allowed to consider that evidence. That is not a reasonable request; it has no basis in the court rules, and is not even consistent with the underpinnings of, or opinions in, Mc Whorter. [HP Rpt, pp 12-13, 17 (emphasis in original).]

We agree with the hearing panel's conclusion on this issue and reaffirm our view, expressed in Grievance Administrator v La Rene, 94-82-JC (1995), that Mc Whorter does not extend a per se rule to this suspension case. Such a "rule" would, of course, be in conflict with the Court's announced principle that petitions for reinstatement are to be decided on a case-by-case basis through a fact intensive individualized balancing approach. See e.g. Grievance Administrator v August, 438 Mich 296, 307 (1991); In re Reinstatement Petition of Mc Whorter, supra, 449 Mich at 139 and 449 Mich at 145 (Weaver, J., concurring).

We also have difficulty with the Grievance Administrator's inability to articulate just what such an "out-of-supervision" rule should be and how it should be applied in this case. As noted above, counsel argued to the panel that suspension for an additional nine to twelve months beyond the term of suspension would be appropriate in order for petitioner to establish a satisfactory record of unblemished conduct outside of federal probation (Tr p 142). In arguments before the Board counsel was asked to suggest a guideline as to the length of time outside of federal supervision which would be "sufficient":

> MR. EDICK: Well, I think that would be within the panel's discretion. I don't mean to be evasive, but I don't think, quite frankly, you could set a particular length of time. It may be, considering the underlying behavior, they

> might consider forty-five or sixty days to be a sufficient length of time. And I suppose it would depend too, on what the person was doing. [Transcript of 11/20/97 Bd Hrg, p 14.]

Unlike the disbarred attorney whose license to practice law has been unequivocally revoked, a suspended attorney seeking reinstatement may be reasonably expected to take the necessary steps to attain reinstatement once the specified term of suspension has elapsed. Every suspended attorney contemplating reinstatement has an incentive to conduct himself or herself in a manner which is exemplary and above reproach whether or not the suspension was the result of a criminal conviction and whether or not the individual was subject to some form of state or federal supervision. We are dubious of the argument that the passage of additional time outside of federal supervision, whether it is as little as forty-five days or as long as twelve months, is always necessary to establish rehabilitation.

Finally, we cannot ignore the anomalous situations which could arise from the application of a per se rule requiring an out-of-supervision period. Under such a rule, an attorney whose conduct warranted imprisonment for two years could, depending on the discipline imposed, be eligible to petition for reinstatement earlier than an attorney whose far less egregious conduct resulted in the more lenient sentence of three years probation. We share the panel's view that it is unlikely that such a result was intended by Justice Brickley in his opinion in Mc Whorter.

Our decision to affirm the hearing panel's order of reinstatement in this case is not intended to preclude a hearing panel from denying reinstatement, under the proper circumstances, on the grounds that insufficient time has elapsed since the attorney's suspension to properly gauge the extent of that individual's rehabilitation. Nor do we imply that petitioner is entitled to reinstatement simply because he completed the term of his suspension or because the Administrator presented no contrary evidence. As this Board held in a 1987 opinion denying reinstatement:

> Under the rules governing reinstatement proceedings, the burden of proof is placed upon the petitioner alone. While the Grievance Administrator is required by MCR 9.124(B) to investigate the petitioner's eligibility for reinstatement and to report his or her findings in writing to the hearing panel, there is no expressed or implied presumption that a petitioner is entitled to reinstatement as long as the Administrator is unable to uncover damaging evidence. In this case, our finding that petitioner Del Rio has failed to meet his burden of establishing eligibility for reinstatement by clear and convincing evidence would be the same if the record were devoid of evidence tending to cast doubt upon his character and fitness since his suspension. . .. [Grievance Administrator v Del Rio, DP 94/86 (ADB 1987).]

In this case, there is no challenge the panel's factual findings as to those eligibility requirements of MCR 9.123 which may be verified objectively. These include whether the term of suspension has elapsed [MCR 9.123(B)(2)]; whether or not the petitioner has practiced or attempted to practice law during the period of suspension [MCR 9.123(B)(3)]; the applicant's compliance with the order of suspension [MCR 9.123(B)(4)]; and, whether the applicant's conduct since the order of discipline has been exemplary and above reproach [MCR 9.123(B)(5)].

Nor does the Administrator challenge the hearing panel's decision with regard to those elements of MCR 9.123(B)(6) and (7) which the Court has recognized as requiring an element of subjective judgment. See August, supra, 438 Mich at 311. The Board is asked to rule that the hearing panel was precluded, as a matter of law, from exercising subjective judgment with regard to petitioner's satisfaction of MCR 9.123(B)(6) and (7) because his probation had not yet ended at the time of the panel hearing.

Having determined that the Court has not handed down a rigid out-of-supervision rule, we apply the standard of review which combines and balances the standards enunciated by the Court, i.e., review of the panel's findings for proper evidentiary support, recognition of the element of subjective judgment which is applicable to MCR 9.123(B) and, finally, the measure of discretion

granted to the Board with regard to its ultimate decision. August, 438 Mich at 304, 311. The hearing panel's decision in this case has ample evidentiary support in the record[1] and was a proper exercise of the panel's subjective judgment. The decision to grant reinstatement is affirmed.

Board Members Elizabeth N. Baker, C. H. Dudley, Barbara B. Gattorn, Grant J. Gruel, Albert L. Holtz, Kenneth L. Lewis, Roger E. Winkelman and Nancy A. Wonch.

Board Member Michael R. Kramer did not participate.

[1] In addition to its first-hand opportunity to evaluate petitioner's sworn testimony, the hearing panel received testimony in support of petitioner's reinstatement from an assistant U. S. attorney whose nineteen-year tenure in the office of the United States Attorney for Eastern District of Michigan included service as chief assistant and chief of the criminal division.