Grievance Administrator,

Petitioner/Appellant,

v

Herbert C. Mick, P 25852

Respondent/Appellee.

96-24-AI; 96-29-JC

Decided: November 21, 1996

BOARD OPINION

Respondent Herbert C. Mick was convicted of the crimes of Operating a Motor Vehicle Under the Influence of Liquor--third offense (a felony) and Driving Contrary to License Restriction (a misdemeanor). Respondent's license to practice law was automatically suspended December 12, 1995, the date of his criminal conviction. Following show cause proceedings conducted under MCR 9.120(B)(3), the hearing panel ordered the suspension of respondent's license to practice law for a period of four months commencing December 12, 1996. The panel further ordered that he be placed on probation for a period of two years. The Grievance Administrator has petitioned for review of the hearing panel's order. We are not persuaded that increased discipline is warranted in this case and we affirm the panel's order.

Panel Proceedings:

On January 18, 1996, respondent's attorney sent written notice to the Administrator and the Board that respondent had been convicted December 12, 1995 in the Oakland County Circuit Court of Operating a Motor Vehicle Under the Influence of Liquor--third offense (a five-year felony)[1] and Driving Contrary to License Restrictions (a ninety-day misdemeanor).[2] In accordance with MCR

[1] MCL 257.6256 D

[2] MCL 257.312

9.120(B)(1), respondent's license to practice law was automatically

suspended on the date of his conviction. The Grievance Administrator filed a notice of filing judgment of conviction on February 6, 1996. That judgment reflects respondent's sentence to 365 days in jail under a work-release program; fines, costs, and fees; and two years probation with participation in a substance abuse program monitored by the Oakland County Probation Department.

In accordance with MCR 9.120(B)(3), respondent was ordered to appear before a hearing panel to show cause why a final order of discipline should not be entered. In answering that order, respondent admitted that he suffers from functional alcoholism. He alleged that he first recognized his problem and attempted treatment in 1988 and that he enrolled in an intensive outpatient program in 1990. Respondent further alleged that he remained alcohol free for over three years while attending weekly AA meetings and bi-weekly outpatient counseling. His 1994 relapse resulted in the arrest and conviction which are the basis for this proceeding.

At the panel hearing conducted in March 1996, respondent testified in his own behalf and presented the testimony of his therapist and another attorney. The panel concluded that termination of the respondent's suspension effective April 12, 1996 was consistent with the maintenance of the integrity and honor of the profession, the protection of the public and the interests of justice.

The panel also imposed a two-year probationary period with conditions equivalent to those imposed by the sentencing judge. Those conditions, which run until December 11, 1998, include 1) abstention from alcohol or controlled substance; 2) participation in Alcoholics Anonymous on the average of twice each week; 3) compliance with the Michigan Rules of Professional Conduct; and, 4) continued treatment with a therapist who is obligated to provide quarterly reports to the Administrator and the Board.

Discussion:

The sole issue on appeal is whether the hearing panel erred in its decision to terminate the suspension of respondent's license to practice law after four months in light of 1) the felonious nature

of respondent's criminal conviction; and, 2) respondent's status, at the time the suspension was terminated, as a resident of the Oakland County Jail's Work-Release Facility. The Grievance Administrator does not challenge the panel's findings that the respondent established the criteria for probation under MCR 9.121(C) and we agree that the conditions of probation imposed by the panel are appropriate in this case.

In matters involving disputed factual findings, the Board must determine whether those findings have proper evidentiary support in the record. However, in exercising its overview function on questions involving the appropriate level of discipline, the Supreme Court has recognized that the Board possesses a greater degree of discretion with regard to the ultimate result. Grievance Administrator v August, 438 Mich 296, 304; 475 NW2d 256 (1991); In re Daggs, 411 Mich 304, 318-319; 307 NW2d 66 (1981).

In this case, the Grievance Administrator presents two arguments which have previously been presented in cases involving an attorney's criminal conviction but which, to date, we have not embraced.

First, the Grievance Administirator argued that it is "axiomatic", that an individual who has forfeited his liberty and freedom as the result of a criminal conviction cannot retain his privilege to practice law without successfully completing reinstatement proceedings. Our search for the validity of such an axiom must proceed under the constraint set forth in Matter of Grimes, 414 Mich 483; 326 NW2d 380:

> In reviewing the discipline imposed in a given case, we are mindful of the sanctions meted out in similar cases, but recognize that analogies are not of great value.
>
> > As a hypothetical proposition, we find dubious the notion that judicial or attorney misconduct cases are comparable beyond a limited and superficial extent. Cases of this type generally must stand on their own facts. [State Bar Grievance Administrator v DelRio, 407 Mich 336, 350; 285 NW2d 277 (1979).]

We are also guided in this inquiry by our Supreme Court's suggestion that the nature the crime must be considered when weighing the impact of a criminal conviction upon the individual's fitness to practice law. The Court's comment to MRPC 8.4 is instructive:

> Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of wilful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category.

We do not in anyway wish to undermine the seriousness of drunken driving as a societal problem. Nor can we overlook the fact that this was respondent's third drunken driving conviction in less than ten years. Nevertheless, if we recognize, as we must, that not every criminal conviction reflects equally upon an individual's fitness to practice law, we must also recognize a central distinguishing factor in this case. Respondent was convicted of offenses related to his operation of a motor vehicle. While serious in their own right, these offenses are not necessarily comparable to offenses involving willful violence, dishonesty, breach of fiduciary responsibility or interference with the administration of justice.

The Grievance Administrator cites one driving related case, Kentucky Bar Association v Jones, 756 SW2d 63 (KY 1988). That case was cited for the proposition that an attorney is an officer of the court and it is an attorney's duty to conduct his or her personal and professional life in a manner as to be above reproach. The

Administrator's brief does not disclose the discipline imposed by the Kentucky Supreme Court in that case.

In fact, the Board has had occasion to consider the issue of discipline for an attorney's driving-related felony in a case which was strikingly similar to the one before us. In Grievance Administrator v Jerome S O'Connor, ADB 82-88 (ADB 1989), the Board affirmed a 104-day suspension imposed by a hearing panel following this attorney's conviction of the felony of involuntary manslaughter.

In addition to their felony convictions (involuntary manslaughter in O'Connor and OUIL--third offense in this case) respondents O'Connor and Mick were each convicted of the misdemeanor of driving on a suspended license. Coincidentally, both O'Connor and Mick were sentenced by the same Oakland Circuit Judge. Mr. O'Connor was sentenced to one year in the Oakland County Jail under a work-release program with three years probation. Respondent Mick was sentenced to one year in the Oakland County Jail under a work-release program with two years probation. Both cases were considered by hearing panels under the provisions of MCR 9.120. In both cases, the panel imposed a suspension equal to the length of the automatic suspension which had been in effect at the time of the panel hearing--104 days in the case of Mr. O'Connor and 112 days in the case of Mr. Mick. The Board's order affirming the hearing panel suspension of 104 days in O'Connor was not appealed to the Supreme Court.

The second argument advanced by the Administrator is that an attorney who has been convicted of a crime, but especially a felony, should be suspended from the practice of law for a period equal to or greater than the attorney's criminal sentence.

Similar arguments we raised in Grievance Administrator v David Foster 94-202-JC (ADB 1995); Grievance Administrator v Deday LaRene, 94-82-JC (ADB 1995), lv den _____ Mich _____ (1996); and Grievance Administrator v Angelo Polizzi 95-69-JC, (ADB 1996). We have declined to adopt a strict rule requiring suspension equal to or greater than the period of probation and we would not adopt such a rule in this case.

At the commencement of the oral arguments before the Board on September 12, 1996, respondent advised the Board that he had received his discharge from the work-release facility on September 10, 1996, having served ten months. No useful purpose would be served by now reinstating the respondent's suspension two months after his release from that program.

The Administrator argued that:

> Under the discipline imposed by the hearing panel, respondent is not required to undergo any scrutiny, either during or subsequent to his incarceration and probation before he can be reinstated to the practice of law. (emphasis in original, GA Brief, 5/21/96, p 12)

We believe that the hearing panel's order of probation provides a high degree of scrutiny in a very real sense. For a period of two years, respondent must continue treatment with his therapist at least once every three months and must submit satisfactory evidence of his attendance at Alcoholics Anonymous meetings on an average of twice each week. The therapist, in turn, must file quarterly reports with the Administrator and the Discipline Board. If the therapist reports at any time that he is seriously concerned about respondent's ability to control his condition or if the respondent violates any condition of his probation, the Grievance Administrator may file a petition for order to show cause and the panel has specifically reserved the right to revoke respondent's probation and impose further discipline.

Finally, the Administrator's reliance on Grievance Administrator v Robert Wiggins, 93-57-JC (ADB 1994) and Grievance Administrator v Elbert L. Hatchett, 91-10-JC (ADB 1992), modified 440 Mich 1210 (1992) is misplaced. The nature and variety of the prior convictions in Wiggins are clearly distinguishable from those in this case. Respondent was previously convicted of drunk driving in October 1988 and October 1990. He offered unrebutted testimony regarding his apparently sincere efforts to confront and deal with his admitted alcoholism until his relapse and arrest for drunk driving in May 1994. By contrast, Wiggins was convicted in May 1990 of the offense of resisting or obstructing a police officer. In considering the appropriate discipline for that conviction, the

Board was presented with the record of Wiggins' 1987 convictions for resisting and obstructing a police officer; for being an habitual offender--second offense; for possession of a firearm while intoxicated; and for use of cocaine.

In Grievance Administrator v Elbert L. Hatchett, supra, the Board ruled that it is not in the best interest of the public, the courts and the legal profession to broaden the term "jail-house lawyer" to include the active practice of law by an attorney serving a period of incarceration in a correctional facility. Hatchett had been convicted of three counts of the misdemeanor of failing to pay federal income tax and he had been sentenced to three consecutive one-year terms of imprisonment followed by five years of probation. The hearing panel imposed a suspension of 120 days which, at that time, was sufficient to trigger the reinstatement requirements of MCR 9.123(B). On review, the Board reduced the suspension to 119 days. In lieu of granting leave to appeal, the Supreme Court reinstated the 120-day suspension imposed by the panel.

Throughout those proceedings, Hatchett was incarcerated in a federal penal facility. Like the panel, the Board agreed with the Administrator that the term "jail-house lawyer" should not include the active practice of law by an attorney serving time in a federal correctional facility and the Board adopted the panel's conclusion that, regardless of the nominal length of his suspension, respondent should not actually be reinstated until his release from a penal facility.

It must be emphasized, however, that the hearing panel had specifically excluded half-way houses or community correctional centers from its definition of correctional facilities. This definition was specifically affirmed by both the Board and the Supreme Court. As a result, Hatchett filed his petition for reinstatement while under the supervision of federal authorities in a half-way house and his license was reinstated while he was subject to federal supervision under the terms of his probation. There is nothing in the record to suggest any appreciable difference between the work-release facility in this case and the half-way house in Hatchett. While Hatchett stands for the proposition that an attorney should not practice law while

incarcerated, the Supreme Court adopted a restrictive definition of "incarceration" in that case. Respondent's participation in a work-release program did not fall within that definition.

Board Members George E. Bushnell, Jr., C. H. Dudley, M.D., Elaine Fieldman, Barbara B. Gattorn, Miles A. Hurwitz, Michael R. Kramer and Kenneth L. Lewis.

Board Member Albert L. Holtz was absent.