

Grievance Administrator,
Petitioner/Appellant,

v

Donald H. Stolberg, P 40698,
Respondent, Appellee.

Case Nos. 95-72-GA; 95-107-FA.

Decided: July 31, 1996

BOARD OPINION

Formal complaint 95-72-GA alleged that respondent violated MCR 9.104(2) and (3), MRPC 6.5, and MRPC 8.4(a) and (c) while in the Lapeer County Courthouse for a hearing on the claimed violation of an injunction in a divorce proceeding. After hearing the testimony of various witnesses to the incidents at the Courthouse, Tri-County Hearing Panel #80 found that "the Commission has not met its burden of establishing by [a] preponderance of the evidence that there has been misconduct," and dismissed the complaint.¹ We affirm.

Cynthia Smith hired respondent to commence divorce proceedings against her husband, Robert S. Smith. During the course of the proceedings, respondent filed a motion to show cause why Robert S. Smith should not be held in contempt of court for violating the court's order enjoining him from assault, harassment, and wasting of assets. The parties and their counsel attended the hearing. Also present were the defendant-husband's parents.

The formal complaint essentially alleges that respondent instigated an altercation with defendant-husband and his family. The panel heard testimony from the defendant and his parents, as well as from respondent and his client Cynthia Smith. After the Grievance Administrator's closing argument, the panel recessed. Upon returning from the recess, the chair announced the unanimous decision of the panel to dismiss the complaint for the reason that the allegations of misconduct had not been proven.

¹ The panel also dismissed the complaint in 95-107-FA. This action is not challenged on review.

The Administrator filed a petition for review asserting that the panel erred in dismissing paragraph 6(b) of the formal complaint. Paragraph 6(b) alleges, in pertinent part, that:

While in the courtroom, Respondent approached Defendant husband's father, . . . , and through physical force, caused him to fall backwards into a bench, then onto the floor.

The witnesses all agreed that during the contempt of court hearing, the judge adjourned to conduct an in camera interview of the parties' minor child. Respondent and his opposing counsel at some point left the courtroom, while Cynthia Smith (and a friend) remained with the defendant and his father. Respondent returned to the courtroom when he heard "yelling and screaming and crying," and recognized that his client was upset.

At this point, the testimony diverges into two contradictory versions of the critical events. The defendant and his father testified that respondent reentered the courtroom while the father consoled his emotionally upset son. According to this account, respondent aggressively approached the two, kicked a chair, accused the defendant-son of lying, demanded that the son get up out of his chair, and moved within six inches of the son. The father testified that he then stood up and told respondent to "leave my boy alone," whereupon respondent moved in close to the father's face and caused some "spittle" to land on the father's face during a heated exchange. The father testified that he then attempted to blow the spittle back onto respondent, and that respondent then forcefully pushed him causing him to fall into a bench and ultimately onto the floor.

The testimony of respondent and Cynthia Smith is directly to the contrary in almost all material respects. According to this version, Cynthia Smith was upset at the recess and asked the defendant: "How can you lie like that?" Father and son thereupon began laughing at her and "high fiving" each other. She became upset. Upon hearing his client, respondent reentered the courtroom. He attempted to calm her, telling her to leave the room and ignore the Smiths.

Respondent testified that father and son continued "laughing and joking" after his client left the room. In an attempt to be a "peacemaker" respondent testified that he said: "Take it easy. Can't you see that she is upset?" According to respondent, the son replied by making a lewd and insulting gesture while grinning broadly. Respondent turned to walk away and was confronted by the father, who blocked his exit from the courtroom. The father placed his face within 4 inches of respondent's face. Respondent testified that the father threatened to "kick [respondent's] ass" and spit in respondent's face. Some of the father's saliva entered respondent's partially open mouth. Respondent pushed the father away.

As to the pushing, respondent testified:

Q [By respondent's counsel]: And when you pushed him away, did you do that in anger?

A: No.

Q: Why did you push him away?

A: To get him away. It was a reflex, It was just--it was so offensive that I pushed him.

* * *

Q: When he blew the spittle in your face, what was your first reaction?

A: I pushed him away from me. I recoiled. It was disgusting, and I left the courtroom immediately.

* * *

MR. KOCH [Panel Chair Koch]: One more [question]. Instead of pushing him, I suppose you could -- you really didn't have to push him. You could have simply stepped back, turned and left. Right?

THE WITNESS: If I had had time to think about it, I guess I would have, but--

MR. KOCH: I understand that.

THE WITNESS: But it was a reflex.

MR. KOCH: Yes. [Tr pp 182, 197, 199-200.]

The Administrator argues that "sufficient evidence was provided to substantiate the charge of misconduct contained within paragraph 6(b) and that the dismissal was therefore improper." Administrator's brief, p 4. This Board reviews the factual findings of a hearing panel for proper evidentiary support Grievance Administrator v James H. Ebel, ADB No 94-5-GA (Bd Op 4/20/95). At the review hearing, counsel for the Administrator conceded that there was evidentiary support for the panel's findings, and stated that he was arguing only that "the specific findings of fact made by the panel show professional misconduct." Upon a careful analysis of the particulars of these two arguments, we find that the difference between them is more apparent than real in this case.

The panel ruled, as noted above, that the Administrator had not established misconduct by a preponderance of the evidence. More specifically, the panel found:

There is a direct and substantial conflict on the testimony of the pushing. We appreciate that this is not a criminal matter, and that may not be critical.

We think that what happened had happened in a very, very short period [of] time, a matter of seconds, again unfortunate.

Mr. Stolberg should have kept his hands to himself, and he agreed in response to my question that he could have backed away, but he just didn't think of it.

The question of the spitting, which was a lot of the testimony, comes down to . . . who did it first. Without exploring that subject any more, we still feel that the Commission has not established its case by a preponderance.

The pushing probably comes down to the most serious thing that occurred. As I have said, we find it a very quick reflex, not justified, but we understand why it was motivated. . . . [A]nd the evidence is directly conflicting, as believable on one side as the other. We find,

therefore, that the case has not been made with a preponderance in this matter. [Tr pp, 233-235; emphasis added.]

Emphasizing the panel's observations that respondent should have kept his hands to himself and that his pushing was not justified, the Administrator argues that these "findings" establish that the panel reached an erroneous conclusion of law when it determined misconduct did not occur. We reject this argument.

The panel's ruling that the Commission did not meet its burden of proof can only be understood in context as a finding that the versions related by the defendant and his father were not sufficiently credible to outweigh the testimony to the contrary. Moreover, the panel specifically found the pushing to have resulted from "a very quick reflex." After a review of the whole record, we conclude that these findings have sufficient evidentiary support.

Properly understood, the panel's ruling is an attempt to articulate the distinction between this case and those in which an attorney has intentionally pushed or assaulted another. The Panel Chair's choice of words reflects sound judgment by clarifying that the decision was not based on "justification." The panel did not hold that shoving or other inappropriate physical contact is justified when provoked by spitting or the like. Instead, the panel grounded its decision on its specific finding that the push resulted from a reflex.

At the review hearing, counsel for the Administrator asked us to "send a message" that attorneys must not resort to violence. We strongly endorse the message that the practice of law, though adversarial, must not include physical combat. But that is not the issue in this case. By characterizing the actions of respondent as "violent," the Administrator continues to quarrel with the panel's finding that respondent pushed Mr. Smith as part of a genuinely involuntary reaction, born of the revulsion brought on by having a stranger unexpectedly spit into his mouth from a distance of four inches. The panel's order of dismissal is affirmed.

Board Members George E. Bushnell, Jr., C. H. Dudley, M.D., Marie Farrell-Donaldson, Elaine Fieldman, Albert L. Holtz, Miles A.

Hurwitz, Michael R. Kramer and Kenneth L. Lewis concur in this opinion.