

In the Matter of the Reinstatement
Petition of Wayne L. Yashinsky, P 22615,

Petitioner.

92-320-RP

Decided: May 21, 1996

BOARD OPINION

The Grievance Administrator asks the Attorney Discipline Board (Board) to vacate the Hearing Panel's order modifying conditions in its order of reinstatement. We affirm.

On December 21, 1992, petitioner Wayne L. Yashinsky (Yashinsky) filed a petition for reinstatement with the Michigan Supreme Court under the then applicable provisions of MCR 9.123(B) and MCR 9.124. The petition was assigned to Tri-County Hearing Panel #17 (Panel) which conducted a hearing on April 12, 1993. On May 5, 1993, the Panel issued an order granting reinstatement conditioned, in part, upon Yashinsky's recertification by the State Board of Law Examiners (BLE) in accordance with MCR 9.123(C). The Panel's order was not appealed to the Board or the Michigan Supreme Court.

On March 9, 1994, Yashinsky filed a motion with the Board seeking deletion of the recertification requirement on the grounds that he had taken and passed the Michigan Bar Examination and that the BLE's refusal to recertify him was therefore contrary to the provisions of Rule 8 of the Rules for the Board of Law Examiners promulgated by the Supreme Court. The Board denied Yashinsky's motion on the grounds that the Board is without jurisdiction to consider the actions taken by the BLE in a specific case.

Thereafter, Yashinsky filed a complaint for superintending control against the BLE in an action entitled Wayne L. Yashinsky v State Board of Law Examiners, S.Ct. 99169. On November 2, 1994, the Supreme Court entered an order in Yashinsky v State Board of Law Examiners vacating the May 5, 1993 order granting reinstatement in Matter of the Reinstatement Petition of Wayne L. Yashinsky, ADB 92-

320-RP and remanding Yashinsky's reinstatement case to the Board for a new hearing on the original petition for reinstatement in light of the Court's amendment to MCR 9.123(B)(7), (effective March 1, 1994). The Court retained jurisdiction.

The Board, in turn, remanded the matter to Tri-County Hearing Panel #17 for a new hearing and findings on the original petition for reinstatement. The panel conducted hearings on February 1, and February 8, 1995. On March 10, 1995, the panel issued an order which again granted Yashinsky's petition for reinstatement. This order was identical to the panel's order of May 5, 1993 except the panel added the further condition that Yashinsky could not be reinstated until he had demonstrated that he had purged an order of contempt entered November 10, 1986 in the United States District Court, Eastern District of Michigan--Southern Division in the matter of Consolidated Rail Corporation v Wayne L. Yashinsky, 84-CV-0371.

The Panel's order was filed with the Supreme Court. On September 19, 1995, the Court issued a final order in Yashinsky v State Board of Law Examiners which directed the BLE to issue Yashinsky's recertification. The Court's order further stated:

In order to be reinstated, the petitioner must comply with the conditions stated in the order of Hearing Panel #17 dated March 10, 1995.

On November 21, 1995, Yashinsky filed a motion with the Board seeking modification of the Panel's order of reinstatement by vacating the requirement that he purge the outstanding order of contempt as a condition of reinstatement. On December 28, 1995, the Board issued an order which stated, inter alia,

It is ordered that petitioner's emergency motion to modify the hearing panel's order granting petitioner's reinstatement is DENIED. The Supreme Court's order of September 19, 1995 in Yashinsky v State Board of Law Examiners specifically directs that the petitioner 'must comply with the conditions stated in the order of Hearing Panel #17 dated March 10, 1995.' Absent further direction from the Court, the Board is without jurisdiction to modify the panel's order.

On February 5, 1996, Yashinsky filed a substantially similar motion with Tri-County Hearing Panel #17 asking that the panel modify its prior order. He argued that his motion to purge contempt, filed in the U. S. District Court in October 1995 had been denied and that the District Judge had subsequently denied his motion for clarification which, he alleged, requested advice as to what he must do to purge the contempt. Yashinsky further argued to the Panel that the requirements of the contempt order were moot in light of the passage of time and he requested an opportunity to produce evidence supporting his claim that further efforts to purge the contempt order would be futile. On February 26, 1996, Yashinsky filed a supplement to his motion, raising additional legal arguments and again requesting that the Panel schedule a hearing.

On February 27, 1996, Yashinsky wrote to the Board's Executive Director, with copies to the Grievance Administrator's counsel and the members of the Panel, pointing out that the Grievance Administrator had not filed an answer to his motion. He requested that in light of the apparent lack of opposition to his motion, the Panel should be requested to act with all deliberate speed. The Grievance Administrator's counsel responded to Yashinsky's letter by sending her own letter to the Board's Director (with copies to Yashinsky and the Panel). Counsel asserted in the letter that Yashinsky's motion before the Panel raised the same issues decided by the Board in its order of December 28, 1995. A copy of the Administrator's response to the earlier motion filed with the Board was included as an attachment to the Administrator's letter. However, the Grievance Administrator did not file any pleadings with the Panel in response to Yashinsky's motion.

Tri-County Hearing Panel #17 entered an order on March 6, 1996 granting Yashinsky's motion to modify the order of reinstatement. That order contains the brief history of the case and concludes:

The hearing panel has considered the petitioner's motion to modify the order of reinstatement issued March 10, 1995. The Grievance Administrator has filed a reply. Neither the Board nor the Supreme Court has ruled on the merits of petitioner's request. We conclude that modification of our order of

March 10, 1995 is warranted under the circumstances presented in this case.

NOW, THEREFORE, it is ordered that the petitioner's motion to modify order of reinstatement is GRANTED. The order granting petition for reinstatement with conditions entered March 10, 1995 is MODIFIED BY VACATING condition #4 [requiring the purging of an order of contempt November 10, 1986].

The Grievance Administrator now petitions for review and asks that the Panel's order be vacated on the grounds that the Panel was without jurisdiction to modify its prior order.

If the procedural history of this case is deleted from the Grievance Administrator's brief in support of petition for review, there remains a single paragraph which declares, without citation to authority or further argument, that a hearing panel's powers and duties are set forth in MCR 9.111(B) and that Tri-County Hearing Panel #17 lacked jurisdiction to take action which had the effect of modifying an order of the Michigan Supreme Court. In oral arguments, the Administrator's counsel distilled this argument to its essence: Because the Supreme Court retained jurisdiction when it vacated the original hearing panel order of reinstatement in the Court's November 2, 1994 order in Yashinsky v State Board of Law Examiners, the remand proceedings triggered by that order conferred no jurisdiction upon the Board or the Panel. Thus, it is argued, the Panel's March 10, 1995 order was in the nature of an advisory recommendation and "The hearing panel's decision in-and-of-itself was nothing." (Review Hrg, 4/18/96, Tr. p. 8.)

The Supreme Court itself has rejected this characterization of the Panel's order. On March 8, 1996, the Grievance Administrator filed a complaint for mandamus captioned "Grievance Administrator, Attorney Grievance Commission v Attorney Discipline Board, Tri-County Hearing Panel #17" accompanied by an emergency motion for a stay of the hearing panel's March 6, 1996 reinstatement order and a motion for immediate consideration. In that complaint, the Grievance Administrator sought the Court's superintending control over the hearing panel asserting that the hearing panel lacked jurisdiction to modify its prior order. Without further comment,

that complaint for mandamus and its ancillary motions were returned to the Grievance Administrator by the clerk of the Supreme Court. The clerk's enclosure letter advised:

As stated by the Court in its order of November 7, 1995 in Grievance Administrator v Attorney Discipline Board, #103683, a copy of which I enclose, the appropriate avenue for relief from a hearing panel order is by petition for review before the Attorney Discipline Board. (March 11, 1996 letter from Corbin Davis, Clerk, to Philip J. Thomas, Grievance Administrator, Grievance Administrator v Hearing Panel #17, ADB 92-320).

If, as argued by the Administrator, the Supreme Court had intended to retain jurisdiction in perpetuity over all aspects of Yashinsky's reinstatement, neither the Panel's conditional order of reinstatement entered March 10, 1995 nor the Panel's March 6, 1996 order granting the motion to delete a condition would be subject to review by the Board. By stating in its order of November 2, 1994 that it retained jurisdiction in the matter of Yashinsky v Board of Law Examiners, a case involving a recertification question, the Court did not necessarily eviscerate the Panel's further ability to consider issues pertaining solely to Yashinsky's reinstatement.

Under MCR 9.115(A), the rules governing practice and procedure in a nonjury civil action apply to a proceeding before a hearing panel, except as otherwise provided. The Panel's authority to modify the conditions of its prior order of reinstatement is consistent with the authority granted to a tribunal under MCR 2.612(C)(1) to relieve a party from a final judgment or order. There was, at the time Yashinsky filed his motion for modification with the Panel, no appeal before the Board or the Court pertaining to Yashinsky's reinstatement or recertification. The authors' comments to MCR 2.612 in 3 Martin, Dean and Webster, Michigan Court Rules Practice, p 547, conclude:

There should be no doubt about the power of the trial court to entertain a motion under MCR 2.612(C) after the appellate court has finished with the case and remanded it. Of course, the trial judge cannot disregard the mandate of the appellate court as to matters

expressly considered and decided by it, but he should be free to consider whether certain circumstances not previously shown to either court would justify relief from the judgment under a motion under MCR 2.612(C). [Emphasis added.]

It has not been demonstrated that the Board or the Court had specifically considered or ruled upon the merits of Yashinsky's motion for modification. Indeed, Yashinsky had not yet attempted to purge his contempt with an order from the U. S. District Court when the Supreme Court ruled on his recertification/reinstatement.

We are not persuaded that this Board's order of December 28, 1995 is dispositive. Because the Board, an intermediate appellate body which has never been called upon to consider the merits of Yashinsky's eligibility for reinstatement, ruled that it did not have jurisdiction to modify the Panel's order, it does not necessarily follow that the Panel itself was without jurisdiction.

In arguments to the Board, Yashinsky characterizes his decision to seek modification of the Panel's order from the Board rather than the Panel as a mistake. We are inclined to agree. Moreover, we acknowledge that we may have compounded that mistake in the wording of our order of December 28, 1995. To the extent that our prior order suggested that authority to modify the Panel's prior order lies only with the Supreme Court, that order was in error.

The sole issue presented in the Grievance Administrator's petition for review is the Panel's jurisdiction to entertain a motion to delete a condition in its prior order of reinstatement. Notwithstanding the Grievance Administrator's recitation in the petition for review of the acts of misconduct for which Yashinsky was disciplined in 1987 and 1988 and notwithstanding Yashinsky's arguments concerning his fruitless attempts to purge the contempt order in the U. S. District Court, neither Yashinsky's eligibility for reinstatement nor the merits of his motion for modification are before the Board.

Although served with Yashinsky's motion to the Panel, the Grievance Administrator elected to file no responsive pleadings with the Panel but simply submitted a letter to the Board's Executive Director reiterating the position that the Panel lacked jurisdiction. The Administrator waived the opportunity to argue the merits of Yashinsky's motion. Having determined that the hearing panel did have jurisdiction to modify its prior order, it is our unanimous conclusion that the Panel's order should be affirmed.

Board Members George E. Bushnell, Jr., C. H. Dudley, M.D., Marie Farrell-Donaldson, Elaine Fieldman, Barbara B. Gattorn, Albert L. Holtz, Miles A. Hurwitz, Michael R. Kramer and Kenneth L. Lewis concur in this opinion.