

GRIEVANCE ADMINISTRATOR,
Petitioner/Appellee,

v

SANDRA S. SCHULTZ, P-30269,
Respondent/Appellant.

ADB 96-89

Decided: May 7, 1990

BOARD OPINION

The respondent was reprimanded by a hearing panel for her admitted failure to file a timely answer to a Request for Investigation. The respondent seeks review of that discipline order on the grounds that her prior unblemished record as a lawyer should have been afforded greater weight, that the panel erred in proceeding to a separate hearing on discipline immediately following the hearing on the charges of misconduct and that the costs assessed in the order of discipline are excessive. The Attorney Discipline Board has considered this petition for review. The hearing panel's Order of Reprimand was appropriate and is therefore affirmed.

The respondent is engaged in the practice of law in Ironwood, Gogebic County, Michigan. The three-count complaint in this matter was filed July 5, 1989 and was assigned by the Board to a hearing panel of three attorneys who practice in the Upper Peninsula. The hearing was originally scheduled to commence August 22, 1989 at the Gogebic County Courthouse in Bessemer, Michigan. The respondent's answer was filed August 3, 1989. Misconduct as alleged in Counts I and II was denied but the respondent admitted the allegations that a Request for Investigation was not answered within the time provided. Respondent's answer was accompanied by a motion to disqualify the panel chairman and for an adjournment of the hearing. Both motions were granted by the Board. As the result of the disqualification of that panel member and the voluntary withdrawal of a second panelist, substitute panelists were appointed by the Board, from Petoskey and Harbor Springs, respectively. The hearing in this matter was conducted in Bessemer, Michigan on October 24 and 25, 1989 in conjunction with the panel's hearing on complaint ADB 95-89, Grievance Administrator v Russell G. Slade, (Ms. Schultz and Mr. Slade are associated in the practice of law and the two complaints involved similar, although not identical issues).

In its report, the hearing panel concluded that the allegations of Counts I and II of the formal complaint against respondent Schultz had not been established by a preponderance of the evidence and those counts were dismissed. Respondent's failure to file a timely answer to the Request for Investigation was found to be professional misconduct in violation of MCR 9.113(B)(2), MCR 9.103(C) and MCR 9.104(7).

After announcing its decision on the issues of misconduct, the panel reconvened to

conduct a separate hearing on discipline, as required by MCR 9.115(J)(2). The panel ordered that respondent Schultz be reprimanded and that the costs incurred in the hearing of the two consolidated case be apportioned between respondents Slade and Schultz. The panel directed that respondent Schultz reimburse the State Bar of Michigan for one-third of the expenses of the hearing, in the amount of \$1020.17.

It is undisputed that the respondent failed to file a timely answer to a Request for Investigation. She admitted in her answer that a Request for Investigation filed by Sharon Kostopolus under file no. 0538/89 was served in accordance with MCR 9.112(C)(1)(b) on March 20, 1989. On May 3, 1989, a final notice was served on the respondent by the Grievance Administrator by certified mail advising her that failure to file an answer by May 13, 1989 would subject her to formal charges of professional misconduct. The exhibits received by the hearing panel include a copy of a letter from complainant Kostopolus to the Grievance Administrator dated May 22, 1989 asking that the Request for Investigation be withdrawn. However, it was not until July 5, 1989, the date the Grievance Administrator's complaint was filed, that the respondent submitted a signed written statement. This letter, Respondent's Exhibit #22, did not address the merits of Ms. Kostopolus' grievance but simply reported that the client's retainer fee had been returned and that the "misunderstanding" had been resolved.

The hearing panel's decision to impose a reprimand for the respondent's failure to timely answer the Request for Investigation was appropriate. MCR 9.104(7) provides that failure to answer a Request for Investigation in conformity with MCR 9.113 is an act or omission which is misconduct and grounds for discipline. Having found that misconduct was established, the hearing panel was required by MCR 9.115(J)(3) to enter an order of discipline. The types of discipline which may be imposed are listed in MCR 9.106. A reprimand was the least form of discipline available to the panel.

The respondent concedes that the hearing panel announced its decision with regard to misconduct on the record and then reconvened to conduct a "separate" hearing on discipline as required by MCR 9.115(J)(2). She argues, however, that she was not given sufficient time to prepare for such a hearing and was thus denied due process. This argument is essentially moot in light of the panel's decision to assess the lowest form of discipline which could be imposed under the circumstances. As the Grievance Administrator has pointed out, the respondent, having admitted a failure to answer a Request for Investigation, knew or should have known that a finding of misconduct on that Count would be made and that a hearing on discipline would be held. The respondent has failed to show that the panel's failure to adjourn the proceedings prevented her from presenting further evidence in mitigation. In any event, as noted above, further mitigation could not have resulted in a reduced level of discipline.

Where even a technical violation of the discipline rules is established, discipline must follow, regardless of the mitigation exhibited . . . once the respondent admitted the allegations before the panel, the panel's discretion was confined to settling on the proper degree of discipline.

Matter of James H. Kennedy, DP 48/80 Brd. Opn. 3/10/81, Brd. Opn. p. 132 (1981).

Having considered this argument, however, we take this opportunity to note that while a panel should give careful consideration to a respondent's good-faith request for an adjournment of the proceedings in order to prepare for a separate hearing on discipline, MCR 9.115(J)(2) does not require that the separate hearings on misconduct and discipline be conducted on separate dates.

Finally, we are not unsympathetic to the respondent's request for relief from the costs assessed. The amount of these costs was due, in large part, to the travel costs incurred by the Grievance Administrator's counsel and the two panel members who traveled to the hearing in Bessemer from their residences in the lower peninsula. The Board is satisfied that the travel expenses for the panel members were unavoidable and were the result of the unavailability of panel members located in the Upper Peninsula.

The assessment of costs in these proceedings is governed by MCR 9.128 which directs that,

The hearing panel and the Board in the order for discipline or for reinstatement must direct the attorney to reimburse the State Bar for the expenses of that hearing, review, and appeal, if any. (emphasis added)

In accordance with the Board's authority under MCR 9.118(D) to amend a hearing panel order in whole or in part, the hearing panel Order of Reprimand and the supplemental order regarding costs are modified. The expenses of the hearing and review assessed against the respondent shall be reimbursed to the State Bar of Michigan in quarterly payments during the period of one year.

All concur