In the Matter of the Reinstatement Petition
of C Hugh Fletcher, P 13521

Petitioner.

93-44-RP

Decided: January 18, 1995

BOARD OPINION

This is a reinstatement matter in which the Grievance Administrator seeks reversal of a hearing panel's order granting reinstatement. Upon a review of the whole record, the Attorney Discipline Board has concluded that there was proper evidentiary support for the hearing panel's findings and that the hearing panel properly exercised its subjective judgment with regard to the petitioner's eligibility for reinstatement under the applicable criteria. The hearing panel's decision is therefore affirmed.

The petitioner, C Hugh Fletcher was convicted on January 8, 1990 in the United States District Court for the District of Connecticut of the felony of conspiracy to defraud the United States Government and impeding and impairing the Internal Revenue Service in violation of 18 USC 371. In accordance with MCR 9.120(A), the petitioner's license to practice law in Michigan was automatically suspended on that date.

The Grievance Administrator and the petitioner subsequently filed a stipulation for consent order of discipline which contained their agreement that an order should be entered by a hearing panel suspending the petitioner's license to practice law for a period of three years and one day effective January 8, 1990 and until further order of the Supreme Court, the Attorney Discipline Board or a hearing panel. In accordance with MCR 9.115(F)(5), that stipulation was referred to a hearing panel for consideration. Following a public hearing and a request for further information, the hearing panel entered an order on June 10, 1991 which adopted

the provisions of the stipulation.

On March 25, 1993, the petitioner filed a petition for reinstatement. On December 27, 1993, Tri-County Hearing Panel #32 filed its report that the petitioner had established his eligibility for reinstatement by clear and convincing evidence in accordance with the requirements of MCR 9.123(B)(1-9). The panel ordered that the petitioner's license to practice law be reinstated subject to the following conditions: 1) Payment of the costs incurred by the Grievance Commission and Discipline Board in the reinstatement proceedings; 2) Proof of petitioner's active membership in the State Bar of Michigan; 3) Proof of petitioner's recertification by the Board of Law Examiners in accordance with MCR 9.123(C); and, 4) Proof of petitioner's discharge from probation.

The Grievance Administrator has filed a petition for review seeking reversal of the hearing panel's order on the grounds that petitioner failed to establish compliance with MCR 9.123(B)(6,7) by clear and convincing evidence and on the further ground that sufficient time has not passed to provide assurance of the petitioner's reformation.

On appeal, the findings of a hearing panel are to be reviewed by the Discipline Board for proper evidentiary support in the whole record. Grievance Administrator v Irving August, 438 Mich 296; 475 NW2d 256 (1991). The record before the panel may be reviewed objectively to determine whether or not there is proper evidentiary support for a panel's finding that the respondent did or did not engage in specific acts. A similar objective standard may be applied to some of the criteria which must be established by a petitioner seeking reinstatement--for example whether or not he or she has served the full term of suspension [MCR 9.123(B)(2)] or has attempted to practice law contrary to the suspension [MCR 9.123(B)(3)].

However, the Supreme Court has recognized that other requirements for reinstatement are of an inherently subjective nature, specifically the requirements of MCR 9.123(B)(6,7), August, supra at page 311.

The Grievance Administrator asks that the Board reverse the hearing panel's finding that the petitioner met his burden under MCR 9.123(B)(6) that he now has a proper understanding of and attitude toward the standards that are imposed on members of the bar and that he will conduct himself in conformity with those standards. In support of this request, it is argued that the petitioner still does not understand the wrongfulness and seriousness of the crime for which he was convicted, as evidenced by this exchange at the reinstatement hearing:

> "AGC Counsel: Regarding that charge, do you understand the wrongfulness and the seriousness of the charge that you've been convicted of?
>
> Petitioner: Absolutely not. (Tr. p. 41-42, cited in Administrator's Brief, p. 5).

However, this excerpt omits the balance of petitioner's answer. The full exchange reads:

> "Q: Regarding that charge, do you understand the wrongfulness and the seriousness of the charge that you've been convicted of?
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> A: Absolutely not. Do you want further elaboration?
>
> Q: I don't need further elaboration.
>
> Panel Chairman: That's fine.
>
> Mr Fletcher: I appeal and I continue to appeal.

In the further testimony cited by the Administrator (Tr. p. 45; Tr. p. 73-74), the petitioner further explained his position.

"Q: I wanted to make sure that my previous question was not misunderstood regarding the wrongfulness and seriousness of the crime for which you have been convicted of.

I didn't ask you whether you were guilty. I asked you whether you understood the wrongfulness and the seriousness of the crime for which you were convicted.

Does your answer change in light of my statement or is your answer the same?

A: I don't understand the distinction. I'm saying I'm innocent. I did nothing wrong. And that's the testimony I have made consistently.

Now, I don't understand the seriousness of my crime because I never committed a crime. I'm totally innocent of the crime committed, allegedly committed. That's my position." (Tr. 45)

* * *

"Panel Chairperson: Mr Fletcher, I don't think that was Mr Campbell's point. We understand your position that you are not guilty of the offense for which you were convicted. Mr Campbell, I think, was trying elicit from you whether you agree -- whether you understand the seriousness of the actions, the seriousness of the circumstances for which you were suspended.

You would agree, would you not, that an attorney -- That is abstracting from your own circumstances now. You would agree, would you not, that an attorney who is convicted of a felony in federal court -- presumably rightfully convicted of a felony in federal court - has committed a serious offense as an attorney?

A: I would agree that if I had --

Panel Chairperson: (Interposing) Not you. If an attorney is convicted in federal court of fraud against the United States Government and he is rightfully convicted, that is a serious matter with respect to the attorney's ability to practice law.

A: Yes, I would agree with that. (Tr. p. 74)

It would have been improper for the hearing panel to deny reinstatement on the grounds that the petitioner had not shown remorse for his prior misconduct based on his continued assertion of his innocence or his refusal to admit any wrongdoing. Petition of Albert, 403 Mich 346; 269 NW2d 173 (1978).

> "While an attitude of remorse and willingness to accept responsibility for the prior misconduct may tend to show that a suspended or disbarred lawyer understands and will conform to the profession's standards and can safely be recommended, the absence of such an attitude is not evidence of the converse.
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> This Court repealed the remorse requirement so that a disciplined lawyer who persists in maintaining his innocence may nevertheless be reinstated. Full implementation of that policy precludes the Grievance Board from relying on continuing assertions of evidence or refusal to admit wrongdoing as evidence that a lawyer seeing reinstatement does not have a proper understanding of the standards, will not conduct himself in conformity with them or cannot safely be recommended". (Albert 269 NW2d 173, 175. Opn. of Justice Levin, Kavanagh, J., concurring)

While petitioner Fletcher was not required to admit guilt, the Administrator and the hearing panel properly questioned him as to his understanding of the seriousness of the crime for which he was convicted. The hearing panel, which had the first-hand opportunity to assess the petitioner's demeanor, weighed the petitioner's answer to that question. There was proper evidentiary support in the record for that aspect of the panel's decision.

The Grievance Administrator further argues on appeal that the petitioner submitted three letters of recommendation from attorneys in support of his reinstatement and that these letters have little or no weight inasmuch as the individuals who wrote the letters had had limited contact with the petitioner.

It should be noted that the Grievance Administrator's investigative report submitted to the panel under MCR 9.124(B) contains not only the three letters of recommendation from attorneys Herbison, Keating and Vincent but also includes three letters of recommendation from non-attorneys. According to their letters, those individuals have known the petitioner since 1985, 1989 and the early 1950's, respectfully.

The hearing panel's report is silent to the weight, if any, given to the letters of recommendation. Assuming arguendo that none of the six letters of recommendation submitted on petitioner's behalf had any significant value, it does not necessarily follow that the hearing panel could not find that the petitioner had met his burden of proof based solely upon his sworn testimony to the panel. The submission of letters of recommendation by an attorney seeking reinstatement is not a requirement in MCR 9.123 or MCR 9.124 nor has the Supreme Court or the Board ruled that such letters are essential to the quantum of proof which must be offered by a petitioner.

In this case, the letters of recommendation submitted on petitioner's behalf comprise seven pages out of a 234 page written investigative report submitted to the hearing panel by the Grievance Administrator. This report was considered by the hearing panel together with the petitioner's sworn testimony at the reinstatement hearing. Considered as whole, the record contains evidentiary support for the hearing panel's conclusion that the petitioner had established his eligibility for reinstatement under the criteria of MCR 9.123(B).

Finally, the Board has considered the argument that sufficient time has not passed to be assured of the petitioner's reformation.

We agree that the mere passage of time is not an adequate basis in and of itself to insure that the public will be protected

by petitioner's readmission. If a petitioner was "entitled" to reinstatement simply by meeting the requirement of MCR 9.123(B)(2) that the term of suspension has elapsed, the balance of that rule, including the requirements of 9.123(B)(5-7) would be rendered meaningless.

We are also mindful of the Supreme Court's order of September 15, 1994 amending MCR 9.123(B)(7) with the addition of language to the effect that the question of whether or not a petitioner can safely be recommended to the public as an attorney and officer of the court must take into account the nature of the misconduct which led to the revocation or suspension.[1] While this amendment was not

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[1] The Court's amendment to MCR 9.123(B)(7) was given immediate effect in an order dated September 15, 1994. The amendment had not been published for comment before its adoption and the panel could not reasonably have foreseen the amendment when it conducted a public hearing in August 1993 or when it issued its order granting reinstatement on December 27, 1993. Michigan Courts generally have not applied amended court rule provisions to matters disposed of in trial court proceedings prior to the effective date of the rule amendments. See Reid v A H Robins Co, 92 Mich App 140, 143; 285 NW2d 60 (1979). In Reid the Michigan Court of Appeals stated:

> [Defendant] correctly argues that amendments to court rules operate only prospectively. This means only that an amendment is not retroactively applied in a manner which will affect action taken in a proceeding which has been closed. Moore v Spangler, 401 Mich 360, 368; 258 NW2d 34 (1977) (amendment to GCR 1963, 701 allowing oral argument in appeals in circuit court does not apply to circuit appeals processed before the effective date of the amendment), People v Kerridge, 20 Mich App 184; 173 NW2d 789 (1969) (action of court in determining defendant's competency to stand trial was not to be measured by standards of court rule adopted after the trial court acted).

Id. See also Genesee Bank & Trust Co v Bourrie, 375 Mich 383, 388; 134 NW2d 713 (1965) ("Since a final order has been signed in this case before the effective date of GCR 1963, the later rules do not govern any proceedings in this case."), and Sandusky Grain Co v Borden's Condensed Milk Co, 214 Mich 306, 324; 183 NW 218 (1921) (amendments to court rule held inapplicable where "issue

in effect when the petitioner's case was considered by the hearing panel, that amendment does not, in any event, signity that the term of suspension originally imposed for the established misconduct is without relevance. In Matter of the Reinstatement of James M Cohen, 91-159-RP (Brd. Opn. 6/11/92), the Board stated:

> "By imposing a suspension for a period time, the panel, Board or Court has already determined that a greater term of suspension, or disbarment, is not appropriate. To permit the panel to revisit the misconduct to determine whether a sufficient length of time has passed in a suspension case would permit the panel or the Board to impose greater discipline ex post facto. We believe that a suspended attorney may not be denied reinstatement solely on the grounds that the reinstatement tribunal may believe that the original misconduct warranted a lengthier suspension."

The three-year and one day suspension originally imposed in this case was the result of a stipulation for consent discipline submitted by the Grievance Administrator with the approval of the Attorney Grievance Commission. It would be difficult for the Grievance Administrator to now argue that the nature of the misconduct, considered alone, warrants a longer period of suspension.

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was made up and the case tried prior to the [effective date of amendment].")

Moreover, it should be pointed out that the Board's assignment of Fletcher's petition for reinstatement to the next available hearing panel resulted in an assignment to the same hearing panelists who had entered Fletcher's consent order of suspension. At the reinstatement hearing, the panel members referred on the record to their previous consideration of the petitioner's criminal offense. It appears to be implicit in the record here that the panel members were very much aware of the nature of the petitioner's misconduct and that they determined that the petitioner could nevertheless be safely returned to the practice of law.

Rather, the Administrator has drawn the appropriate distinction between consideration of the passage of time for time's sake and consideration of whether or not the passage of time since the petitioner's suspension or disbarment has been sufficient, under all of the circumstances to establish a suitable "track record" upon which the panel can make an informed judgment as to the petitioner's present character.

In Matter of Reinstatement of Evan H Callanan, Jr, 440 Mich 1207, (1992), the Supreme Court reversed an order granting reinstatement to an attorney whose license had been revoked following his conviction of the crimes of making false declarations before a grand jury and obstruction of justice. In Callanan, the petitioner's license to practice law was revoked in September 1983, he filed a petition for reinstatement in August 1990 and a public hearing was conducted by a panel in February 1991. During his period of revocation, petitioner Callanan was incarcerated for three years, from December 1985 to November 1988. His incarceration was followed by three months in a half-way house and he then reported monthly to a parole officer, until November 1990.

In its order vacating the panel's order of reinstatement, the Court stated:

> "The misconduct which led to revocation of the petitioner's license to practice law was substantial and, because the petitioner had spent little or no time outside the supervision of federal authorities since his license was revoked, it was not possible for the hearing panel and the Attorney Discipline Board to determine the present fitness of the applicant for readmission." MCR 9.123(B)(6,). Callanan, supra.

According to the stipulation for consent discipline filed by the parties in this case, the petitioner's suspension for three years and one day commenced January 8, 1990. His petition for

reinstatement was filed in March 1993 and a public hearing was held before a panel in August 1993. The record discloses that the petitioner was incarcerated in a federal prison from November 10, 1991 to June 1, 1992 and he was then in a half-way house until mid July 1992. (Administrator's report p. 139). The petitioner remained on probation until September 10, 1993.

The Supreme Court's order in Callanan, which involved the reinstatement petition of a disbarred lawyer, does not set forth rigid guidelines which can be applied easily in the case of an attorney whose license was suspended for a period of time in a consent order approved by the Attorney Grievance Commission.

As the Supreme Court noted in Grievance Administrator v August, supra, there are a number of disciplinary measures less than license revocation but there are none more severe.

> "The most severe sanction which may be imposed for a single violation of a serious nature is the same sanction available for multiple instances of the same misconduct. The most severe sanction for misconduct corrupting the administration of justice is the same sanction for severe misconduct unrelated to the practice of law. Without considering the nature of the misconduct, the panel or the Board has no basis to determine whether an attorney whose license was revoked has become fit to hold the public trust by practicing law." Grievance Administrator v August, supra at p. 312.

While it is appropriate for a hearing panel or the Board to consider the nature of the petitioner's misconduct in the case of an attorney who has received discipline less than the ultimate sanction of revocation, the questions regarding the severity of the petitioner's offense discussed by the Court in August have already been adjudicated in a suspension case. This is especially true where, as in this case, the respondent, the Grievance Administrator and the Attorney Grievance Commission have stipulated that the

severity of the attorney's misconduct does not warrant a suspension of more than three years and one day. As petitioner points out, the severity of his misconduct, the terms of his sentence and the likelihood of his incarceration were known to the respondent and the Grievance Administrator when they submitted the stipulation to the Attorney Grievance Commission and to a hearing panel for approval.

When petitioner Fletcher appeared before the reinstatement hearing panel in August 1993, his license had been suspended for more than forty-two and one-half months. During that period, he was incarcerated for approximately six and one-half months. Extracting the petitioner's period of incarceration from the period of suspension, the panel still had an opportunity to evaluate the petitioner's conduct, and the extent of his reformation, for a period of three years during which the petitioner lived and worked in the community.

The Supreme Court has not ruled that an attorney whose license has been suspended, rather than revoked, may be ineligible for reinstatement while on parole or probation, even if the petitioning attorney is incarcerated during the entire period of his suspension. Such a situation was presented to the Court in Grievance Administrator v Hatchett. 440 Mich 1210; 489 NW2d 462 (1992). There, respondent was convicted of three federal tax misdemeanors for failing to pay federal income tax and was sentenced to three consecutive one-year terms of imprisonment, to be followed by five years probation. In its order modifying a judgment of the Attorney Discipline Board by increasing the respondent's suspension from 119 to 120 days, the Court specifically adopted the hearing panel's ruling that the respondent should not be eligible to file a petition for reinstatement while imprisoned in a "federal correctional facility" but that that term did not include a half-way house or equivalent facility.

In accordance with those provisions imposed by the Court, Hatchett petitioned for reinstatement while residing in a half-way house. His petition for reinstatement was granted by a hearing panel on November 24, 1993 notwithstanding the evidence that he would be on probation for five years commencing September 1994. Matter of the Reinstatement Petition of Elbert L Hatchett, 93-60-RP (1993).

In short, the hearing panel was not precluded from finding as it did that the petitioner had satisfactorily served the term of suspension and had otherwise established his eligibility for reinstatement by clear and convincing evidence. We conclude that proper evidentiary support for the panel's decision is found in the record and that the order of reinstatement should be affirmed.

Board Members C Beth DunCombe, Elaine Fieldman, Barbara B Gattorn, Linda S Hotchkiss, M.D. and Albert L Holtz.

DISSENTING OPINION

Miles A Hurwitz

C Hugh Fletcher (herein "Fletcher") filed a petition seeking reinstatement of his privilege to practice law in Michigan on March 23, 1993. Fletcher resides in Tennessee. Fletcher testified before a hearing panel in support of his petition that he had never practiced law since his admission to the Michigan bar in 1961.

Fletcher now wishes to practice law in Tennessee drafting post-conviction criminal appeals. He seeks to protect rights of individuals against oppressive conduct by offices of the U S Attorney and the Internal Revenue Service.

On January 8, 1990, Fletcher was convicted of conspiracy to defraud the United States Government; and, to impede and impair the Internal Revenue Service in violation of 18 USC 371. The Grievance

Administrator and Fletcher subsequently entered into a stipulation for consent order of discipline in which the parties agreed that Fletecher's license to practice law in Michigan should be suspended for three years and one day, commencing the date of his conviction and until reinstatement under MCR 9.123(B) and MCR 9.124. That agreement was approved by the Attorney Grievance Commission and a hearing panel of the Attorney Discipline Board.

Fletcher was in prison or in a half-way house from November 1991 through July, 1992. Fletcher continued on parole until September 10, 1993. From his conviction on January 8, 1990 through his discharge from parole on September 10, 1993, Fletcher was under the supervision or restraint by federal authorities.

The public hearing on Fletcher's petition for reinstatement was held on August 24, 1993, two and one-half weeks before his discharge from parole. Among other things, Fletcher was required under MCR 9.123(B)(7) to:

> "establish by clear and convincing evidence that: . . . he . . . can safely be recommended to the public, the courts and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence, and in general to aid in the administration of justice as a member of the bar and as an officer of the court."

Under the rules promulgated by the Supreme Court, a Michigan attorney can be suspended or disbarred for misconduct which has been established by a preponderance of the evidence. MCR 9.115(J)(3). By contrast, the individual seeking reinstatement from that suspension or disbarment must meet a higher standard of proof and must establish his or her eligibility for reinstatement by clear and convincing evidence. Grievance Administrator v August, 485 Mich 296, 305 (1991). Furthermore, it is the petitioner alone who must meet this burden and reinstatement should not be granted simply because no adverse evidence has been presented. The Board has stated:

> "Under the rules of governing reinstatement

> proceedings, the burden of proof is placed on 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 express 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 DelRio 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." Matter of James DelRio DP 94/86 Brd Opn 8/11/87.

The report of the hearing panel in this case is largely conclusory and fails to specifically identify evidence which supports its finding that Fletcher satisfied the requirements of MCR 9.123(B)(7) in a clear and convincing manner. Based upon any subjective or objective standard, Fletcher did not meet that burden of proof.

Similarly, it was Fletcher's burden under MCR 9.123(B)(5) to establish that his conduct since the order of discipline has been exemplary and above reproach. As stated in DelRio, supra, it was not the Grievance Administrator's burden to show that petitioner engaged in questionable acts during that period.

More importantly, while Fletcher has apparently led an uneventful life in Tennessee since his release from incarceration, he was not discharged from parole until seventeen days after the reinstatement hearing and the record below contains no evidence bearing upon Fletcher's conduct at a time when he was not under some form of supervision or restraint by federal authorities. For that reason alone, the hearing panel's order granting reinstatement should be reversed.

In the matter of the Reinstatement Petition of Evan H Callanan, Jr, 440 Mich 1207 (1992), the Supreme Court considered

the reinstatement petition of an attorney who had been disbarred following his felony conviction of the crimes of making false declarations before a grand jury and obstruction of justice. Callanan's license was revoked effective September 1, 1983, the date of his conviction. He was incarcerated for three years, from December 2, 1985 to November 30, 1988 and his parole was terminated on November 30, 1990. Like Fletcher, Callanan filed a petition for reinstatement while he was still subject to parole. When Callanan appeared before a panel for the hearing on his reinstatement petition in February 1991, he had been off parole for approximately two and one-half months.

The hearing panel order of reinstatement in Callanan was affirmed by the Attorney Discipline Board and was appealed to the Supreme Court which peremptorily reversed the Board. The Court stated:

> "The misconduct which led to the revocation of the petitioner's license to practice law was substantial and, because the petitioner had spent little or no time outside the supervision of federal authorities since his license was revoked, it was not possible for the hearing panel and the Attorney Discipline Board to determine the present fitness of the applicant for readmission, MCR 9.123(B)(6,7)." Matter of the Reinstatement Petition of Evan H Callanan, 440 Mich 1207; 487 NW2d 750 (1992).

I see no significant difference between Callanan and this case.

Finally, the majority refers to the fact that Fletcher's suspension resulted from an agreement between the Grievance Administrator and Fletcher that he should receive a suspension of three years and one day. The majority suggests that that agreement should not be ignored and that the Administrator cannot argue now that the nature of the misconduct, considered alone, warrants a longer period of suspension.

During the hearing panel proceedings, the Grievance Administrator attempted to argue the significance of the criminal conduct which led to Fletcher's conviction. The panel was not

receptive to those arguments, indicating that the Grievance Commission was bound by its stipulation for consent discipline.

On September 15, 1994, the Supreme Court amended MCR 9.123(B)(7) by requiring that the Board and its hearing panels take into account the nature of the misconduct which led to the suspension in determining whether the petitioner has "nevertheless" satisfied the requirements of that sub-rule.

On November 2, 1994, the Supreme Court entered orders in two matters involving attorneys who had been reinstated by a hearing panel but who had not yet been recertified under MCR 9.124(C) and were challenging the conditions of recertification imposed by the State Board of Law Examiners. In Wayne L Yashinsky v State Board of Law Examiners, SCt 99169, the Court vacated the hearing panel order of reinstatement entered May 5, 1993. In John Kelly v State Board of Law Examiners, SCt 99219, the Court vacated the hearing panel reinstatement order entered October 5, 1993. Although neither reinstatement order had been appealed to the Board or the Court, the Court remanded both cases to the Board to conduct new hearings and to make findings on the petitioners' eligibility for reinstatement in light of the Court's amendment to MCR 9.123(B)(7) (eff. September 15, 1994), referred to above.

The mandate of the Supreme Court in its recent amendment to MCR 9.123(B)(7), as applied to reinstatement petitions considered in 1993 in Kelly and Yashinsky, should not be ignored. Even if the Board is otherwise satisfied with the conclusions of the hearing panel, it should remand this case for rehearing in light of the Court's amendment to MCR 9.123(B)(7).

However, for the reasons set forth in this opinion, I believe that the hearing panel's order of reinstatement should be reversed and that the petition for reinstatement should be denied.

Board Members George E Bushnell, Jr., and Marie Farrell-Donaldson did not participate.

Board Member John F Burns was recused and did not participate.