In the Matter of the Reinstatement
Petition of Evan H. Callanan, Jr., P-30564,

Petitioner/Appellee.

92-324-RP

Decided: September 29, 1994

MAJORITY BOARD OPINION

This is a reinstatement matter. The petitioner's license to practice law in Michigan was revoked, effective September 1, 1983, following his felony conviction in a United States District Court of the crimes of making false declarations before a grand jury and obstruction of justice.

The petitioner filed a petition for reinstatement on August 21, 1990. Public hearings were conducted in February 1991, an interim order of reinstatement was issued February 22, 1991 and a hearing panel order of reinstatement was entered May 8, 1991. Matter of Evan H Callanan, Jr, 90-140-RP. That order of reinstatement was appealed to the Attorney Discipline Board by the Grievance Administrator. The Board entered an order on April 14, 1992 affirming the hearing panel's order of reinstatement. The Administrator then filed an application for leave to appeal in the Michigan Supreme Court. On August 7, 1992, the Court issued its order peremptorily reversing the Board and ordering that the petitioner not be reinstated at that time. The Court's order stated:

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because the petitioner had spent little or no time outside the supervision of federal authorities since his license was revoked, it was not possible for the hearing panel and the Attorney Discipline Board to determine the present fitness of applicant for readmission."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

On August 26, 1992, the petitioner moved the Supreme Court for reconsideration. The Supreme Court denied that request by an order entered November 24, 1992.

On December 11, 1992, the petitioner filed a new petition for

reinstatement which was assigned to Tri-County Hearing Panel #29 under file no. 92-324-RP. Following evidentiary hearings on May

10, 24 and June 14, 1993, the panel issued its report and order of reinstatement on October 7, 1992. The Grievance Administrator seeks reversal of the panel's order on the grounds that the time which has elapsed since the petitioner's release from federal supervision has not been sufficient to allow the hearing panel to make an informed evaluation of the petitioner's rehabilitation.

Applying the guidelines provided by the Supreme Court, including the Court's prior order in Callanan, supra and Grievance Administrator v Irving August, 438 Mich 296 (1991) we conclude that the hearing panel's decision to grant reinstatement was a proper exercise of what the Court has described as the "element of subjective judgment in the application of MCR 9.123(B)". August at 311. The panel's decision is affirmed.

On review, the Board must first determine whether or not the findings of the hearing panel have proper evidentiary support in the whole record. In re Freedman, 406 Mich 256; 277 NW2d 635 (1979); In re Grimes, 414 Mich 483; 326 NW2d 380 (1982); Grievance Administrator v August, 438 Mich 296 (1991). We are mindful, of course, that while the Board reviews that judgment of the hearing panel for adequate evidentiary support, the Board at the same time possesses a measure of discretion with regard to its ultimate decision. In re Daggs, 411 Mich 304, 318-319; 307 NW2d 66 (1981); Grievance Administrator v August, supra at 304.

As in August, the Grievance Administrator does not challenge the panel's factual findings as to those eligibility requirements of MCR 9.123 which may be verified objectively, for example, whether five years have elapsed [MCR 9.123(B)(2)], whether or not the petitioner has practiced or attempted to practice law during the period of revocation [MCR 9.123(B)(3)]; the applicant's compliance with the order of revocation [MCR 9.123(B)(4); and whether or the applicant's conduct since the order of discipline has been exemplary and above reproach [MCR 9.123(B)(5)].

Nor does the Administrator challenge the hearing panel's conclusions that the petitioner established the requirements of MCR 9.123(B)(6,7) which deal with a petitioner's understanding of the standards imposed on members of the bar, whether or not the petitioner will conduct himself in conformity with those standards in the future and whether or not he or she can be safely recommended to the public, the courts and the legal profession as a person fit to be consulted by others and to otherwise act in matters of trust and confidence as a member of the bar and as an officer of the court. It was in its discussion of these criteria in MCR 9.123(B)(6,7) that the Court identified "an element of subjective judgment in the application of MCR 9.123(B)", August supra at 311.

Rather, the Board is asked to rule in this case that the hearing panel was precluded from exercising subjective judgment

because the petitioner had still spent little or no time outside the supervision of federal authorities since his license was revoked and it was not yet possible for the hearing panel to determine the petitioner's present fitness for readmission. In support of this argument, it is argued that the petitioner was not discharged from parole until April 7, 1992, that the evidentiary hearings below were concluded on June 14, 1993 and that, therefore, "no matter how exemplary his conduct between his discharge of parole and the close of proofs before the hearing panel, the period of time from April 7, 1992 through June 14, 1993 is simply not sufficient to enable a hearing panel to determine that appellee has been rehabilitated". (Administrator's Brief p 6).

We must first consider the petitioner's argument that his federal supervision ended on November 30, 1990 and that the panel mistakenly referred in its report to the date of a notice of discharge rather than the termination date itself.

Careful review of the relevant documents included in the investigative report submitted by the Grievance Administrator in accordance with MCR 9.124(C) discloses that the panel's mistaken reference to the termination of petitioner's parole in April 1992 is without evidentiary support. The documents compiled and submitted by the Grievance Administrator in its investigative report establish beyond any reasonable argument that the petitioner's parole status ended November 30, 1990.

The petitioner was convicted September 5, 1983 and was sentenced on October 14, 1983. The sentencing documents establish that the petitioner was sentenced to five years imprisonment in People v Evan H Callanan, Jr, 83-CR-60104-DT-01 [false declarations before a grand jury, 18:USC 1623] to run concurrently with an eight-year prison term for the petitioner's conviction under the federal RICO and RICO conspiracy statutes in People v Evan H Callanan, Jr, 83-CR-60101-02.

The petitioner remained at liberty on an appeal bond until December 2, 1985. He was incarcerated in various federal penal facilities until November 30, 1988 (Tr p. 135). The petitioner spent the next three months in a half-way house in Detroit (Tr p. 136) and then reported monthly to a parole officer in Detroit until the termination of his parole on November 30, 1990 (Tr p. 136).

The Grievance Administrator concedes that the petitioner's convictions under the RICO statutes were on appeal during his incarceration and that those convictions were vacated in 1990. Inasmuch as the eight-year sentence was imposed solely for those counts which were subsequently vacated, the maximum sentence to be served by the petitioner was the five-year sentence which commenced December 1, 1985 and which was terminated automatically on November

30, 1990.[1] Those circumstances are outlined in the petitioner's letter dated June 27, 1992 which is included at page 595 of the Grievance Administrator's investigative report. That letter to the United States Department of Probation requests that the notice of discharge dated April 7, 1992, showing an expiration date of petitioner's sentence as June 3, 1991, be corrected to reflect the proper date of discharge. The corrected notice of discharge, also dated April 7, 1992, acknowledges that the petitioner's sentence expired November 30, 1990. That notice is included in the Administrator's investigative report at page 596.

The hearing panel's report is therefore corrected to reflect the petitioner's release from federal supervision on November 30, 1990, the date his sentence expired and not April 7, 1992, the nominal date the discharge notice was issued.

As in Grievance Administrator v Irving August, supra, petitioner seeks reinstatement of his license to practice law having been stripped of that license following conviction of a federal felony involving corruption of the judicial system. Under August, the hearing panel was required to consider the nature of the misconduct for which the petitioner was disbarred and to weigh the seriousness of that misconduct against the time which had elapsed since disbarment and since the commission of the acts resulting in disbarment. August at 307, 309. Specifically, the burden is upon the petitioner to establish that the length of time which has elapsed since disbarment and the commission of the acts resulting in disbarment has been sufficient to establish a claim of rehabilitation. August at 307. In addition, the Court's prior order in Callanan, supra makes it clear that the time which has elapsed while the petitioner was under "federal supervision" may not provide a sufficient basis for determining rehabilitation.

In a recent opinion affirming a hearing panel order of reinstatement entered approximately twelve years after a petitioner's felony conviction and disbarment, the Board concluded that:

> "In short, the Board's review in reinstatement proceedings must combine and balance the standards enunciated by the Court, i.e. review of the panel's findings for proper evidentiary support, recognition of the element of subjective judgment which is applicable to MCR 9.123(B) and, finally, the measure of discretion granted to the Board with regard to its ultimate decision". Matter of the

[1] Petitioner's sentence commenced December 1, 1985. He was credited with one day for time served and was remanded to the custody of federal authorities on December 2, 1985.

Reinstatement Petition of Robert A McWhorter, 92-83-RP, Brd. Opn. 5/20/94.

Applying that standard of review to the record in this case, we believe that the hearing panel's decision to grant reinstatement should be affirmed. The record before the panel is voluminous. The Grievance Administrator's investigative report prepared in accordance with MCR 9.124(C), including "the available evidence bearing on the petitioner's eligibility for reinstatement" is more than 650 pages. There is ample evidentiary support in the record for the panel's conclusions and findings, including, specifically, that sufficient time had elapsed, while the petitioner was not under federal supervision, to evaluate the extent of his rehabilitation.

The acts for which the petitioner was convicted and disbarred occurred in 1981 and 1982. The revocation of the petitioner's license was deemed effective September 5, 1983. When the panel below concluded its evidentiary hearings on petitioner's eligibility for reinstatement, more than ten years had elapsed since his commission of those acts and slightly less than ten years had elapsed since the revocation of his license. During that period, the petitioner was incarcerated for three years, he spent approximately three months in a half-way house and made monthly reports to a federal probation officer for twenty-one months. The petitioner has not been under the supervision of federal authorities in any sense since November 30, 1990 and has not been physically restrained since approximately March 1989.

On August 7, 1992, the Supreme Court ruled that the petitioner should "not be reinstated at this time". We are not prepared to say that that order laid down guidelines regarding the passage of time "outside the supervision of federal authorities" which would preclude the panel from determining the petitioner's present fitness for readmission under the subjective criteria of MCR 9.123(B).

Board Members John F Burns, George E Bushnell, Jr, Marie Farrell-Donaldson and Barbara B Gattorn concur in this opinion.

Board Secretary Linda S Hotchkiss, M.D. would reverse the panel's decision and would deny reinstatement at this time.

SEPARATE DISSENTING OPINION OF VICE-CHAIRPERSON MILES A HURWITZ

I would reverse the hearing panel's decision and deny reinstatement at this time.

I agree that the hearing panel's report erroneously refers to the date a notice of discharge was issued by the federal probation office (April 7, 1992) and that the petitioner's parole, i.e. his supervision by federal authorities ended on November 30, 1990. However, this modification of the hearing panel's report does not significantly impact upon the central issues presented in this case.

On August 7, 1992, the Supreme Court ruled that this petitioner should be denied reinstatement at that time because he had not spend sufficient time outside of the supervision of federal authorities to give a hearing panel or the board an adequate basis for evaluating his rehabilitation in light of the seriousness of his criminal offense.[2] The petitioner's motion for reconsideration of that order was denied by the court on November 24, 1992. Less than three weeks after that order was entered, petitioner filed this Petition for Reinstatement.

In Grievance Administrator v Irving August, 438 Mich 296 (1991) the Supreme Court emphasized that the nature of the misconduct for which an attorney was disbarred must be considered in the proceeding for reinstatement. August, 306 While MCR 9.123(B)(2) allows a disbarred attorney to petition for reinstatement after five years, that "temporal milepost" which should be interpreted as a minimum period in which rehabilitation may occur following revocation. August, 310

> "Obviously, the question whether an attorney may be safely recommended to the public is a different inquiry in the case of an attorney disbarred for corrupting the administration of law than in the case of an attorney whose disbarment resulted from conduct unrelated to the practice of law August, 310."

Petitioner Callanan's 1983 convictions of the felonies of making false declarations before a grand jury and obstruction of justice fall within that category of offenses identified in August as requiring a lengthier period of rehabilitation. Furthermore, the time spent by the petitioner under the supervision of federal authorities substantially reduced the panel's opportunity to determine the petitioners present fitness for readmission. Matter of Reinstatement Petition of Evan H. Callanan Jr. 440 Mich 1207;

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[2]Matter of Reinstatement of Evan H. Callanan, Jr. 440 Mich 1207; 487 NW2d 750 (1992).

487 NW2d 750 (1992).

In addition, to the balancing of the seriousness of the misconduct against the passage of time necessary to establish rehabilitation which is applicable in the case of a disbarred attorney, all applicants for reinstatement under the provisions of MCR 9.123(B) must establish the criteria in that subrule by clear and convincing evidence. Review of the panel's report reveals that the panel placed substantial weight upon the testimony of attorney G. Gerald Hemming as grounds for establishing the criteria of MCR 9.123(B) (5), (6), and (7).

Mr. Hemming testified on the petitioner's behalf at a hearing conducted in May 1993. At that time, the petitioner had been employed regularly at Hemmings law firm as a law clerk since January 1993. The petitioner's counsel in these reinstatement proceedings is also a member of that law firm and witness Hemming did not have sole supervision of the petitioner's work as a law clerk.

The Board has stated:

> "Under the rules 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 Del Rio 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 Del Rio) DP 94/86 Brd. Opn 8/11/87)."

While I do not imply that Mr. Hemming's testimony should have been discredited in any way, I do not believe that Hemming's limited professional contact with the petitioner from January 1993 to May 1993 constitutes proper evidentiary support for the panel's findings that the petitioner met his burden of proof by the "clear and convincing standard" required by MCR. 9.123(B).

As noted in the majority opinion in this case, the standard of review to be employed by the board includes not only a review of the record of evidentiary support but a certain degree of discretion with regard to the ultimate decision. Application of the criteria for reinstatement of a disbarred attorney as set forth in August requires denial of respondent Callanan's petition for reinstatement. The petitioner has not established that sufficient

time has elapsed since the revocation of his license to ameliorate the taint on the legal profession caused by his felony convictions.

SEPARATE DISSENTING OPINION OF CHAIRPERSON ELAINE FIELDMAN

The questions of whether a sufficient period of time has elapsed since disbarment and whether the petitioner has served a sufficient period of time free from supervision are, as the Supreme Court said in August, subjective. Grievance Administrator v Irving August, 438 Mich 296; 475 NW2d 256 (1991). While the Supreme Court has directed that we use our subjective judgment in deciding these cases, we must also predict what the Supreme Court would decide. Based on August, which also involved corruption of the judicial system, I believe that the Supreme Court would hold that the petitioner should not be reinstated at this time and would reverse the panel's decision.