In the Matter of the Reinstatement
Petition of Robert A McWhorter, P 17563,

Petitioner/Appellee.

Case No. 92-83-RP

Decided: May 20, 1994

BOARD OPINION

This is a reinstatement matter involving a former attorney, Robert A McWhorter, whose license was suspended for 121 days, effective October 29, 1979 and subsequently revoked effective February 24, 1981. That revocation order was the result of the respondent's conviction on May 29, 1980 of the crimes of kidnapping and conspiracy to forceably seize and kidnap another with the intent to extort money in violation of MCLA 750.349 and MCLA 750.157(a).[1]

On April 8, 1993, the hearing panel assigned to rule upon the petitioner's fitness for reinstatement entered an order of reinstatement, with conditions. By a vote of two to one, the panel found that the petitioner had fulfilled the applicable criteria of MCR 9.123(B) and had established his eligibility for reinstatement by clear and convincing evidence.

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[1] An earlier order of revocation had been entered against the petitioner in Matter of Robert A McWhorter, ADB Case No. 35951-A as the result of his conviction in the United States District Court for the Western District of Michigan of the crimes of aiding and abetting in the manufacture of methamphetaine in violation of Sec. 841(a)(1), (b)(1), (B) Title 21 U.S.C) and Sec 2(a), Title 18 U.S.C. That order of revocation was vacated by the Attorney Discipline Board on September 9, 1980 upon the entry of an order by the U.S. Sixth Circuit Court of Appeals reversing the conviction and remanding the matter for trial. The petitioner was ultimately convicted of conspiracy to import cocaine, unlawful manufacture of methamphetaine and conspiracy to distribute methamphetaine. The petitioner's second appeal to the Sixth Circuit Court of Appeals was denied and those convictions were upheld on October 29, 1982. Disciplinary proceedings based upon the federal convictions were not reinstated. However, the circumstances of the petitioner's federal conviction and his resulting incarceration and parole were included in the investigative report filed with the hearing panel and they were argued and considered by the reinstatement hearing panel.

The Grievance Administrator has petitioned for review on the grounds that the seriousness of the criminal conduct which resulted in revocation of petitioner's license precludes his reinstatement. The petitioner filed a cross-petition for review seeking the elimination of the conditions imposed by the panel.

In accordance with MCR 9.118(B), the Attorney Discipline Board issued an order to show cause on May 6, 1993 directing the parties to appear before the Board to show cause why the hearing panel's conditional order of reinstatement should not be affirmed. Prior to such hearing, the Board, on its own motion, remanded this matter to the hearing panel for an evidentiary hearing and supplemental report on the nature and scope of the petitioner's supervision by federal authorities during the period of his parole. The panel's supplemental report, filed December 13, 1993, was accompanied by exhibits and transcripts of the testimony of two federal parole officers regarding the petitioner's supervision from August 1988 through June 1992. That proceeding is included in the record considered by the Board on review.

On review, the Board must first determine whether or not the findings of the hearing panel have proper evidentiary support on 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).

As in August, supra, the Grievance Administrator's challenge is not to the factual findings of the hearing panel but to the panel's ultimate determination that the petitioner should now be reinstated, notwithstanding the nature of his criminal conduct in 1977 and 1978, the resulting felony convictions and the revocation of his license to practice law in 1981. While the Board reviews that judgment 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, 438 Mich 296, 304 (1991).

The Grievance Administrator does not challenge the panel's factual findings as to those eligibility requirements of MCR 9.123(B) which may be verified objectively, for example whether five years have elapsed since revocation [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 not the applicant's conduct since the order of discipline has been exemplary and above reproach [MCR 9.123(B)(5)].

Rather, the Board is asked to rule that the hearing panel erred in finding that the petitioner established the requirements of MCR 9.123(B)(6), that the petitioner has a proper understanding of and attitude toward the standards that are imposed on members of the bar and will conduct himself in conformity with those standards, and MCR 9.123(B)(7), that he can be 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.

As the Grievance Administrator points out, the petitioner's prior criminal misconduct stands as irrefutable evidence that in 1977 and 1978 he did not have a proper understanding of and attitude toward the standards imposed on practicing members of the bar at that time. We are not persuaded, however, by the claim on appeal that the petitioner failed to establish at reinstatement proceedings conducted some fourteen years later that he had satisfied the criteria of MCR 9.123(B)(6,7).

In Grievance Administrator v August, supra, the Supreme Court ruled that the Board had applied an erroneous standard of review to the panel's findings under MCR 9.123(B). There the Board reversed a hearing panel decision denying reinstatement to a petitioner whose license had been revoked following a felony conviction. The conviction in that case stemmed from August's collaboration with a clerk of a United States Bankruptcy Court to manipulate the blind-draw system for assigning judges. In August, the Court distinguished sub-rule (6) which deals with the applicant's ability, willingness and commitment to conform to the standards required of members of the bar from sub-rule (7) which focuses on the public trust which the Court (and its adjudicative and prosecutorial branches) must protect. Specifically, the Court noted that sub-rule (7) involves "the discretionary question of whether the Court is willing to present that person to the public as a counselor, member of the state bar, and officer of the Court bearing the stamp of approval from this Court". August, 438 Mich 296, 311.

In its discussion of those criteria, the Court recognized "an element of subjective judgment in the application of MCR 9.123(B)", August, supra at 311. We cannot conclude that the element of subjective judgment referred to by the Court in August is reserved for judicial review of contested reinstatement matters. Certainly, an element of subjective judgment by the Board is entirely consistent with the Court's pronouncement that the standard of review to be applied by the Board includes "a measure of discretion with regard to its ultimate decision". In re Daggs, 411 Mich 304, 318-319 (1981); Grievance Administrator v August, supra at 304. More importantly, the element of subjective judgment in the application of MCR 9.123(B)(6,7) is applicable to the findings and conclusions of the hearing panel which is in the unique position during the reinstatement process of assessing the character and demeanor of the petitioner and, in some cases, the credibility of other witnesses who may be called to testify.

In short, the Board's review in reinstatement cases 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.

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.

Public hearings were conducted before the panel on four separate days between August 12, 1992 and November 9, 1992. In the course of those hearings, the panel had ample opportunity to consider and evaluate the credibility and sincerity of the petitioner during his testimony and cross-examination. In addition to that testimony, the panel was in a position not shared by this Board to observe, assess and question if necessary the other witnesses who testified on the petitioner's behalf. These witnesses included:

1) The pastor of the Peoples' Church in Kalamazoo who testified that petitioner has been an active member of that church for approximately four years where he participates in a number of church activities, particularly the "extended family" program;

2) Two other members of petitioner's church who testified as to petitioner's reputation for honesty and trustworthiness and his strong participation in activities of the church;

3) Three attorneys from the Kalamazoo area testified that they had hired the petitioner and his company, Research Unlimited, on more than one occasion to do legal research and write appellate briefs. Each testified that he had a high opinion of petitioner's work product, his legal capabilities, and personal qualities and each found him to be honest and trustworthy. Each of these attorneys also testified that he knew of no instance in which the petitioner had attempted to practice law during the period of revocation and that he had not held himself out as an attorney during that period;

4) Two other Kalamazoo attorneys offered testimony of their personal and/or professional relations with the petitioner during the period of revocation. One of these witnesses testified to his admiration of the petitioner's "ethical morality", the other testified to the petitioner's "keen awareness of ethical standards";

5) A former legal assistant to an attorney who appeared on petitioner's behalf testified that she considered petitioner to be a mentor during the year she had known him and that she found him to be trustworthy and honest;

6) An auto salesman who met petitioner shortly after he was released from prison and who has known him for approximately seven years testified as to petitioner's honesty and rehabilitation;

7) A legal secretary/legal assistant who has known petitioner since 1985 testified as to the high quality of his legal research, his devotion to the law and her impressions as to his honesty and integrity;

8) Suzanne Kallan, PhD, a clinical psychologist testified that petitioner had been in treatment with her on a regular basis since 1986. She found the petitioner to be candid and forthright with her regarding his background, including his criminal convictions. She testified that the petitioner had benefited from psychotherapy and had made psychological and emotional adjustments during the past six years;

9) An attorney who has known petitioner since 1985 testified that his former law firm had hired the petitioner to do some research on complex cases and that he had an opportunity to work with petitioner on some of that research. He testified that petitioner referred to himself as a "researcher", and never as an attorney and that he believed that the petitioner was sensitive to ethical issues;

10) An attorney who has known petitioner since 1975 testified to the panel that he had observed a change in the petitioner's attitudes and personality over the years to the point that while he and the petitioner had had conflicts and personality clashes in the past, he would be willing to associate with the petitioner professionally in the event of his reinstatement;

11) Petitioner's daughter, a licensed attorney since May 1992, testified that her father's attitude and personality had changed since his incarceration and that he now takes more interest in church and family;

12) Petitioner's son, a law school student, testified to the petitioner's devotion to the law and his resulting motivation to become an attorney;

13) The petitioner's wife testified as to the petitioner's efforts to reestablish his relationship with his wife and children since his incarceration. She testified that she first noticed these changes while he was in prison, where he attended AA, taught other inmates to read and participated in a marriage encounter group. She also testified as to the petitioner's decision to go into therapy after his release from prison as well as the end of his abuse of alcohol.

Taken as a whole, the testimony presented by the petitioner and the witnesses on his behalf constitutes a body of evidence upon

which the panel could find that the petitioner had satisfied the criteria of MCR 9.123(B) clearly and convincingly.

We are mindful of the witnesses called by the Grievance Administrator in opposition to the petitioner's reinstatement. The petitioner's former legal secretary from 1968 to 1977 testified that during the period of employment by petitioner, he was not timely for meetings or court appearances, was not always truthful with his clients or employees, appeared in court after lunches which included alcohol and that petitioner was "getting himself involved. . .over his head with some of the clients, and there was too much stress for me. I wanted out". (Tr. p. 22)

The chief assistant prosecutor for Kalamazoo County testified as to the petitioner's abrasive and offensive manner toward parties and their counsel prior to his revocation. This witness also testified that he prosecuted the kidnapping case against the petitioner. During that time, he testified, the petitioner showed no signs of remorse and never acknowledged his guilt.

Finally, the Grievance Administrator called the assistant U. S. attorney assigned to the criminal case against the petitioner in the U. S. District Court for the Western District of Michigan. The witness testified to the nature of the allegations and the proceedings against the petitioner. He also testified that the petitioner refused to acknowledge guilt during the criminal proceedings against him.

As the standard of review makes clear, it is not within the Board's province to substitute its own judgment for that of the hearing panel on issues of credibility. Therefore, it is not necessarily significant that the witnesses on the petitioner's behalf outnumbered those called by the Grievance Administrator. The Board's review for evidentiary support is not concerned with the relative weight which we would give to conflicting testimony if this matter was considered de novo. Nor is the issue before us whether or not there is evidentiary support for the position urged by the party seeking review. Rather the issue is whether or not there is proper evidentiary support for the panel's findings. We conclude that there was. Furthermore, it is noteworthy that the witnesses called on the petitioner's behalf testified primarily as to the petitioner's present character and reputation based upon professional or personal relationships with the petitioner since his release from incarceration. By contrast, the witnesses who testified in opposition testified primarily to the petitioner's character and reputation as it existed prior to 1981.

The Grievance Administrator also asserts that the panel should be reversed on the grounds that "the seriousness of petitioner's criminal conduct precludes his reinstatement". (Grievance Administrator's Supporting Brief, p. 9)

Once again, we turn to the Supreme Court's 1991 opinion in Grievance Administrator v Irving August for guidance. In that opinion, the Court made it clear that while MCR 9.123(B)(2) allows a disbarred attorney to apply for reinstatement after five years, this "temporal milepost" merely fixes the minimum time after which a disbarred attorney may be declared rehabilitated. August, supra at 309. As the Court noted:

> "The determination whether the disbarred attorney may be safely recommended to the position of public trust held by members of the state bar necessarily requires consideration of the time elapsed since disbarment and since the commission of the acts resulting in disbarment. This is only consonant with the established principle that each attorney misconduct case is to be considered on its own facts. Grimes, 414 Mich 490, State Bar Grievance Administrator v DelRio, 407 Mich 336, 350; 285 NW2d 277 (1979). 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. It is also obvious that a showing of present fitness may require a lengthier period of rehabilitation where an attorney has engaged in a repeated or calculated series of acts designed to corrupt the administration of justice than in the case of an attorney whose disbarment resulted from a single instance of similar conduct. . .August at 310.

In this case, the order revoking the respondent's license law became effective February 24, 1981. The petitioner passed the temporal milepost created by MCR 9.123(B)(2) on February 24, 1986 and he was eligible to file a petition for reinstatement at that time. In fact, another six years elapsed before the petitioner petitioned for reinstatement on April 6, 1992. The record discloses that the criminal conduct engaged in by the petitioner occurred during the years 1977 and 1978. Under August, it is appropriate to consider the fourteen year period since the commission of the acts resulting in disbarment.

We must first confront the apparent position taken by the Grievance Administrator that there is no need to weigh the egregiousness of the petitioner's criminal conduct against the time which has elapsed because the nature and scope of petitioner's activity "precludes reinstatement".

In the opinion reversed by the Supreme Court in Grievance Administrator v August, the Board stated:

> "Affirmation of the denial of reinstatement in this case demands a ruling that there are certain types of professional misconduct which are so egregious that reinstatement should never be granted. While we do not necessarily disagree with this proposition, it is our belief that the Supreme Court alone has the authority to promulgate such a rule." Matter of the Reinstatement Petition of Irving A August, ADB 241-88, Brd. Opn. 12/22/89

Addressing that issue in its opinion in August, the Court noted that a number of jurisdictions do hold that there is conduct so egregious that it should preclude reinstatement to the practice law. However, the Court said:

> "We need not rule on that question because we are not prepared to say that this is such a case". Grievance Administrator v August, 438 Mich 296, 313.

The felonious conduct engaged in by petitioner Irving August resulted in convictions for conspiring to defraud the United States of the due administration of justice in violation of 18 U.S.C. 371, impeding the due administration of justice in violation of 18 U.S.C. 1503, and attempting to influence a court clerk in the discharge of her official duties in violation of 18 U.S.C 1503. In August, the Court noted that:

> "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". Grievance Administrator v August, 438 Mich 296, 310.

In the present case, petitioner McWhorter was disbarred following his conviction on state charges of kidnapping and conspiracy to kidnap with the intent to extort money. During the period of revocation, a federal conviction which had previously been dismissed was reinstated. Those convictions include conspiracy to import cocaine, the unlawful manufacture of controlled substances, conspiracy to distribute controlled substances, and using a commercial facility to facilitate the manufacture of controlled substances.

In August, the Court was not prepared to say that the petitioner's conviction for corrupting the administration of justice was conduct so egregious that it should preclude reinstatement to the practice of law. Mindful of the distinction drawn by the Court in August between a disbarment for corruption of the judicial system and a disbarment for conduct unrelated to the practice of law, we are not prepared to say now that petitioner McWhorter's conviction for conduct not directly related to the practice of law or the administration of justice should bar his reinstatement forever.

After four days of hearing, the hearing panel in this case applied the element of subjective judgment approved by the Court in August and determined that when the egregiousness of the petitioner's conduct was weighed against the fourteen years which had elapsed since the misconduct and the eleven years since the effective date of the order of revocation, the scale was not tipped against reinstatement.

We have also reviewed the panel's decision in light of Matter of the Reinstatement Petition of Evan H Callanan, Jr 440 Mich 1207, 487 NW2d 750 (1992). There, the petitioner's license was revoked effected effective September 1, 1983 following his felony conviction of making false declarations before a grand jury and obstruction of justice. Callanan's petition for reinstatement was filed August 21, 1990. The record before the panel disclosed that, following his conviction, Callanan was incarcerated for a period of three years. Following his release from a half-way house in November 1988, he was on parole until April 7, 1992. The hearing panel's decision to grant reinstatement in Callanan was affirmed by the Board. In lieu of granting leave to appeal, the Supreme Court peremptorily reversed and ordered that the petitioner not be reinstated at that time. The Court 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 the applicant for readmission".[MCR 9.123(B)(6,7)] Callanan, supra.

Recognizing the potential applicability of the Court's order in Callanan to the present case, the Board ordered that the matter be remanded to the hearing panel for further testimony and a supplemental report focusing on the issue of the nature and scope of McWhorter's supervision by federal authorities following his incarceration.

Petitioner McWhorter was incarcerated for a period of forty months. He was on parole from his release in 1985 until June 28, 1992. We have considered the Grievance Administrator's argument that "evaluation of petitioner's conduct while under strict restraint and supervision is not an adequate basis by which to gauge his behavior and render a decision upon his fitness to be reinstated to the practice of law". (Grievance Administrator's Brief, p. 13) Based upon the supplemental testimony of two federal parole officers assigned to petitioner McWhorter, we cannot conclude that the petitioner was under strict restraint and supervision from 1985 to 1992. We find no evidentiary basis in the record for the assertion that the petitioner reported to a federal parole officer "who monitored his daily activities". On the contrary, the testimony of the parole officers established that his reporting on a monthly basis eventually consisted of little more than perfunctory meetings during which the petitioner confirmed his continued residence and employment in Kalamazoo. This petitioner lived, worked and engaged in sufficient contacts with his community as a whole during the seven years following his incarceration to sharply differentiate this case from the situation presented in Callanan.

Finally, we have considered the petitioner's cross-petition for review which seeks the elimination of the following conditions imposed by the hearing panel: 1) that the petitioner continue his weekly therapy sessions; 2) that petitioner maintain activity with his church and that his minister submit two reports as to petitioner's progress and attitudinal changes at intervals of six months and five months; 3) that petitioner submit bi-monthly reports to the panel from his therapist or a qualified psychologist; and, 4) that petitioner attend bi-monthly meetings with an attorney appointed by the Board and that the monitoring attorney submit a report as to petitioner's activities every two months. The panel's conditional order of reinstatement issued April 7, 1993 directed that if the petitioner fully complied with those conditions, a final order of unconditional reinstatement would be entered March 31, 1994.

The Grievance Administrator's argument that the publication of a conditional order of reinstatement will erode public confidence in the legal system by giving the impression that attorneys will be admitted to practice even though full rehabilitation has not been established has been largely vitiated by the Supreme Court's amendment to MCR 9.124(D), effective March 1, 1994 which allows entry of a reinstatement order subject to conditions. Under this rule, such conditions must be "relevant to the established misconduct or otherwise necessary to insure the integrity of the profession, to protect the public, and to serve the interests of justice".

The petitioner has raised legitimate questions regarding the appropriateness of a discipline order requiring attendance at a

particular church and he has alluded to potential problems of client confidentiality which may be presented by the monitoring of his practice by another attorney. We need not address these concerns individually. We are persuaded that the record as a whole establishes an adequate basis upon which to evaluate the petitioner's work history, involvement in church activities, voluntary continuation of therapy on a regular basis, family relationships and personal development during the last seven years in his community. We do not find that the interim conditions ordered by the panel in March 1993 are necessary to achieve the protection of the public which is the overriding goal of these proceedings.

For all of the above stated reasons, we conclude that the hearing panel decision to grant reinstatement was based upon ample evidentiary support and was an appropriate application of the subjective judgment which is inherent to a determination of eligibility for reinstatement under MCR 9.123(B). Appropriate grounds for reversal the panel's decision have not been established.

Concurring: John F Burns, George E Bushnell, Jr., Elaine Fieldman, Barbara B Gattorn, Albert L Holtz, Linda S Hotchkiss, M.D. and Miles A Hurwitz.

Not Participating: Marie Farrell-Donaldson and C Beth DunCombe