STATE OF MICHIGAN

Attorney Discipline Board

In the Matter of the Reinstatement Petition
of Robert C. Horvath, P 42046,

Petitioner/Appellant,

v

Grievance Administrator,

Appellee.

Case No. 91-220-RP

Decided: November 17, 1992

BOARD OPINION

The petitioner, Robert C. Horvath, seeks review of a hearing panel order denying his petition for reinstatement. For the reasons stated in this opinion, the hearing panel's order is reversed and the petition for reinstatement is granted.

The petitioner was admitted to the bar in Michigan in November 1988. Prior to his admission, the petitioner was the owner of a limousine manufacturing company. In the spring of 1987, the petitioner had knowledge that stolen automobile parts were used in a limousine made by the company in Michigan and then transported to Florida to be sold.

After his admission to the bar, the petitioner was indicted by a federal grand jury and pleaded guilty on April 22, 1991 to one count of aiding and abetting in the transportation of a stolen motor vehicle contrary to 18 USC 2312 Sec.2- He was sentenced to five years probation, including four months at a Community Treatment Center, and was ordered to make restitution to three insurance companies in the total amount of $33,457.43.

In accordance with MCR 9.120, the petitioner's license to practice law in Michigan was automatically suspended on April 22, 1991, the date of his felony conviction. On September 10, 1991, the petitioner and the Grievance Administrator filed a written stipulation for consent order of discipline under MCR 9.115(F)(5) agreeing that an order should be entered suspending the petitioner's license to practice law for 120 days effective April 22, 1991. That stipulation was approved by the Attorney Grievance Commission and a hearing panel. An order embodying the agreement of the parties was entered on September 30, 1991.

On October 21, 1991, a petition for reinstatement was filed with the clerk of the Michigan Supreme Court as required by MCR 9-123(B) alleging that the period of suspension had elapsed and that the petitioner had

otherwise complied with the applicable rules. Reinstatement proceedings were conducted under the procedure described in MCR 9.124, including the publication of a notice of hearing in the December 1991 issue of the Michigan Bar Journal; the filing of the Grievance Administrator's written investigative report on January 30, 1992; and a hearing before a panel in Cheboygan on February 10, 1992.

In its written opinion filed March 26, 1992, the hearing panel ruled that the petitioner had failed to demonstrate by clear and convincing evidence that he had satisfied the requirements of MCR 9.123(B)(5-7).

Specifically, the panel concluded that petitioner Horvath had not demonstrated that his conduct since the entry of the order of discipline had been exemplary and above reproach. The panel noted that the petitioner had failed to present evidence of community service, involvement in continuing legal education, enrollment in ethics classes or "similar pursuits".

As to the requirements of MCR 9.123(B)(6,7), the panel found that the petitioner did not have a proper understanding of and attitude toward the standards imposed on members of the bar, that he had not established that he would conduct himself in conformity with those standards in the future, and that petitioner could not now be safely recommended to the public, the courts or the legal profession as a person fit to be consulted by others. The panel concluded that petitioner had not accepted personal responsibility for the crime for which he was convicted and was not forthright in answering questions regarding his actual involvement in the crime. Based upon the amount of restitution ordered by the U. S. District Court, the panel concluded that the petitioner had a "far greater involvement in the conspiracy than he would admit."

The panel also reported that the petitioner did not appear to have a cohesive plan to practice law, had no plans to carry professional liability insurance and presented no expectation of employment as a practicing attorney in the event he was reinstated.

I.

In reviewing the hearing panel's decision, the hearing panel's findings are to be reviewed for proper evidentiary support on the whole record. Grievance Administrator v Irving A. August, 438 Mich 296 (1991). At the same time, the Board does possess a measure of discretion with regard to its ultimate decision, August, supra, citing In re Daggs, 411 Mich 304 (1981).

In reviewing the panel's finding that the petitioner's conduct was not exemplary and above reproach, we note that the panel did not focus on what the petitioner had done during his suspension, but rather what he had not done. As the petitioner has pointed out, the panel specifically mentioned his failure to take part in community service or continuing legal education, although neither of those activities was required, or even

suggested, in the order of discipline. We are reminded of Justice Levin's observation in a plurality opinion in Matter of Albert, 403 Mich 346, 357 (1978), that:

> "A suspended lawyer petitioning for reinstatement should not feel compelled to present an exhaustive account of his life and character in the hope that he will, at some point, stumble on the essence of the problem as perceived by the panel and convince it that he is basically a good person who should be permitted to practice law."

In prior reinstatement cases, the Board has reversed a denial of reinstatement based primarily on a panel's perception that the petitioner had not done enough during the suspension. In Matter of David Huthwaite, DP 78/85, Brd. Opn. 11/11/86, for example) the Board reversed a reinstatement denial based upon the petitioner's failure to seek employment and his delinquency in child support payments.

More recently, in Matter of Allen N. Davey, 90-118-RP, Brd. Opn. 8/16/91, the Board reversed a panel's denial of reinstatement which included the panel's observations that there was no evidence that the petitioner "had put his life in order" and that the petitioner had been living the life of a "virtual vagabond" in Hawaii, surviving on annuity payments and gifts from his parents.

In its recent opinion in Grievance Administrator v August, supra, the Court distinguished between those requirements in MCR 9.123(B) which are of an inherently subjective nature and those requirements which may be verified objectively. August, p. 311. While placing the requirements of MCR 9.123(B)(1)(6,7) in the former category, the Court noted that the requirement of MCR 9.123(B)(5) "may be verified objectively as well, but may in some instances require judgments on the basis of the evidence." August, p. 311, footnote 7.

Viewed objectively, the evidence presented by the petitioner regarding his conduct since his suspension contains no suggestion that he has engaged in any questionable, or improper conduct. It appears that the petitioner's conduct was measured against a standard which included requirements of which the petitioner had no prior notice, i.e. community service, involvement in continuing legal education or enrollment in ethics classes. Such conditions are not specifically required by the applicable Rules and were not included in the consent order of discipline.

Furthermore, some consideration must be given to the chronology of events in this case. The petitioner and the Grievance Administrator submitted a stipulation for consent order of discipline on September 10, 1991 in which the parties agreed that the petitioner's license to practice law should be suspended for a period of 120 days commencing April 22, 1991. On the date that stipulation was filed, the petitioner's suspension had already been in effect for 140 days. This was not a situation where an

attorney suspended for a lengthy period of time might be expected to make arrangements to maintain currency in the law or become involved in community affairs. This case involved the shortest period of suspension for which reinstatement proceedings are required and the four-month suspension had already elapsed when the stipulation was filed.

The record discloses that the petitioner was gainfully employed during his suspension. His testimony that his employment and his responsibilities to a family which included six minor children did not give him "the luxury of being able to partake in outside activities" (Tr. p. 31) was unrebutted and reasonable.

Based, upon review of the whole record, including the nature and length of the suspension and the petitioner's unchallenged testimony regarding his conduct during the suspension period, we are unable to identify sufficient evidentiary support for the panel's conclusion that his conduct since suspension has been inadequate. On the contrary, this record, viewed as a whole, demonstrates that the petitioner's conduct since suspension has been exemplary and above reproach in conformity with the requirements of MCR 9.123(B)(5).

II.

The panel further found that the petitioner had not established the eligibility requirements of MCR 9.123(B)(6,7). As noted above, the Court has recognized the "inherently subjective nature" of these two requirements. We agree with that characterization. Nevertheless, the subjective nature of those requirements does not relieve the Board of the responsibility of reviewing the panel's findings for evidentiary support.

The hearing panel's denial of reinstatement was based, in part, upon its conclusion that the petitioner did not accept personal responsibility for the crime for which he was convicted and did not understand the magnitude of the crime. The panel noted that the petitioner appeared to place the blame for his involvement in the crime on financial and emotional stress. The petitioner's testimony on these issues was consistent with testimony given under oath approximately one year earlier to the Attorney Grievance Commission when the petitioner and the Grievance Administrator executed a stipulation for consent discipline. We believe that the hearing panel should have had an opportunity to consider that prior consistent testimony and the circumstances under which it was given.

On September 10, 1991, the Grievance Administrator filed a stipulation for consent order of discipline in accordance with MCR 9.115(F)(5). It was accompanied by a certified transcript of the petitioner's sworn statement taken at the office of the Attorney Grievance Commission on August 1, 1991. In that transcript, the petitioner was asked by the Administrator's counsel to explain the circumstances surrounding the offense for which he was convicted. Consistent with his testimony to the reinstatement panel, the petitioner recalled the head-on collision on January 22, 1987 which resulted in serious injuries to his wife, who was then pregnant, and his minor children. On both occasions, the petitioner

testified that the conduct which resulted in his conviction occurred at a time when he was financially and emotionally devastated. We find no substantial discrepancies between the petitioner's statement to the Grievance Administrator in August 1991 and his testimony to the reinstatement hearing panel in February 1992.

As discussed below, the Grievance Administrator's Investigative Report submitted to the panel in accordance with MCR 9.124(B) appears to be based on a broad interpretation of the requirement in that rule that the report contain "the available evidence bearing on the petitioner's eligibility for reinstatement". Although the report includes pleadings and transcripts pertinent to the criminal conviction itself as well as a substantial amount of material pertaining to the petitioner's personal life prior to the suspension and prior to his admission to the bar, the report does not, inexplicably, include the stipulation for consent order of discipline or the supporting transcript. That material is relevant to the petitioner's eligibility for reinstatement. Without the opportunity to consider the petitioner's prior testimony to the Grievance Administrator regarding the circumstances of his misconduct and conviction, the hearing panel could not properly evaluate the petitioner's testimony on that subject at the reinstatement hearing. The panel should have had the opportunity to consider not only the content of that prior testimony but the fact that the Grievance Administrator, the Attorney Grievance Commission and a hearing panel all considered that testimony in arriving at the conclusion that a suspension for 120 days was appropriate.

Finally, the panel also commented in its report that the petitioner failed to establish the requirements of MCR 9.123(B)(6,7) by failing to present a specific plan for the practice of law and by failing to demonstrate his understanding of "the necessity of and reasons for carrying [liability] insurance".

It was the unrebutted testimony of the petitioner that although he felt that he was unable to afford malpractice insurance when he first started practicing law, "I definitely think you should have malpractice insurance . . . it's advisable now". (Tr. p. 38,39) With regard to his plans for practicing law, it is difficult to understand how much more specific the petitioner could be expected to be after he testified that he "definitely" planned to practice law, either as a sole practitioner or under the supervision of another attorney in the fields of business and litigation. (Tr. p. 34). Until reinstatement is granted, definite plans for employment would be difficult.

There are no requirements in the Court Rules or the statutes requiring Michigan attorneys to carry professional liability insurance or to present a detailed plan for employment when applying for reinstatement. The consent order of discipline, which could have included conditions, contained no such requirements. We are unable to find evidentiary support for the panel's conclusion that the petitioner's testimony with regard to those issues precluded a finding that he had met the criteria of MCR 9.123(B)(6,7).

III.

The Board's conclusion that the hearing panel's findings were without appropriate evidentiary support requires reversal in this case. However, we strongly believe that the positions taken by the Grievance Administrator in opposition to the petitioner's reinstatement warrant comment.

In the Administrator's appellate brief, for example, the Board is urged to consider that:

> Petitioner's crime was serious. It involved dishonesty, fraud, the direct disobeyance of the law and concealment. Petitioner has repeatedly provided testimony which attempts to lessen his involvement with the conspiracy charges and has endeavored to place the blame on the other parties involved. (Transcript, pp. 21,22). In addition, he has utilized the auto accident involving his wife as an excuse for many of his problems. (Transcript, p. 34). Administrator's Brief, p. 7.

The "serious nature" of the petitioner's crime and his account of the circumstances surrounding that conduct were known to the Grievance Administrator and the Attorney Grievance Commission when the consent discipline proposal was approved by the Commission, when the petitioner's sworn statement was taken on August 1, 1991 and when the written stipulation was filed with a hearing panel. The Board is now urged to overlook the Grievance Administrator's recommendation in September 1991 that a suspension of 120 days be approved. Instead, it is argued, the petitioner's "serious" criminal conduct should be considered as grounds to continue a suspension which has been in effect for more than eighteen months.

Similarity, the Administrator emphasizes on appeal that the petitioner has completed only one-fifth of the five-year probation period ordered as part of his criminal sentence. The Administrator cites cases from other jurisdictions (Florida and New York) which hold that an attorney's completion of probation should be a prerequisite to reinstatement. Those decisions should not be relevant in this case. The Grievance Commission and the Administrator knew that the petitioner had been sentenced to five years probation when the Commission approved and recommended entry of a suspension of 120 days.

In short, it was the Grievance Administrator's position on August 1, 1991, that consideration of the petitioner's crime, petitioner's version of the circumstances at the time of his misconduct and the sentence imposed upon conviction should result in a suspension of 120 days. In the review proceedings before the Board, it is now the Administrator's position that those same factors--the "serious nature" of the petitioner's crime, his attempts to "excuse" his conduct, and the fact that he remains on probation--should be considered as factors warranting denial of reinstatement. The argument that the petitioner knew when he entered into

the stipulation that he would be required to prove his eligibility for reinstatement is disingenuous at best in light of the Administrator's decision to raise these issues for the first time on appeal.

We are deeply troubled by the interjection of these arguments in this case. If it is the Administrator's position that reinstatement should be denied upon consideration of the nature of the misconduct and the terms of the sentence, we can only conclude that the Administrator now feels free to repudiate the terms of the consent discipline stipulation which his counsel executed approximately one year ago.

IV.

We are further urged to affirm the hearing panel's denial of reinstatement because:

> As an additional consideration in a petition for reinstatement, the Court in August held that the passage of time between the discipline and the commission of the acts resulting in the discipline is a necessary consideration. August, p. 11. Whether or not the disciplined attorney may be safely recommended to the position of trust held by the members of the State Bar requires consideration of the time period elapsed. Administrator's Brief, p. 7.

We do not believe that the holding in August is applicable in this case. The August rationale is applicable to the reinstatement of attorneys who have been disbarred.

> The language employed by the Court in August was:
>
> 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 commission of the acts resulting in disbarment. Grievance Administrator v August, 438 Mich 296, 309 (1991). (Emphasis added.)

In our opinion in Matter of the Reinstatement of James M. Cohen, Case No. 91-159-RP, Brd. Opn. 6/11/92 (reconsideration denied 7/16/92), we ruled that the Court's decision in August is not applicable to the reinstatement of suspended lawyers. We noted in that opinion:

> By imposing a suspension for a period of 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 argument against application of August in suspension cases would appear to be even stronger where, as in this case, the suspension in question was entered into by consent. The Administrator, having agreed to a suspension of 120 days as the appropriate suspension for petitioner's criminal conduct, now argues that the reinstatement panel should be free to consider whether sufficient time has elapsed. Apart from due process considerations, we do not believe that such a position is warranted under August. Moreover, in practical terms it is hard to imagine that any attorney would ever enter into a stipulation with the Grievance Administrator for a suspension greater than 120 days knowing that the Administrator might later argue against reinstatement on the grounds that the nature of the misconduct warrants a longer suspension.

V.

Finally, the Board has considered the scope of the investigative materials submitted to the panel. MCR 9.124(B) directs that the Administrator shall investigate a petitioner's eligibility for reinstatement and shall submit a written report to the hearing panel summarizing the facts of all previous misconduct and "the available evidence bearing on the petitioner's eligibility for reinstatement."

Specifically, we have considered the inclusion in the Investigative Report of the complete investigation file of the State Bar's Character and Fitness Committee and material identified as a Federal Bureau of Investigation Investigative Report.

The petitioner apparently applied for admission to the State Bar of Michigan on October 21, 1987. Based upon information provided by petitioner in his Affidavit of Personal History, the petitioner was interviewed by an investigator of the State Bar of Michigan in April 1988. His application was referred to a district committee on July 1, 1988 and his application was approved by the district committee on November 2, 1988.[1]

Included in the Character and Fitness file is information regarding:

1) The petitioner's arrest in December 1977 with three other people for possession with intent to deliver or sell marijuana and PCP. The petitioner explained that the police confiscated drugs found in a safe belonging to

[1] Rule 15, Section 1(7) of the By-laws of the State Bar of Michigan states that “Information obtained in the course of processing an application for admission to the Bar may not be used for any other purpose or otherwise disclosed without the consent of the applicant or by order of the Supreme Court.” The Administrator's Investigative Report is silent as to whether this confidential material was released as the result of a Supreme Court order or the prior consent of the applicant.

> another individual in a house where he was staying. A memo dated July 1, 1988 to the petitioner's Character and Fitness file states that "due to the fact that this was an arrest not followed by conviction and the fact that it occurred eleven years ago, no further investigation was conducted . . . this information will not remain with the relevant investigation material and will not be mailed to the district committee."
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> 2) The petitioner's involvement as a plaintiff or defendant in several civil cases in 1987 and 1988.
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> 3) The circumstances underlying his Chapter 5 Discharge from the United States Army. The petitioner explained that he received a general discharge under honorable conditions at the age of nineteen.
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> 4) The petitioner's divorce in North Carolina in 1983 and subsequent litigation concerning child custody.

The material presented under the hearing "Federal Bureau of Investigation Investigative Report" consists of the typed notes of an FBI agent from telephone interviews with four individuals during the period June 3, 1988 to September 30, 1988.[2] These notes contain statements by a former employee of petitioner's limousine company. Three other individuals were interviewed regarding specific vehicles delivered to the petitioner or his company prior to the summer of 1988. Two individuals reported to the FBI that the petitioner had used a hand gun to shoot his dog. None of these statements was verified.

In a recent opinion in Matter of the Reinstatement Petition of Basil W. Brown, 90-123-RP, Brd. Opn. 7/8/92, the Board considered the admissibility during reinstatement proceedings of tape recordings made by a police informant - Those tapes were made at the time of the arrest which led to Brown's suspension. The tapes had not been offered as aggravating evidence regarding petitioner's moral character at the time discipline was imposed. In Brown, the Board stated:

> We affirm the panel's ruling to exclude the tapes and transcripts. This evidence of petitioner's character and conduct at the time of his arrest in 1985 was available to the Grievance Administrator at the discipline proceedings conducted in 1988. The tapes were not offered as exhibits during those

[2] The interview notes obtained from the FBI contained the following notation at the bottom of each page “This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.” The Investigative Report is silent as to whether FBI approval was obtained for the publication of these notes which are now open to the public under MCR 9.126(C).

> proceedings. Even if the tapes and transcripts were relevant as to the issue of the character of the petitioner in these reinstatement proceedings, MRE 403 would exclude their admissibility. The prejudice to petitioner Brown resulting from the use of the tapes and transcripts would not be outweighed by their probative value." Matter of Basil Brown, Brd. Opn. p. 2.

The material contained in the Character and Fitness file and FBI material included in the Administrator's report goes far beyond the scope of the material excluded in Matter of Basil Brown. Unlike the tapes made incident to Brown's arrest for criminal conduct at a time he was a lawyer, the material in the Character and Fitness file relates to events in the petitioner's personal life before he even became a lawyer.

While the FBI notes are at least related to the petitioner's criminal offense, they are subject to the same objections as those raised in Brown, i.e. they relate to the petitioner's conduct more than three years prior to his suspension, the evidence was not disclosed to the hearing panel which imposed discipline, and, under MRE 403, the prejudicial effect would far outweigh any probative value.

The Board is well aware that the Grievance Administrator's Investigative Report was admitted into evidence by the hearing panel without objection by petitioner's counsel. However, unlike the Brown matter in which the tapes and transcripts were first offered at the reinstatement hearing, the Investigative Report in this case was mailed directly to the hearing panel members more than a week before the hearing, giving them ample time to review and digest the contents of the report.

In the first page of the Grievance Administrator's Report, entitled "Introduction", the reader encounters the statement that "There is no representation by the Grievance Administrator that the information herein is exhaustive with respect to the activities of the disqualified attorney since the date of discipline". (Emphasis added) This implication that the focus of the Administrator's investigation was on the period since suspension is bolstered by the inquiries posed to the petitioner during the transcribed interview which is included in the Administrator's report (pp. 83-105). In each instance, the questions to the petitioner regarding his involvement in law suits, bankruptcy claims, traffic arrests or criminal investigations were all specifically limited to the period of time since the petitioner's suspension.

We agree with the Grievance Administrator that any attorney suspended for a period of 120 days or more is placed on notice that he or she must establish eligibility for reinstatement in accordance with MCR 9.123 (B) However, the clear import of the questions posed to the petitioner during his investigative interview was that he would be answerable for his conduct since the date of his suspension. There is

nothing in the record below which suggests that any notice was given to the petitioner, prior to the filing of the administrator's report, that he would be required to defend and explain aspects of his personal life prior to his admission to the Bar.

At least two of the matters referred to in the Character and Fitness section of the Administrator's report were deemed to worthy of comment by the panel which noted in its report that:

> "Among questionable activities of the petitioner prior to his admission as an attorney were a 1977 arrest of the petitioner for possession with intent to deliver or sell marijuana and PCP and a discharge from the United States Army under Chapter 5, which is a general discharge". (Hrg. Pnl. Rept. p. 3)

These two incidents in particular were apparently considered by the Administrator to be relevant to the petitioner's eligibility for reinstatement as evidenced by the opening paragraph of the Statement of Facts which appears in the Administrator's brief filed with the Board:

> "Prior to his admission, petitioner was questioned extensively by the Character and Fitness Committee of the State Bar of Michigan. Investigation was based upon his involvement in activities including a 1977 arrest for possession with intent to deliver or sell marijuana and PCP and a Chapter 5 general discharge from the United States Army". (Adm. Brf. p. 2)

Certainly, the fact that a petitioner's license to practice law was suspended by a consent order does not constitute a guarantee of reinstatement and the panel must consider all relevant evidence pertaining to the petitioner's conduct since suspension. We are not prepared to say categorically that evidence concerning a petitioner's conduct prior to suspension or prior to admission to the bar may never be relevant to a determination of that petitioner's character and his or her present moral and ethical fitness to be a lawyer. In every reinstatement proceeding, the paramount concern of all parties involved must always be the protection of the public. Matter of Trombly, 398 Mich 377; 247 NW2d 873, 876 (1976).

Under the circumstances presented in this case, however, we can only conclude that the complete Character and Fitness file and the FBI notes were outside the scope of this inquiry. No persuasive argument has been made, for example, that the petitioner's arrest, without conviction, or his discharge from the Army at the age of nineteen are relevant to his eligibility for reinstatement when those events occurred more than ten years before the conduct which led to his suspension.

We must conclude that, having stipulated in writing to the entry of an order suspending the petitioner's license to practice law for 120 days, the Grievance Administrator's introduction of evidence pertaining to events prior to the misconduct for which discipline was assessed was inherently prejudicial to the petitioner in the absence of any showing that such evidence was unavailable at the time the consent discipline was approved.

Finally, an observation should be made about the inclusion of an anonymous letter in the investigative report compiled by the Grievance Administrator and distributed to the hearing panel members. In addition to signed letters from two lawyers and four non lawyers in support of the petitioner's reinstatement, the Administrator's report includes a letter signed by an individual identified only as “a concerned citizen”. It is included under the heading “Letters of Opposition” (Exhibit 1, Page 117).

It is presumed that the Supreme Court gave consideration to the language employed in MCR 9.124(B) when it directed that the Administrator's report include “the available evidence bearing on the petitioner's eligibility for reinstatement”. We do not believe that the term “evidence” as used in this rule is so broad as to include anonymous letters. The introduction of anonymous letters does not comport with the most fundamental precepts of fairness applied in judicial or quasi-judicial proceedings. These include the right to confront one's accusers. The use of anonymous letters as evidence of opposition to a petition for reinstatement is inconsistent with those principles.

CONCLUSION

We find that the hearing panel's report was based, in several instances, upon the application of erroneous standards. Furthermore, the proceedings themselves were flawed by the inclusion of material outside the proper scope of inquiry. We conclude, therefore, that the hearing panel's decision to deny reinstatement in this case did not have proper evidentiary support in the record. On the contrary, the evidence submitted by the petitioner satisfactorily establishes that he has met each of the applicable criteria in MCR 9.123(B) and reinstatement should be granted.

John F. Burns, Elaine Fieldman, Linda S. Hotchkiss, M.D., and Theodore P. Zegouras

George E. Bushnell, Jr., and C. Beth DunCombe did not participate in this decision

DISSENTING OPINION

Miles A. Hurwitz

I respectfully dissent from the Board's decision to reverse the hearing panel's Order Denying Reinstatement. While I share some of the concerns expressed in the majority opinion, our overriding concern must be the protection of the public. Matter of Trombley, 398 Mich 377; 247 NW2d 873, 876 (1976).

It is the Board's function on appeal to review the findings of the hearing panel for proper evidentiary support on the whole record. In re Grimes, 414 Mich 483; 326 NW2d 380 (1982); Grievance Administrator v August, 438 Mich 296; 304 NW2d (1991). While this standard of review has been dutifully recited by the majority, I sense that the majority has focused exclusively on specific aspects of the proceedings below while overlooking the cumulative effect of the whole record.

In its opinion in Grievance Administrator v August, supra, the Supreme Court made it clear that the nature of the offense and the time elapsed since its commission and since disbarment are relevant and important considerations in determining whether a disbarred attorney should be recommended to the position of public trust that is held by members of the bar. August, supra p. 314. 1 agree with the majority that the rationale announced by the Court in August is applicable only to the reinstatement of attorneys who have been disbarred. It is not applicable to the reinstatement petition of an attorney who has been suspended for a fixed term.

In most other respects, however, the standards to be applied to reinstatement proceedings involving disbarred attorneys and attorneys suspended for more than 119 days are the same. See the plurality opinion of Justice Levin in Petition of Albert, 403 Mich 346; 269 NW2d 173 (1978). Justice Levin, joined by Justice Kavanagh, noted that prior to 1970 a reinstatement hearing was to be given focus by the chairman of the Grievance Committee who was required to give the petitioner an advance notice of the nature of the proofs required for reinstatement. This was contrasted with the substantive criteria in the present rules which require an affirmative showing by the applicant that he possesses the requisite qualities of character and learning. These substantive criteria, Justice Levin complained, vest a large measure of unstructured discretion in the hearing panel "with the risk that [the] decision may turn on subjective feelings about a lawyer's personality, beliefs or character". Petition of Albert, supra at 355.

In the fourteen years which have passed since Justice Levin complained of the subjective nature of reinstatement proceedings, and despite his suggestion in Albert that the rules regarding reinstatement be amended to require identification of specific problems or conditions to be addressed by the lawyer seeking reinstatement, there have been no substantive changes in the reinstatement rules. In fact, the Supreme Court has recognized the "inherently subjective nature" of several of the requirements for reinstatement and has declared that the element of subjective judgment in the application of MCR 9.123(B) is "appropriate". Grievance Administrator v August, supra p. 311.

My point is simply that regardless of any feeling which any member of the Board may have regarding the nature of these reinstatement proceedings, the fact remains that MCR 9.123(B), as interpreted by the Court, does give a great deal of subjective discretion to the hearing panel. Furthermore, the Court has made it clear that a hearing panel's exercise of that discretion is not easily disturbed. See for example, the Court's recent peremptory reversal of this Board's decision to vacate a hearing panel denial of reinstatement in Grievance Administrator v Leonard R. Eston, ADB 90-138-RP; S.Ct. 93610, Order dated 8/7/92

Whether or not the Grievance Administrator chooses to introduce evidence in opposition to reinstatement, the petitioner is never relieved of the burden of establishing his or her eligibility by "clear and convincing evidence" under the applicable criteria outlined in MCR 9.123(B)(1-9). As the Discipline Board stated in a 1987 opinion, there is

no express or implied presumption that a petitioner is entitled to reinstatement simply because the Grievance Administrator has not presented damaging evidence. Matter of the Reinstatement of James DelRio, DP 94/86, 8/11/87.

Applying these observations to this case, I find that I disagree with the majority in several respects.

First, although the majority opinion is careful to leave the door open for situations in which evidence concerning a petitioner's conduct prior to suspension or prior to admission to the bar may be relevant to a determination of the petitioner's eligibility for reinstatement, it is strongly suggested by the majority that the focus of the reinstatement hearing in this case should have been limited to petitioner Horvath's conduct since his suspension. I am not prepared adopt that view.

It is significant that sub-rule 9.123(B)(5) is limited to the petitioner's conduct “since the order of discipline” but that sub-rules 6 and 7 contain no such restrictions. In accordance with those sub-rules, the petitioner must show that he or she has a proper understanding of and attitude toward the standards imposed on members of the bar and must demonstrate that he or she can safely be recommended “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”. Those sub-rules are not limited as to time or scope.

Those qualities which we define as a person's “character” cannot necessarily be demonstrated by the applicant's conduct during the months, years, or in this case, the days, following an order of suspension. I believe that a hearing panel should have an opportunity to consider an applicant's “character” in light of all available evidence.

This applicant was not given sufficient notice of the nature of the Grievance Administrator's opposition to his petition for reinstatement or the nature of the information contained in the Administrator's written report. There is no question that the questions posed to Mr. Horvath at his interview were limited to the petitioner's conduct since his suspension. The report, which contained a great deal of information not mentioned during the interview, should have been served upon the petitioner and his counsel more than a week in advance of the hearing. However, the fact remains that the report was served upon the petitioner and his counsel and was not objected to at the hearing or on appeal.

As for the contents of the report itself, such matters as the petitioner's discharge from the army, an arrest without conviction at the age of nineteen, or the circumstances surrounding his divorce may not have probative value. Possibly, those matters should have been excluded from the written report provided to the panel members. It does not follow, however, that the inclusion of those matters in the report requires reversal of the panel's decision or that the petitioner should be relieved of his burden of establishing his fitness to practice law.

In the final analysis, I dissent because grounds for reversal of the panel's decision have not been established. The hearing panel, which had a far-greater opportunity to observe petitioner Horvath, has made a subjective determination that the petitioner did not sustain his burden of establishing his eligibility for reinstatement by clear and convincing evidence. Under the standard of review announced by the Supreme Court, that determination must be affirmed if it has evidentiary support in the whole record. Regardless of claimed procedural shortcomings in the proceedings, the panel's conclusion had adequate evidentiary support.