STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellee,

v

Thomas J. Shannon, P 35153,

Respondent/Appellant.

Case No. 91-76-GA

Decided: June 10, 1992

BOARD OPINION

The Attorney Discipline Board has considered the supplemental report of the hearing panel and the respondent's objections to that report. Based upon review of the whole record, the panel's report is adopted. Discipline in this case is increased to a suspension of two years.

The formal complaint against the respondent was filed by the Grievance Administrator on April 26, 1991. The respondent then held the position of a magistrate employed by the 36th District Court in Detroit and the complaint identified the respondent as a magistrate. Following the procedure described in MCR 9.116 (Hearing Procedure; Judges], this complaint was triggered by the filing of the Judicial Tenure Commission's recommendation to the Supreme Court that the respondent be suspended from his duties as a magistrate for 120 days.

The hearing panel's order suspending the respondent from the practice of law for a period of one year was appealed to the Attorney Discipline Board by the respondent on the grounds that the panel was prohibited by MCR 9.116(D)(1) from suspending the respondent from practicing law for a period beginning earlier than or extending beyond the suspension period recommended by the Judicial Tenure Commission.

In responsive pleadings filed with the Board, the Administrator initially asserted that the limitations expressed in MCR 9.116(D)(1) were intended to limit the discipline which could be imposed by the Board for "Judicial" misconduct but that the sub-rule does not prohibit the Board from imposing discipline greater than that recommended by the Tenure Commission where the conduct was "nonjudicial". However, a subsequent brief filed by the Grievance Administrator during the review proceedings raised a further argument-that subsequent to the public hearing conducted by the panel but prior to the entry of the panel's report and order, the respondent was terminated from his position as 36th District Court Magistrate. Therefore, it was argued, the panel was not bound by the apparent limitation of MCR 9.116(D)(1) but was instead subject to MCR 9.116(D)(3) which provides that "If the respondent no longer holds a judicial office, then the panel may impose any type of discipline authorized by these rules."

The respondent argued, on the other hand, that the respondent had a right to rely, and did rely, on the unambiguous language of *MCR* 9.116(D)(1). As the respondent pointed out, the respondent had every reason to expect that the longest suspension he faced was one of 120 days based upon the rules and the expressed position of the Grievance Administrator, including this argument to the hearing panel:

> Mr. Thomas: I have to say, as Grievance Administrator, I think it's unfortunate there is a cap on the discipline this panel can Impose; however, that is the case. You can't, according to court rules, Impose more than 120 days as set forth in the Judicial Tenure Commission's decision and recommendation for order of discipline, but I urge this panel not to consider in any way, shape or form anything less than that. (T 17)

In an Order of Remand dated November 25, 1991, this Board ruled that the respondent's termination as a 36th District Court Magistrate on June 3, 1991 would, if true, warrant further consideration by the hearing panel of the level of discipline to be imposed. The Board's order directed the panel to conduct a public hearing, 1) to receive evidence bearing upon the respondent's status as a judicial officer subsequent to June 4, 1991; and, 2) in the event the respondent no longer held judicial office, to conduct a hearing on discipline and to submit a supplemental report to the Board.

The supplemental report of Tri-County Hearing Panel 12 was filed on January 21, 1992. The panel noted that the Grievance Administrator and the respondent had stipulated that the respondent was terminated as a 36th District Court Magistrate effective June 3, 1991. No further testimony was presented to the panel by either party. Upon its consideration of the record and the arguments presented by counsel, the panel submitted its recommendation that the respondent be suspended from the practice of law for a period of two years. The panel specifically commented in its report upon the respondent's failure to disclose his termination as a magistrate to the panel. Noting the general requirements of candor and disclosure of material facts in Michigan Rules of Professional Conduct, 3.3 and the more specific provisions of MRPC 8.1(a,b), the panel reported that it was particularly disturbed that the respondent's lack of candor in failing to disclose his change of status was consistent with the underlying misconduct charged in the complaint. The panel concluded that "Respondent has now knowingly compounded those acts of admitted misconduct."

The Board has considered the respondent's objections to the panel's supplemental report. Counsel for the parties were afforded an opportunity to file further briefs and to present further arguments to the Board at a hearing on March 12, 1992. Based upon a review of the whole record, the Board concludes that a suspension of the respondent's license to practice law for a period of two years is warranted in this case.

In announcing our decision to impose the discipline recommended by the panel, we must clarify the basis for that decision. As the respondent correctly points out, the respondent has not been served with a complaint charging that his failure to disclose his termination as a magistrate

constitutes professional misconduct. The imposition of discipline grounded solely upon the respondent's failure to make such a disclosure would constitute a fundamental violation of due process. A respondent may not be found guilty of misconduct that Is not alleged in the formal complaint. In re Freid, 388 Mich 711; 202 NW2d 692 (1972); In re Ruffalo, 390 US 544 (1968).

The panel's finding that the respondent exhibited a lack of candor during the proceedings could be considered, however, as an aggravating factor having an impact on the level of discipline. The Standards for imposing Lawyer Sanctions approved by the American Bar Association in February 1986 identifies a list of factors which may be considered in aggravation, including:

> Rule 9.22(F) Submission of false evidence, false statements, or other deceptive practices during the disciplinary process.

In this case, we need not rule that the respondent or his counsel was under a duty to disclose his termination as a magistrate to the panel where that termination occurred after the conclusion of the public hearing but prior to the issuance of the panel's report. The nature and scope of the respondent's misconduct provides ample evidentiary support for a conclusion that protection of the public, the courts and the legal profession requires a suspension of two years where such misconduct includes incidents of neglect, forgery, misrepresentation, incompetence and contempt of court.

The Board has also considered the applicability of MCR 9.116(D)(1) and MCR 9.116(D)(3). We decline to adopt the position offered by the Grievance Administrator that the limitations expressed in MCR 9.116(D)(1) are applicable only when the respondent has been charged with acts of “Judicial” misconduct and that those restrictions may be Ignored when the misconduct is “nonjudicial” in nature. No authority has been cited in support of such an interpretation of that sub-rule.

The language cited from Justice Levin's dissent in Matter of Probert, 411 Mich 210, 246 (1981) recognizes that the Judicial Tenure Commission and the Attorney Grievance Commission operate Independently to protect distinct interests and that the same kind of misconduct may not result in identical levels of discipline. The example cited by Justice Levin, however, is that of a person whose conduct or temperament might render him or her unfit to hold judicial office while not substantially affecting fitness as a lawyer. We find nothing in that dissent or in the majority opinion which suggests that the applicability of MCR 9.116(D)(1) is limited by the nature of the underlying misconduct for which the Judicial Tenure Commission has recommended discipline.

As the respondent has pointed out, some guidance in this area was provided by the Supreme Court In the footnote to the Court's opinion in State Bar v Ryman, 394 Mich 167; 229 NW2d 311 (1975). There the Court noted that the then existing State Bar and General Court Rules permitted parallel proceedings by the State Bar Grievance Board and the Judicial Tenure Commission and the Court placed the bar on notice of Its intention

to amend those rules to give the Tenure Commission “sole disciplinary jurisdiction while they [judges] are serving in judicial capacities.” That intention was carried out and is now embodied in MCR 9.116 which makes It clear that the Attorney Grievance Commission may not take action against a judge unless and until the Judicial Tenure Commission recommends a sanction. Because a license to practice law is a prerequisite to a judicial position in Michigan, the restrictions in MCR 9.116(D)(1) clearly reflect the Court's intention to avoid a situation in which a recommendation by the Judicial Tenure Commission as to the appropriate sanction for a sitting judge could be superceded by a harsher discipline imposed by a hearing panel of the Attorney Discipline Board.

By adopting MCR 9.116(D)(3), the Court recognized that this public policy concern is not an issue when the respondent no longer holds judicial office. Contrary to the fear expressed by the respondent, our decision to allow the imposition of discipline under the MCR 9.116(D)(3) is not inconsistent with the letter or the spirit of MCR 9.116(D)(1). Our decision in this case is limited by the specific facts presented, including the fact that the respondent's removal as a magistrate occurred while this case was still pending before the hearing panel, well within the twenty-eight day period suggested by MCR 9.111(B)(4) as the appropriate time within which to file a report after the conclusion of the hearing.