

STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellee,

Barbara M. Katzowitz,

Complainant/Appellant,

v

Kurt A. O'Keefe, P 30718,

Respondent/Appellee.

90-13-GA

Decided: April 14, 1992

BOARD OPINION

The complainant has filed a Petition for Review objecting to a hearing panel order of dismissal. The panel's order was based upon its acceptance of a stipulation to dismiss submitted by the Grievance Administrator and the respondent. It is the position of the complainant that the Attorney Grievance Commission and the Grievance Administrator did not thoroughly investigate the allegations against the respondent/attorney and the complainant requests that the Grievance Administrator be directed to continue with the investigation and prosecution of those charges. The Attorney Discipline Board has concluded that the authority to seek dismissal of actions which it believes are unworthy of prosecution is inherent in the Attorney Grievance Commission as the prosecution arm of the Supreme Court. The petition for review is therefore dismissed and the hearing panel Order of Dismissal is affirmed.

On January 29, 1990, the Grievance Administrator filed a complaint against the respondent, Kurt A. O'Keefe, Formal Complaint 90-13-GA. The complaint charged that the respondent was retained in October 1987 by the complainant Barbara Katzowitz, in a complaint for divorce but that he failed to represent his client diligently, failed to further his client's lawful objectives and failed to avoid prejudicing or damaging his client. Specifically, the complaint enumerated the respondent's alleged failures to seek the appraisal of various property owned or held by the complainant's husband. An answer to the complaint was filed by the respondent. The respondent's denials of the misconduct charges were accompanied by affirmative statements regarding the discovery undertaken on his client's behalf.

The hearings scheduled for April 23, 1990 and May 22, 1990 were adjourned by stipulation of the respondent and the Grievance Administrator. On July 30, 1990, the respondent and the Grievance Administrator, by their respective counsel, filed a Stipulation to Dismiss the complaint which stated:

"Said stipulation is premised on the development of new information which has resulted in the Commission's conclusion that it cannot prevail against respondent. This additional investigation included an interview with the trial judge and an interview with respondent. It also consisted of further review by volunteer counsel and his agreement that dismissal is warranted."

On the day the stipulation to dismiss was filed, July 30, 1990, the Attorney Discipline Board sent a copy of the stipulation to the complainant with a letter which contained the following instructions:

"Any comments or questions regarding this procedure should be filed, in writing, with the Attorney Discipline Board with copies to the individual panel members, respondent and his counsel, and the Grievance Administrator."

On August 8, 1990, Ms. Katzowitz returned a written reply to the Board acknowledging receipt of the stipulation and advising that her attorney would be on vacation until later that month. The complainant indicated her desire to file a "request for new hearing".

Neither the hearing panel or the Board received any further communication from the complainant or her attorney. On February 6, 1991, the panel issued an Order of Dismissal based upon the panel's acceptance of the stipulation filed by the parties. This matter is before the Attorney Discipline Board upon the complainant's petition for review filed February 28, 1991.

In her supporting brief, complainant Katzowitz acknowledged that she received written notice from the Grievance Administrator's counsel in June 1990 regarding the Grievance Commission's intent to dismiss the complaint against respondent O'Keefe. The complainant was then advised that her objections to the dismissal would be treated as a request for reconsideration by the full Grievance Commission. Ms. Katzowitz was subsequently notified that the Commission had reviewed her correspondence and reaffirmed its decision to seek dismissal of the complaint. In a letter to the complainant dated July 27, 1990, Ms. Katzowitz was informed:

"Once more, this information consisted of an interview of the trial judge, an interview of Mr. O'Keefe, complete review of the court file, and further review by our expert witness who has agreed that it does not appear we can establish misconduct on the part of Mr. O'Keefe."

In this petition for review, the complainant has asked that the Attorney Grievance Commission be ordered to reinstate the formal complaint, to resume its investigation into the respondent's conduct and to make available to the complainant the material upon which it based its decision to dismiss the complaint.

In a 1990 opinion, the Board considered a complainant's petition objecting to the dismissal of a complaint without prior notice to the complainant. Matter of Richard Durant. ADB 208-88, Brd. Opn. 5/9/90. The

Board took the opportunity in that opinion to reaffirm its ruling in Matter of William E. Bufalino, II, 36580-A, 1 Mich Disc Repr 405 (1981) that the complainant is entitled to receive prior notice that the Attorney Grievance Commission intends to dispose of the allegations in a formal complaint by stipulating to a dismissal.

It is clear that complainant Katzowitz was afforded such notice in this case. Not only did the Commission provide written notice of its intent to seek dismissal, but notice was further given that the complainant's concerns and comments could be submitted to the hearing panel after the stipulation was filed.

The Board's opinion in Durant supra is cited here for its recognition of the Grievance Commission's authority to discontinue a disciplinary complaint:

"We do not mean to imply in any way that the complainant has a right to veto such decisions by the Grievance Commission or the Grievance Administrator nor do we question the Commission's authority to seek dismissal of actions which may become unworthy of prosecution. As we said in Bufalino, supra "Such authority is inherent in the Commission as the prosecution arm of the Supreme Court". Matter of Richard Durant, supra page 3

We recognize that Ms. Katzowitz is caught in a procedural web not entirely of her own making. Had the complainant's Request for Investigation been rejected by the Grievance Administrator as insufficient, under the provisions of MCR 9.112(C)(1)(a) or been had it been dismissed by the Grievance Commission under MCR 9.114(A), the complainant would have had the right to file a complaint for mandamus in the Supreme Court. See MCR 9.122(A)(2) and MCR 7.304. In light of the fact that the Attorney Grievance Commission is under the Court's direct supervisory control as its investigation and prosecution arm [MCR 9.108(A)] and the Grievance Administrator is the Court's direct appointee [MCR 9.109(A)], it is appropriate that the Court, not the Board, should review discretionary acts of the Commission or the Administrator with regard to the dismissal of an investigation or a prosecution.

However, once the formal complaint was filed with the Attorney Discipline Board and assigned to a hearing panel, the hearing panel's dismissal of the complaint, even if by stipulation or unilateral withdrawal, was then subject to review under the provisions of MCR 9.118(A) which directs that the administrator, the respondent or the complainant may petition the Board for review.

Having determined that the dismissal in this case met the guidelines set forth in Bufalino and Durant, supra regarding notice to the complainant and disclosure of the grounds for the dismissal, the Board is not in a position to review the basis for the Commission's decision. Such review, if it is to be undertaken, should be requested from the Supreme Court.

All Concur