GRIEVANCE ADMINISTRATOR,
Petitioner/Appellant,

v

JEFFREY T. ROSS, P-32289,
Respondent/Appellee.

ADB 56-89; 80-89

Decided: May 7, 1990

MAJORITY BOARD OPINION

Defaults were entered against the respondent as the result of his failure to timely answer two complaints which charged that he violated the provisions of a previous order of suspension, that he failed to answer a Request for Investigation and that he failed to answer a formal complaint. The hearing panel's Order of Reprimand is before the Board as the result of a petition for review filed by the Grievance Administrator. The Administrator argues that the respondent's default established the misconduct charged in the complaints but that the panel improperly limits its consideration to his failure to answer to answer the Request for Investigation. It is further argued that a reprimand is inappropriate in light of the misconduct which was established. Based upon a review of the record below and consideration of the arguments presented by the parties, the Board has concluded that the reprimand imposed by the panel should be vacated and that an order should be entered suspending the respondent's license for sixty days.

The first hearing in this matter was conducted on July 27, 1989. Prior to that date, a pre-hearing order had been issued by the panel on June 19, 1989 directing that the respondent file a motion to set aside defaults, with supporting affidavits and a brief, no later than June 29, 1989. It was conceded at the hearing that the respondent had failed to comply with that requirement. Following its deliberations on the Grievance Administrator's motion for entry of a default judgment on both complaints, the panel ruled that misconduct had been established and that the panel was prepared to proceed to the discipline phase of the proceedings. (Tr. 7/29/89 p. 12) The panel received testimony in mitigation at that hearing and at a subsequent hearing conducted on August 25, 1989.

While the panel's report does focus upon the respondent's failure to answer the Request for Investigation, to the apparent exclusion of the charges that he violated the terms of an order of suspension, the record does not indicate that the defaults entered against the respondent were set aside or that the panel specifically ruled that any portion of either complaint was not to be considered.

We conclude, therefore, that the misconduct alleged in the formal complaints was established by virtue of the defaults which were properly entered. See Grievance Administrator v Boyer, ADB 67-88, Brd. Opn. 8/11/89; Grievance Administrator v Sewell, ADB 58-88; Brd.

Opn. 7/31/89.

While the testimony offered by the respondent could not be used to absolve his conduct entirely, the panel was entitled to consider that testimony in mitigation and to afford that evidence considerable weight.

With regard to the charge in Formal Complaint Case No. 56-89 Count I that the respondent appeared as an attorney on behalf of a client in Osceola County Circuit Court on November 4, 1988, contrary to the terms of a suspension order which became effective October 22, 1988, the panel noted that the Order of Suspension was "unintentionally violated" because the respondent believed that his letter to the Attorney Discipline Board seeking rehearing created an automatic stay of discipline. The panel noted that it was presented with no evidence which reflected that the Board responded to that request. For the record, it should be noted that the Attorney Discipline Board was never aware of such a request. That exhibit submitted by the respondent to the panel was not received by the Board and is not contained in its files.

The panel was clearly entitled to accept the respondent's unrebutted testimony that such correspondence was mailed and that it constituted a basis for a good-faith belief that a stay had been granted. Nevertheless, whether or not such conduct was "unintentional" it was a violation warranting consideration. As the Board has ruled previously, even technical violations of the discipline rules must result in discipline and a respondent's explanation in mitigation may tend to limit the severity of the discipline imposed, but may not wholly excuse the established misconduct. See Matter of James R. Kennedy, DP 48/80, Brd. Opn. 3/10/81, Opn. Brd. p. 132.

Upon a review of the whole record, the mitigation which has been submitted by the respondent in this case, while significant, does not persuade us that a reprimand is entirely appropriate. The respondent's failure to answer the Requests for Investigation and his failure to answer the formal complaint would normally constitute sufficient grounds for the imposition of discipline greater than a reprimand. Matter of David A. Glenn, DP 91/86, Brd. Opn. 2/23/87. We therefore vacate the Order of Reprimand which became effective November 16, 1989 and direct that an order be entered suspending the respondent's license to practice law for a period of sixty days, effective November 16, 1989. The respondent shall be eligible to be reinstated under the provisions of MCR 9.123(A).

John F. Burns, Remona A. Green, Hanley M. Gurwin, Linda S. Hotchkiss, M.D. and Theodore P. Zegouras

DISSENTING OPINION

Hon. Martin M. Doctoroff

Having reviewed the record in this case and having considered the further explanations offered to the Board by the respondent in his appearance before the Board, I agree that the respondent has offered substantial mitigating evidence and that his actions or inactions have not been the result of a contemptuous attitude toward these proceedings. On the other hand, the respondent's professed ignorance of the discipline system) with which he has had previous contact, warrants closer scrutiny of his fundamental understanding of his duties as an attorney. I believe that such scrutiny should be given during the course of reinstatement proceedings as described in MCR 9.123(B) and MCR 9.124 and I would therefore increase the discipline in this case to a suspension of 120 days.