

In the Matter of the Reinstatement
Petition of James W. Daly, P-25170,
Petitioner/Appellant.

ADB 277-88

Decided: December 8, 1989

BOARD OPINION

The petitioner and the Grievance Administrator agreed to a consent order of discipline in 1988 suspending Petitioner's license for a period of 120 days. The consent order was based on charges that petitioner accepted a retainer to appeal an O.U.I.L. conviction but failed to take action; that he failed to communicate with his client and failed to refund the unused portion of the fees; that he failed to take action in a separate criminal appeal; and that he failed to answer two Requests for Investigation. Approximately three weeks before the execution of the Stipulation for Consent Order of discipline, the petitioner was convicted in the Macomb County Circuit Court of the misdemeanor of attempted possession with intent to deliver marijuana. The stipulation specifically provided that the agreed upon suspension of 120 days would constitute a resolution of any disciplinary action take which might otherwise have been imposed as the result of that criminal conviction.

On January 29, 1989, Mr. Daly filed a petition for reinstatement in accordance with MCR 9.124(A) and a hearing panel proceeding was conducted on May 16, 1989.

Based largely upon petitioner's testimony the hearing panel concluded that petitioner had not established by clear and convincing evidence the requirements of MCR 9.123(B)(5),(6)and(7) which stipulate that petitioner's conduct since the order of discipline must be exemplary and above reproach; that petitioner understands the standards of the Bar and will conform to them; and that petitioner might be safely recommended to the public, the courts and the legal profession. Of primary concern to the panel was petitioner's admittedly strained financial circumstances. He testified that he had entered into the drug transaction believing he would gain a substantial profit from the deal to ease his mounting financial pressures. The panel concluded that the circumstances which induced the prior misconduct still existed and precluded a finding that he was "fit to be consulted in matters requiring trust and confidence or that petitioner will conduct himself in an exemplary manner if granted his reinstatement."

Petitioner seeks review of the hearing panel's denial of his Petition for Reinstatement. We reverse the hearing panel denial of reinstatement and hereby order that petitioner be reinstated.

The Board does not agree with the panel finding that petitioner, by admitting his lingering financial difficulties,

failed to satisfy the conditions of reinstatement as outlined in MCR 9.123(B)(1)-(9). The panel's fears concerning the susceptibility of the petitioner to improper behavior because of financial pressures do not constitute an appropriate basis for the determination that petitioner has not established by clear and convincing evidence his fitness to practice law.

It is undisputed that the burden of establishing eligibility for reinstatement rests squarely with the petitioner, as underscored by the requirement that "clear and convincing evidence" be presented in satisfaction of MCR 9.123(B)(1)-(9). Questions involving the sufficiency of the evidence offered by a reinstatement petitioner have been decided by the Board on a case-to-case basis. It appears, however, that an attorney who has completed a fixed term of suspension and has established, prima facie, his or her eligibility in accordance with the criteria enumerated in MCR 9.123(B)(1)-(9), should not be denied reinstatement in the absence of factual evidence tending to demonstrate his or her continued unfitness.

The issue presented in this case, the hearing panel's fear that continuing financial pressures might weaken the petitioner's stated resolve to conduct himself in conformity to the standards of our profession, has been previously considered by the Board. In Matter of David P. Huthwaite, DP 78/85 (Jan. 30, 1987), the hearing panel's decision to deny reinstatement was based in part upon the petitioner's frank admission that he could not unequivocally guarantee that the misconduct which led to his disbarment, misappropriation of funds, would never occur again. The petitioner in that case further admitted that his poor financial situation had prevented him from fully satisfying his child support obligations during the period of his disbarment. In reversing the hearing panel's decision and granting Huthwaite's petition for reinstatement, the Board stated:

"We must agree, to some extent, with the observations of Justice Levin in a plurality opinion remanding a denial of reinstatement in Matter of Petition of Albert, 403 Mich 346; 269 NW2d 173 (1978), which noted that 'the vagueness of the present rule leaves unclear what the lawyer seeking reinstatement must show and what the hearing panel must require to justify reinstatement . . . 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.' Petition of Albert, 269 NW2d 173, p. 177.

"Our primary concern is the protection of the public, not the punishment of the attorney under investigation. See In the Matter of Friedman, 406 Mich 256; 277 NW2d 635 (1979); In the Matter of Trombley, 389 Mich 377; 247 NW2d 874 (1976)."

As in Huthwaite, we believe that there is ample support in the record for our belief that Mr. Daly's forced removal from his chosen profession has had a corrective effect in the sense that he is now acutely aware of his duties to the public, the courts and the legal profession, the he is aware from personal experience of the consequences of violations of those duties.

In summary, we find that petitioner has, in good faith, established his eligibility for reinstatement by clear and convincing evidence as required by the Court Rules. We therefore reverse the hearing panel denial of his petition for reinstatement and order that petitioner be eligible for reinstatement.

Hon. Martin M. Doctoroff, Remona A. Green, Hanley M. Gurwin, Robert S. Harrison and Theodore P. Zegouras.