Grievance Administrator,
Petitioner/Cross-Appellant,
v
Bradley S. Knoll, P-28449,
Respondent/Appellant.

ADB 239-88; 249-88

Decided: December 8, 1989

BOARD OPINION

The respondent was charged in Formal Complaint ADB 239-88 with neglect in failing to file a timely appeal in a criminal matter and failure to communicate adequately with his client; making a false statement in an answer to a Request for Investigation; and making a false statement in a subsequent letter to the Grievance Administrator. The hearing panel below ruled that those charges were not established. However, an order of reprimand was issued for the respondent's failure to file a timely answer to that formal complaint. The Attorney Discipline Board has considered the Petition for Review filed by the respondent seeking dismissal of the complaint. A Cross-Petition for Review was filed by the Grievance Administrator alleging that the hearing panel erred in setting aside the respondent's default and arguing that a reprimand is insufficient discipline for failure to answer a formal complaint. The hearing panel's decisions to set aside the respondent's default and to dismiss Complaint ADB 239-88 are affirmed.

Based upon the unique circumstances presented in this case, it is the Board's further decision that the respondent's good-faith effort to file an answer well within twenty-one days of his actual receipt of the complaint does not suggest a contemptuous attitude toward the discipline process but was, in fact, evidence of his desire to cooperate with the Grievance Commission's inquiry. A reprimand under those circumstances would not be appropriate. The hearing panel Order of Reprimand in Formal Complaint ADB 239-88 is therefore vacated and the complaint is dismissed.

Formal Complaint ADB 239-88 was filed with the Attorney Discipline Board on October 20, 1988. A proof of service was filed showing that it was mailed to the respondent by regular and certified mail on October 24, 1988. In accordance with MCR 9.115(C)and(D), service was effective at the time of mailing and the respondent was required to file an answer within twenty-one days, i.e., on or before November 14, 1988. In fact, his answer was mailed from Holland, Michigan on November 14, 1988 but was not post-marked in Grand Rapids until November 15, 1988 and was received at the Attorney Discipline Board on November 17, 1988. On November 15, 1988, the Grievance Administrator's office filed a default based upon the respondent's failure to answer the formal complaint within the time prescribed by the Court Rules. The default and affidavit were both signed "Cynthia C. Charles by ENL"

(apparently referring to Deputy Grievance Administrator Eugene N. LaBelle).

At the hearing on January 12, 1989, the hearing panel, on its own motion, set the default aside on the grounds that it was not accompanied by an appropriate affidavit. The Grievance Administrator argues that the hearing panel erred as a matter of law and that the default should have cemented the allegations of misconduct contained in that complaint. We affirm the ruling of the hearing panel. The affidavit in support of the default was clearly insufficient in that it was not signed by the purported affiant. Furthermore, the Grievance Administrator received notice of the respondent's defenses as set forth in the answer filed November 17, 1988. The hearing was not conducted until January 12, 1989. The Grievance Administrator's counsel has not alleged any prejudice whatsoever as the result of the hearing panel's ruling that the case should be tried on the merits and the respondent allowed to assert the defenses set forth in his answer.

Having considered the testimony and documentary evidence submitted by the parties, the hearing panel announced on the record (Tr. p. 74) that Counts II and III (alleged misrepresentations in response to the Grievance Administrator's investigation) had not been established. The panel chairman further stated that:

> "As to Count I, we find there was misconduct . . . I might say, Mr. Knoll, what we are saying in our finding is that there was delay, and that is misconduct, but we are not finding you guilty of lying to the Commission."

Nevertheless, the panel's written report concluded that while the respondent had not communicated properly with his client the record disclosed "insufficient evidence to conclude under the circumstances involved that respondent's conduct violated MCR 9.104(1)and(4)." Ordinarily, the hearing panel's written report will take precedence over statements and conclusions recited on the record. Based upon our review of the record, we are unable to conclude that the hearing panel's ruling in the written report signed by the hearing panel chairman was erroneous and the dismissal of Complaint ADB 239-88 is affirmed.

We are not persuaded by the Grievance Administrator's argument that the respondent's failure to file a timely answer, standing alone, warrants an increase in discipline. We hereby reaffirm our warning to the Bar in Matter of David A. Glenn, DP 91/86 (February 23, 1987) that "the lawyer who ignores the duty imposed by Court Rule to answer Requests for Investigation and Formal Complaints does so at his or her own peril and that, absent exceptional circumstances, that attorney may expect a discipline greater than a reprimand." In Glenn, we increased discipline from a reprimand to a suspension of thirty days in the case of an attorney who simply failed to answer a Request for Investigation and offered no reasonable excuse. The Board Opinion cited in Glenn recognized

that failure to answer could be considered "professionally irresponsible and contemptuous" and could indicate a "conscious disregard for the rules of the court." See Schwartz v Kennedy, DP 40/80 (1981) Brd. Opn. p. 132.

In the instant case, the respondent answered both the Request for Investigation and the Formal Complaint. In the case of the answer to the Complaint, it is unrebutted that he mailed the answer within twenty-one days of his actual receipt of the Complaint and, in fact, that it was mailed within twenty-one days of the mailing of the Complaint. When it was actually delivered to the Attorney Discipline Board, the answer was three days late. We are unable to conclude from the unique facts in this case that the respondent exhibited a contemptuous attitude. We cannot simply conclude that professional discipline is warranted in this case.

John F. Burns, Hon. Martin M. Doctoroff, Remona A. Green, Hanley M. Gurwin, Robert S. Harrison, Linda S. Hotchkiss, M.D., and Theodore P. Zegouras.