

Grievance Administrator,
Petitioner/Appellee,
v
David M. Jutkowitz, P-25885,
Respondent/Appellant.

ADB 83-88; 178-88

Decided: October 6, 1989

BOARD OPINION

The Attorney Discipline Board has considered a petition filed by the respondent seeking review of a hearing panel order suspending his license to practice law for three years. The respondent seeks a determination that the hearing panel acted improperly by refusing to consider a second formal complaint consolidated for hearing and the respondent asks that a suspension of two and one-half years be imposed in the consolidated cases in accordance with the terms of a stipulation for consent order of discipline filed by the parties. We affirm the hearing panel's right to reject the stipulation submitted by the parties in accordance with MCR 9.115(F)(5). Upon review of all of the facts and circumstances, the Board exercises its authority under MCR 9.118(D) and orders other discipline in the form of a suspension for two and one-half years.

There is little dispute between the parties regarding the somewhat unusual procedural sequence of events in this case. The Grievance Administrator's sixteen county complaint, ADB 83-88, was filed April 25, 1988 and was assigned to Wayne County Hearing Panel #20 for hearing. The complaint was served on May 9, 1988 and the respondent's answer was due on or before May 30, 1988. The respondent attempted to file his answer on June 1, 1988 but it was filed approximately two hours after the filing of a default by the Grievance Administrator. The hearing panel declined to set aside the default. The respondent then requested and was granted an adjournment of the separate hearing on discipline but he failed to appear at the adjourned hearing on July 5, 1988. The respondent's motion for rehearing alleging that he did not receive actual notice of the hearing date was denied.

While Case No. ADB 83-88 was pending before the hearing panel, counsel for the Grievance Administrator and the respondent negotiated a resolution to that case as well as another pending complaint and three investigative files. On September 16, 1988, a stipulation for consent order of discipline was executed by the parties calling for the respondent's plea of nolo contendere to the charges of misconduct in the two formal complaints and three additional investigative files in exchange for an agreement that a suspension of two and one-half years could be entered by the panel. In accordance with MCR 9.115(F)(5), the stipulation was executed with the prior approval of the Attorney Grievance Commission and was to be submitted to the hearing panel for approval or rejection.

On that date, September 16, 1988, the parties filed a stipulation that Formal Complaints ADB 83-88 and ADB 178-88 could be consolidated for the purpose of considering the proposed consent discipline. The stipulation for consent discipline itself was filed on September 23, 1988.

On November 22, 1988, the hearing panel filed an order rejecting the stipulation for consent discipline together with an order of suspension in Case No. ADB 83-88 suspending the respondent's license for three years. The panel's supplemental report recited the procedural history of the case and disclosed that the panel's decision to impose a three-year suspension was contained in a proposed report originally mailed to the Board on September 13, 1988. At that time, the panel had not been advised by the parties that a proposal for consent discipline was contemplated nor had the panel been requested to hold the matter in abeyance pending negotiations between the parties.

It is the respondent's position that, in reliance upon the stipulation, he effectively waived his right to present mitigating evidence to the hearing panel. This argument assumes that respondent could have persuaded the panel to reopen the proofs for the purpose of presenting such evidence. The record does not necessarily support that assumption.

We do not find that the hearing panel abused its discretion by rejecting the stipulation offered by the parties or by returning the newly consolidated case for assignment to another panel. While the hearing panel could not, within the letter or spirit of MCR 9.115(F)(5), consider the merits of the newer case following its consideration of the stipulation, the panel specifically noted that it was not made aware of the stipulation until after a decision had been reached in the first case. Nevertheless, it appears in retrospect that a notice to the panel that a stipulation for consent discipline was to be filed might have prevented the sequence of events which prompts our review in this case.

The stipulation presented to the hearing panel was not accompanied by further pleadings or statements describing the procedural background of the case or the respective positions of the parties. These arguments have now been made to the Board in these review proceedings and we have had the benefit of the cogent arguments presented by counsel. Under the authority granted by MCR 9.118(D) to affirm, amend, reverse or nullify the order of the hearing panel, we conclude that a two and one-half year suspension is an appropriate discipline. In lieu of further reassignment of Formal Complaint ADB 178-88, the Board's previous order consolidating cases ADB 83-88 and ADB 178-88 is reaffirmed and both cases are included in the discipline imposed. We note that this result is consistent with the original stipulation of the parties approved by the Grievance Administrator and the Attorney Grievance Commission.

The stipulation executed September 16, 1988 also contained the respondent's plea of nolo contendere to charges contained in three investigative files (Grievance Commission file #'s 2097/88; 2170/88 and 2380/88). We are imposing discipline in the two complaint based upon our review of the whole record and our evaluation of the circumstances in this case. Because we have not reversed the hearing panel's decision to reject the stipulation, the three investigative files referred to in the stipulation are not included in this disposition.

All concur.