Grievance Administrator,
Petitioner/Appellant,
v
Barry Boyer, P-29940,
Respondent/Appellee.

Case No. ADB 67-88; 187-88

Decided: August 11, 1989

BOARD OPINION

The Grievance Administrator has appealed an Order of Reprimand issued by a panel based upon its finding that respondent failed to answer two Requests for Investigation. The Grievance Administrator argues that the panel's dismissal of other counts in the complaint was erroneous in light of the respondent's default for failure to answer the complaint. It is further argued that the misconduct warrants a greater level of discipline. We agree on both points. The hearing panel's decision to dismissed Counts I through IV and VI is reversed. The Order of Reprimand issued by the panel is vacated and the respondent's license to practice law in suspended for thirty days.

The Grievance Administrator filed a seven-county complaint which was served on the respondent by regular and certified mail on April 20, 1988. Counts I, III, IV and VI charged that the respondent committed acts of professional misconduct by failing to appear on behalf of a client in a driver's license restoration, by presenting non-sufficient funds checks to discharge personal obligations, and by failing to honor an obligation to pay for certain typing services. Counts II, V and VII charged that the respondent failed to file timely answers to three separate Requests for Investigation. Respondent's default for failure to answer that complaint was filed on May 12, 1988. At the September 6, 1988 hearing, the panel ruled that the respondent had failed to comply with the appropriate court rules and denied his motion to set aside the default. Following that ruling, the panel chairman announced that "based on the findings,we do find that the respondent is in default and I believe that the only other matter before the commission at this point then would be in mitigation of circumstances." The respondent offered testimony on his own behalf on the issue of mitigation.

It appears, however, that the respondent's testimony offered in mitigation in the disciplinary phase of the proceeding was taken into account by the panel as a basis for its finding that the Grievance Administrator had failed to establish misconduct by a preponderance of the evidence as to five of the seven counts and that those counts should be dismissed.

An identical situation was presented to the Board in Matter of David Glenn, P-14049; File No. DP 91/85 (February 23, 1987). For the reasons stated in that opinion, we again reaffirm out prior

rulings that a default for failure to answer a formal complaint in these discipline proceedings constitutes an admission of misconduct and further proceedings on that complaint are limited to a determination of the level of discipline which should be imposed. The panel's decision to dismiss the allegations in Counts I through IV, VI and VII was erroneous in light of the panel's refusal to set aside the respondent's default and the announcement on the record that respondent's testimony was to be received as part of a mitigation/aggravation hearing.

Count II of the complaint charged that the respondent failed to file a timely answer to a Request for Investigation served July 29, 1987. The panel made a factual finding that a final notice was sent to Mr. Boyer on August 26, 1987 but that he did not file an answer until November 6, 1987. The panel's conclusion that failure to file a timely answer to a Request for Investigation does not constitute professional misconduct where the late filing does not prejudice the Grievance Administrator is at odds with MCR 9.113(B)(2) which clearly states:

> "The failure of a respondent to answer within the time permitted [twenty-one days] is misconduct."

Prejudice to the Grievance Administrator and the Attorney Grievance Commission is not a necessary element to a finding of misconduct under MCR 9.113(B)(2). In its opinion in Matter of James H. Kennedy, DP 48/80, March 10, 1981 (Brd. Opn. p. 132), the Board discussed the importance of an attorney's obligation to answer Requests for Investigation in accordance with the rules.

> "Members of the Bar have an unavoidable duty to answer Requests for Investigation. These requests are complaints, generally made by members of the public, against attorneys. Beyond the self-interest which should impel conscientious lawyers to answer, it is an affirmative duty to do so. This duty has two faces: responsibility to the Bar and to the public. The duty to the Bar is to help clarify complaints made about its members, so the grievances with merit may proceed, and those without substance may be disposed of quickly. The Bar should not suffer the effects of uncertainty resulting from dangling complaints. The duty to the public relates to fairness to lay people who may have a legitimate grievance . . . failure to fulfill this dual duty of responding is in itself substantive misconduct, and should never be ignored by a hearing panel, or excused as a peccadillo unworthy of drawing discipline."

Turning to the issue of discipline, we believe that

respondent's testimony, while not appropriately considered as a defense to the charges of misconduct, certainly has a mitigating effect with regard to Count I, III, IV and VI. Those allegations, especially those involving the issuance of two insufficient funds checks and the failure to pay a $30.00 typing fee would not, in our opinion, warrant more than a reprimand under the circumstances presented in this case. Our decision to increase discipline to a suspension of thirty days is based solely upon the respondent's failure to answer three Requests for Investigation in accordance with the rules.

As noted above, Count II of the complaint charged that the Request for Investigation filed by Larry Dudzinski and served on July 29, 1987 was not answered until November 6, 1987. The panel further found that, as alleged in Count V, a second Request for Investigation served July 29, 1987 was not answered by the respondent until December 10, 1987. In that matter, the respondent admitted that he was derelict in his duty to file an answer. Finally, the record establishes that the respondent was served with a Request for Investigation on December 4, 1986 but, as alleged in Count VII, filed no answer.

In this case, the pattern of indifference evidenced by the respondent's failure to make timely answer to three Requests for Investigation is aggravated by his failure to file a timely answer to the formal complaint, resulting in the entry of a default on May 12, 1988. Although the respondent acknowledged receipt of the notice of default on May 13, 1988, the motion to set aside the default was not mailed by Mr. Boyer until September 2nd, four days before the hearing. The motion was not served upon the Grievance Administrator as required by MCR 9.115(A).

For the reasons stated in the Board Opinion in Matter of David A. Glenn, DP 91/86, February 23, 1987, we conclude that, in the absence of exceptional mitigating circumstances, a suspension of thirty days is warranted in this case.

Concurring: Hon. Martin M. Doctoroff, Remona A. Green, Hanley M. Gurwin, Linda S. Hotchkiss, M.D., and Theodore P. Zegouras.

CONCURRING OPINION

By Patrick J. Keating

I agree with the decision to increase discipline in this case to a suspension of thirty days based upon respondent's failure to file timely answers to three Requests for Investigation. However, I do not join in the decision to reverse the hearing panel's dismissal of Counts I, III, IV and VI. For the reasons expressed in my dissenting opinion in Matter of David A. Glenn, supra, I do not agree that the respondent's default, standing alone, constitutes an admission of misconduct.