Grievance Administrator,
Petitioner/Appellee,
v
John G. Harte, P-33510,
Respondent/Appellant.

ADB 59-88; 125-88; 144-88; 157-88; 227-88

Decided: August 18, 1989

BOARD OPINION

The Respondent has filed a petition for review seeking modification of an order of discipline suspending his license to practice law for two (2) years with conditions that he continue weekly attendance at support groups in connection with his recovery from substance abuse. We conclude that the hearing panel did not abuse its discretion in rejecting the Respondent's request that he be placed on probation in accordance with MCR 9.121(C). We are persuaded, however, that a reduction of discipline is warranted. The Respondent shall be suspended for a period of one (1) year. The conditions imposed by the panel regarding the continuation of therapy and attendance at AA/NA meetings shall remain in effect for a period of two (2) years commencing with the effective date of the suspension.

The separate acts of misconduct alleged in the complaints consolidated for hearing are summarized in some detail in the hearing panel's report. Those findings of misconduct have not been appealed. The misconduct in this case, established by default and largely admitted by the Respondent, included eight counts alleging neglect of various legal matters, one count alleging misrepresentation to a client, one count alleging misuse of client funds, one count each of filing misleading or untimely answers to requests for investigation an done count alleging a failure to answer a formal complaint.

For the most part, the misconduct involves the Respondent's inaction in his dealings with his clients and the discipline system during 1987 and early 1988, although his inability to respond appropriately to inquiries from the Grievance Administrator continued until October 1988. It is the Respondent's position that his inability to practice law competently during that period was materially impaired by addiction to alcohol and cocaine, that the impairment substantially contributed to the conduct alleged in the complaints, that his impairment is susceptible to treatment and that he is, in fact, actively involved in a recovery program. It is his position that the evidence presented to the panel was sufficient to establish his eligibility for an order of probation in accordance with the provisions of MCR 9.121(C).

It is apparent that the hearing panel carefully considered the request for probation in light of the evidence presented. The panel's report includes a discussion of the evidence in support of

each of the four criteria enumerated in MCR 9.121(C)(1)(a)-(d). In its review of the panel's findings, the Board will sustain those findings which have proper evidentiary support in the record. In re Del Rio, 407 Mich 336; 285 NW2d 277 (1979).

As the panel noted in its report a respondent who has established those criteria in MCR 9.121(c)(1)(a)-(d) is not entitled to an order of probation. It remains within the hearing panel's discretion to make the specific finding that an order of probation is not contrary to the public interest. In this case, the hearing panel specifically declined to make that finding on the basis that it was not satisfied that an order of probation would adequately protect the public, the courts and the legal profession. We do not believe that it would be appropriate to disturb the hearing panel's conclusion in that regard.

We conclude, however, that the weight of the evidence presented by the Respondent in mitigation warrants a reduction in the discipline imposed. The testimony of the Respondent, his wife, friends and fellow members of AA established the devastating effects of alcohol and cocaine addiction on Respondent's personal life. The evidence in support of his efforts to conquer those addictions was unrebutted. Under the circumstances, we believe a suspension of two (2) years would be unduly punitive. A one (1) year suspension followed by reinstatement proceedings in accordance with MCR 9.123(B) and MCR 9.124 will adequately meet the goals of these disciplinary proceedings when coupled with the conditions imposed by the panel regarding the Respondent's continued therapy.

(Board Members Green, Hotchkiss and Zegouras concur in this decision.)

Dissent

Hanley M. Gurwin and Martin M. Doctoroff

We would affirm the hearing panel order of discipline. This is not to say that we necessarily disagree with the majority that a one year suspension constitutes an acceptable discipline. However, we are not persuaded that the suspension imposed by the panel was clearly inappropriate. It appears that the panel carefully weighted the nature of the misconduct together with the unique mitigating and aggravating factors present in this case. Addiction to cocaine, the use of which is a felony, is not a circumstance which should be a basis for mitigation. Furthermore, the cumulative effect of sixteen counts of misconduct is such that the discipline imposed by the panel is appropriate and ought not be disturbed.