Grievance Administrator,
Petitioner/Appellee,
v
James R. Bandy, P-28790,
Respondent/Appellant.

ADB 235-88

Decided: July 31, 1989

BOARD OPINION

The respondent has filed a petition seeking review of a hearing panel order suspending his license to practice law for thirty (30) days for his failure to file an answer to a Request for Investigation. We affirm the decision of the hearing panel that the respondent has failed to show that his failure to answer was the result of exceptional circumstances. The suspension is affirmed consistent with the Board's ruling in Matter of David Glenn, DP 91/86, Board Opinion, February 23, 1987.

The two-count formal complaint filed by the Grievance Administrator charged in Count I that the respondent failed to return unearned fees to a client following his discharge. The hearing panel ruled that the allegations in that Count had not been established by a preponderance of the evidence. The dismissal of that Count has no been appealed by either party and requires no further discussion.

A second count charges that the respondent was served with a Request for Investigation on June 30, 1988 in accordance with MCR 9.113(C)(1)(b) and that a "Final Notice" was sent by certified mail on August 9, 1988 advising him that failure to answer would subject him to formal charges of professional misconduct. Count II charged that respondent's failure to answer the Request for Investigation constituted professional misconduct in violation of MCR 9.104(1)-(4)and(7); MCR 9.103(C); MCR 9.113(B)(2) and Canon 1 of the Code of Professional Responsibility, DR 1-102(A)(1),(5)and(6).

That complaint was served on the respondent on October 13, 1988. His default for failure to answer was filed November 7, 1988. The respondent filed a motion to set aside one week later. The hearing panel set aside respondent's default but assessed costs of $100 for the "needless effort and inconvenience to respective staffs of the Attorney Discipline Board and the Attorney Grievance Commission."

At the separate hearing on the issue of discipline held in accordance with MCR 9.115(J)(2), an employee of the Attorney Grievance Commission testified that Mr. Bandy's telephone requests for extensions of time to answer the Request for Investigation were granted and that the "Final Notice" was mailed on August 9, 1988 when the last extension requested by Mr. Bandy had expired.

In explaining to the panel why he had failed to answer the Request for Investigation, the respondent referred to his impending marriage on August 5, 1988, his preparations for a reception on September 11th, his heavy trial schedule and his son's illness and hospitalization.

In a decision issued by the Attorney Discipline Board in February 1986, Matter of David Glenn, supra, we expressed our dismay that a substantial number of attorneys disciplined for misconduct failed to answer a Request for Investigation served by the Grievance Administrator despite the provisions of MCR 9.104(7) which declare that a failure to answer constitutes a separate act of professional misconduct warranting discipline. The Board's opinion recited consistent rulings by the Board emphasizing the seriousness of such misconduct. Schwartz v Kennedy, DP 40/80, 1981 (Brd. Opn. p. 132); Schwartz v Ruebelman, DP 5/81, 1981 (Brd. Opn. p. 150); and In re Smith, 35229-A, 1979 (Brd. Opn. p. 21). The Board stated further in Glenn, that:

> "Our decision to increase the discipline imposed by the hearing panel from a reprimand to a suspension of thirty days is intended to serve notice upon the respondent and the Bar 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 peril and that, absent exceptional circumstances, that attorney may expect a discipline greater than a reprimand."

The report filed by the hearing panel makes specific reference to the Board's decision in Matter of David A. Glenn, and expresses the panel's specific finding that the respondent in this case had failed to establish "exceptional circumstances" warranting the imposition of a reprimand.

The petition for review filed by the respondent is based primarily upon an argument that the panel's ruling is against the great weight of evidence. As a general rule, a hearing panel's findings will be supported where "upon the whole record, there is proper evidentiary support." In re Del Rio, 407 Mich 336; 285 NW2d 277 (1979). In reviewing panel decisions, the Board has stated:

> "The hearing panel receives evidence in the first instance and has the opportunity to judge . . . credibility. The hearing panel's finding of fact should be given deference whenever possible." Schwartz v Walsh, DP 16/83, 1984 (Brd. Opn. p. 33).

In this case, there is ample evidentiary support for the panel's findings. The panel, having had the opportunity to observe the respondent and weigh his testimony, concluded that it was "singularly unimpressed with the respondent's explanations for his

failure to perform the rudimentary act of answer a Request for Investigation." In its final report filed March 13, 1989, the hearing panel catalogued the reasons given by the respondent for his failure to answer the Request for Investigation and characterized those reasons as "feeble and insufficient."

We also note the considerable aggravating effect of the respondent's reprimand in a prior case for his failure to answer a Request for Investigation. (Matter of James R. Bandy, ADB 126-87), coupled with his failure to make a timely answer to the formal complaint in the instant case.

The respondent has also cited as error a statement place on the record by the panel chairman likening the imposition of discipline to a criminal sentencing in that the imposition of a suspension in this case might deter other attorneys from failing to file an answer to a Request for Investigation. We need look no further than the Supreme Court's decision in Matter of Grimes, 414 Mich 483; 326 NW2d 380 (1982) where the Court stated:

> "Further the purpose of discipline--protection of the public, the courts and the legal profession--may at times best be achieved through the deterrent effect of punishment. We do not accept that the assertion that 'protection' and 'punishment' are irreconcilable concepts and that the line between them cannot be crossed."

Finally, we have considered the charges raised by respondent's counsel at the review hearing before the Board that the inclusion in the Grievance Administrator's brief of testimony by the respondent given in a prior disciplinary case amounts to prosecutorial misconduct warranting dismissal. While it is true that Mr. Bandy's verbatim testimony in the prior matter was not offered into evidence in the instant proceedings, the respondent was in fact cross-examined with regard to that testimony, without objection by his counsel. The respondent was asked (Hrg. Tr. p. 112) whether he recalled the reasons he had given to the previous hearing panel for failing to answer a Request for Investigation. He was asked specifically whether those reasons included a change in the immigration laws, his business office schedule, his divorce action, his son's problems and his own physical condition. The respondent answered affirmatively.

These questions were posed at the separate hearing on discipline, after the hearing panel had already rendered its decision on misconduct. At that point in the proceedings, the panel had already been made aware of the respondent's prior reprimand. We are unable to conclude that the hearing panel or the Board was improperly influenced by further references to the prior proceeding. Our decision to affirm the thirty-day suspension in this case is based solely upon the record before the hearing panel below.

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

DISSENTING OPINION

By Patrick J. Keating

I would reduce discipline in this case to a reprimand. In the Board's decision in Matter of David A. Glenn, supra, I filed a dissent on an issue not present in this case but agreed that, absent unusual circumstances, failure to answer a Request for Investigation constitutes misconduct warranting discipline greater than a reprimand. I am firmly opposed, however, to the rigid application of such a rule. If the terms "exceptional" or "unusual" circumstances, then I believe the Board has an obligation to temper its application of that standard. I have no difficulty finding that the personal and professional difficulties which converged at the time the respondent received this Request for Investigation clearly constituted exceptional circumstances and I see no need for a thirty-day suspension in this case.