

Grievance Administrator,
Petitioner/Appellant,
v
Terry McCarthy, P-28550,
Respondent/Appellee.

ADB 135-88

Decided July 24, 1989

MEMORANDUM OPINION

The respondent has filed a Motion for Reconsideration pursuant to MCR 9.119(F) and a Motion for New Trial pursuant to MCR 2.611 seeking reconsideration of the Board's Order Increasing Discipline which was entered January 13, 1989. That Order was accompanied by the Board's opinion which stated that the respondent's failure to answer a Request for Investigation, aggravated by his failure to answer the Formal Complaint, warranted discipline greater than the reprimand imposed by the hearing panel. Discipline was increased to a suspension of thirty days. The respondent further alleges in the motion that the Board's opinion contains factual misstatements regarding the identity of the person who filed the unanswered Request for Investigation. Finally, respondent has filed a pleading requesting an automatic stay of discipline.

Jurisdiction

In accordance with an amendment to sub-chapter 9.100 of the Michigan Court Rules which became effective June 1, 1987, an explicit provision has been made for the filing of a motion for reconsideration of an order of the Attorney Discipline Board following show cause proceedings conducted before the Board in accordance with MCR 9.118. The provisions of MCR 2.119(F) (governing reconsideration of a decision on a motion) and MCR 2.611 (governing a motion for new trial) are not applicable in a disciplinary proceeding conducted under the provisions of sub-chapter 9.100. The respondent's motion is treated as a motion for reconsideration pursuant to MCR 9.118(D).

Denial of Request for Reconsideration

The Board is not persuaded that reconsideration is warranted in this case for the reason that it has not been demonstrated that the hearing panel erred in its procedural rulings nor has it been demonstrated that the Board's decision to increase discipline to a suspension of thirty days was improper.

As recited in the Board's opinion in this case, a formal complaint was filed by the Grievance Administrator and was served on the respondent by regular and certified mail on June 6, 1988. The complaint charged that the respondent's failure to answer a Request for Investigation constituted professional misconduct. Mr. McCarthy's default for failure to answer was filed with the Board

on June 28, 1988. The respondent took no action to set aside the default and filed no pleadings prior to the commencement of a hearing before a hearing panel on July 18, 1988.

Respondent's Motion for Reconsideration implies that the formal complaint contained two separate causes of action and that the complaint alleged a) that respondent was guilty of misconduct in substantive matters and b) the respondent failed to answer the Grievance Administrator's Request for Investigation. The respondent's motion specifically states that the hearing panel "dismissed all substantive charges of misconduct." The accompanying brief filed by the respondent asserts that "the hearing panel found that the substantive complaint was not meritorious, but issued an order of reprimand for his failure to respond to the Request for Investigation." There is no basis in the record for those statements.

The formal complaint filed by the Grievance Administrator contained a single count which charged that respondent's failure to answer a Request for Investigation constituted professional misconduct. There were no charges in the complaint based on the allegations contained in the Request for Investigation. Contrary to the respondent's assertion, the hearing panel did not dismiss any portion of the complaint and the substance of the Request for Investigation was not an issue. The panel's comment that the original Request for Investigation did not "appear" to be of meritorious substance is included merely for its mitigating effect.

The Board takes this opportunity to reject the respondent's premise that respondent's admitted failure to answer the Request for Investigation was not a matter of "substantive" misconduct. The Michigan Court Rules do not describe substantive or non-substantive classes of professional misconduct. Moreover, we reject any implication that failure by an attorney to discharge his or her obligation to answer a Request for Investigation or a formal complaint is a mere "technical" violation.

The respondent did not file a petition for review. The argument now made on respondent's behalf that the hearing panel erred in denying respondent's oral motion to set aside default is raised for the first time in the Motion for Reconsideration. Nevertheless, we also take this opportunity to affirm the hearing panel's refusal to set aside the default. Notwithstanding respondent's argument that an oral motion must be presented during trial [MCR 2.119(A)(1)], the power to set aside default is clearly governed by the requirements of MCR 2.603(D)(1) which allow a default to be set aside only if good cause is shown and an affidavit of facts showing a meritorious defense is filed. Respondent did not comply with either of those requirements.

The respondent further argues that he was denied a mitigation hearing as required by MCR 9.115(J)(2). As with the previous argument, this issue has not previously been raised by the respondent and was not properly preserved on appeal. Further,

respondent's claim that he was denied a mitigation hearing is contradicted by the record.

Following a recess at the hearing on July 18, 1988, the members of the hearing panel announced to the parties that they had deliberated on the issue of misconduct and they rules that the respondent's failure to respond to the Request for Investigation as alleged in the formal complaint constituted professional misconduct. (Hrg. Tr. p. 18, lines 1-8.) The hearing panel chairman then announced:

"At this point, it's the obligation of the panel to conduct a separate hearing pursuant to the Court Rules regarding the level of discipline to be imposed, and also to hear from the parties regarding any facts that would have a tendency to have a bearing on aggravating or mitigating factors." (Hrg. TR. p. 18, lines 9-14.)

The respondent did not request an adjournment to prepare for the mitigation phase of the hearing. He availed himself of the opportunity to present a statement in mitigation and that statement appears in the hearing transcript at pages 19-21.

Correction of Board Opinion

The respondent brings to the Board's attention our factual misstatement regarding the relationship between the respondent and the complainant who filed the Request for Investigation. The Request for Investigation was not, as stated in our opinion, filed by a client of Mr. McCarthy's but by an individual who complained that she was contacted by Mr. McCarthy and that he used rude and abusive language toward her. The error does not, however, have a bearing upon the respondent's duty to answer a Request for Investigation which has been filed with the Attorney Grievance Commission and served by the Grievance Administrator in accordance with MCR 9.112(C)(1)(b).

The respondent also brings to our attention the statement in the opinion that the Grievance Administrator's "final notice" was sent to the respondent and was returned to the Grievance Administrator by the postal service. The mailing of a final notice is not required by the Court Rules. Further language in the opinion regarding respondent's receipt or non-receipt of that notice is not necessary.

Request for Stay

The respondent's Motion for Reconsideration and Motion for New trial was accompanied by a request for Automatic Stay of Discipline. MCR 9.119(D) does not provide for an automatic stay of discipline in connection with the filing of a motion for reconsideration with the Board. The Board may, however, grant a

stay pending its decision on a motion for reconsideration. Under the circumstances, the Board concludes that a stay of discipline should be entered pending the Board's consideration of the motion. The stay of discipline is therefore ordered, nunc pro tunc, effective February 3, 1989. In accordance with the provisions of MCR 9.118(D), the stay of discipline shall remain in effect for a period of twenty-one (21) days following the issuance of the order denying motion for reconsideration.

All concur.