GRIEVANCE ADMINISTRATOR,
Petitioner,
v
CLYDE RITCHIE, P-19469,
Respondent.

ADB 52-87

Decided: May 31, 1988

OPINION OF BOARD

This matter comes before the Attorney Discipline Board on the filing of Petition for Writ of Superintending Control in the Nature of Mandamus in which the Grievance Administrator alleging that the hearing panel committed error by granting the Respondent's Motion To Set Aside Default. The Administrator requests that the Board direct the panel to reverse its earlier decision and enter Respondent's default. Having reviewed the pleadings filed by the parties and the transcript of the proceedings before the panel, we agree that the Respondent has failed to satisfy the requirements of the Court Rule which govern the setting aside of defaults and that the default previously entered must stand.

The Formal Complaint in this case was filed by the Grievance Administrator on April 20, 1987 and was served on the Respondent on April 27, 1987 by regular and certified mail. It was accompanied by an instruction sheet entitled "IMPORTANT PROCEDURAL INSTRUCTIONS" which directed the Respondent to consult all applicable court rules, including MCR 1985, 9.100 and specifically advised as follows:

> (3) Default. An Answer to the Formal Complaint must be filed within twenty-one (21) days after the date of service of the Complaint on Respondent. Service of the Complaint is effective at the time of mailing or personal service. WARNING: Failure to file a timely Answer will result In Default and constitutes separate, actionable misconduct. See MCR 9.113 and 9.115(D)(2). (Capitalization and underlining as they appear in the original)

On June 3, 1987, the Grievance Administrator filed a Default and Affidavit based upon Mr. Ritchie's failure to file an answer within twenty-one days of service. That Default was served on the Respondent by regular and certified mail on June 3rd.

On June 12, 1987, the Adrian gearing Panel convened in Adrian pursuant to the Notice of Hearing which accompanied the Complaint. Mr. Ritchie did not appear at that hearing and counsel for the Grievance Administrator urged that the panel accept the Respondent's default as an admission of the charges of misconduct. At that point, neither the Attorney Discipline Board, the Attorney Grievance Commission or the hearing panel had received any written or verbal

communication from Mr. Ritchie in response to the Formal Complaint and Notice of Hearing served April 27th.

Mr. Ritchie did, however, file a Motion to Set Aside Default on June 29, 1987 with a supporting Affidavit and a proposed Answer to the Formal Complaint. In his Affidavit, the Respondent asserted that he did have a good defense to the charges of misconduct; that he had provided information to the Attorney Grievance Commission including a letter to the Commission one year earlier in June 1986; and that he had inadvertently calendared the June 12, 1987 hearing date for June 22nd.

A hearing was held on the Respondent's Motion to Set Aside Default on August 3, 1987. At that hearing, over the objection of the Grievance Administrator, the hearing panel ruled that it would set aside the Default stating that "the feeling of the panel is chat while the Respondent has not answered the Formal Complaint which is, in itself, a Grievance, that the underlying alleged grievances are sufficiently in doubt so as to require that we should proceed with the hearing on those and see what develops." (8/3/87 rr. p. 22)

Except as otherwise provided, the Court Rules governing practice and procedure in a non-jury civil case apply to a proceeding before a hearing panel [MCR 9.115(A)], "therefore the hearing panel In this case considered Respondent's Motion under the guidelines of MCR 2.603(D)(1) which provide :

> A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an Affidavit of facts showing a meritorious defense is filed.

Respondent Ritchie filed an Affidavit which contains factual allegations submitted as a defense to the charges in the Complaint. It is clear, however, that MCR 9.1803(D)(1) requires not only that the Respondent put forward a defense but that he or she show "good cause". Review the record in which case, we are unable to find that Mr. Ritchie has alleged, much less show, the required good cause.

Good cause, in connection with the getting aside of a default, has been held to constitute 1) a substantial defect or irregularity in the proceedings on which the default is based, 2) a reasonable excuse for failure to comply with the requirement which created the default or 3) some other reasons showing that manifest injustice would result from permitting the default to stand, Glasner v Griffin, 102 Mich App 445 (1980); Borovar v Bursar Realty Corporation, 86 Mich App 732 (1978).

Although there is an explanation for his failure to appear at the hearing, the Motion to Aside Default filed by Respondent's behalf simply does not address the issue of his failure to file an answer to the Complaint. The error in placing the hearing date in his calendar had nothing to do with his failure to answer. We look, therefore, to any further explanations which were offered on Respondent's behalf and we find that the following representations are made to the panel:

> "Respondent's Counsel: These proceedings, I think, are very foreign to me as they are to every lawyer, and they certainly were to Mr. Ritchie . . . .
>
> He did receive the Formal Complaint. He assumed, and I think probably that it was a reasonable assumption, that he could appear at the hearing and answer those charges. He doesn't know the formalities the dotting of the , "I's", crossing of the "t's", that he had to file a formal answer. He probably should have -- looked it up" (8/3/87 Tr. p. 21)

We strongly disagree that this Respondent had any basis for the assumption chat he could ignore his duty to answer the Complaint. No claim has been made by Mr. Ritchie that he made even the most minimal effort to read the applicable Court Rules. Had he made such an effort, he would have discovered that MCR 9.115(D) is clear and straight-forward In its requirement that "the Respondent shall file and serve a signed answer" and that "a default, with the same effect as a default in a civil action, may enter against a respondent who fails within the time permitted to file an answer." The procedural instruction sheer which was mailed to him contained a "WARNING" which was capitalized and underlined advising him chat a failure to file a timely answer would result in a default, In short, Mr. Ritchie did not intend to file an Answer and now claims that it would be unfair if any penalty should result from his failure to follow the rules.

Rather then accept the characterization of the duty to answer a Formal Complaint as something akin to "the dotting of the I's or crossing of the t's", the Attorney Discipline Board had consistently ruled that the duty to answer a formal Complaint is fundamental and such a failure to answer indicates conscious disregard for the rules of the Court" Schwartz v Ruebelman, 36527-A, Michigan Attorney Discipline Board (1980) (Brd. Opn. p. 97).

We have in other cases afforded the hearing panels the right to exercise their discretion in weighing the allegations of "good cause" made by respondents seeking to overturn a default. In this case, however, the hearing panel was not given an opportunity to exercise such discretion because the Respondent did not put the issue of "good cause" before it. He admits he received the Formal Complaint but chat he had no intention or filing an answer. Instead he has relied on a totally unwarranted "assumption" that he could simply appear at the hearing to present his defense. Even though he was subsequently served with a copy of the pleading entitled "Default", he was apparently not concerned to the point of consulting the Court Rules.

The Board has reviewed this matter in light of the established policy of the courts in this state against the setting aside of defaults which are regularly entered, Glasner v Griffin, supra, p. 448; and Borovar v Bursar Realty Corporation, Supra, p. 737. We cannot conclude that the record in this case demonstrates that manifest justice will result if the default is not set aside. The Court Rule in question requires a showing of good cause which is, in the context of that Rule, something other than a showing that he is able to allege a defense to the charges. To grant Respondent's Motion to Set Aside Default in this case, where good cause has not been shown and where the Respondent's only reason for not answering was that he did not bother to read the Court Rules, would result in an

injustice to the discipline system and its ultimate beneficiaries, the Courts, the public and the legal profession.