STATE OF MICHIGAN

Attorney Discipline Board

In the Matter of the Reinstatement Petition
of Leonard R. Eston, P 13231,
Petitioner/Appellant.
Case No. 90-138-R-P

Decided: December 2, 1991

MAJORITY BOARD OPINION

Remona A. Green, Elaine Fieldman, Linda S. Hotchkiss, M.D. and Theodore P. Zegouras

This matter is before the Attorney Discipline Board to review an order entered by Tri-County Hearing Panel 126 on April 10, 1991 denying a petition for reinstatement filed by petitioner, Leonard R. Eston. Based upon review of the record below, we conclude that the petitioner's reinstatement to the practice of law is warranted at this time. The hearing panel's decision is therefore reversed.

The petitioner was suspended for fifteen months effective July 29, 1987. Matter of Leonard R. Eston, DP 75/85, Brd. Opn. 7/7/87. In that matter, the Attorney Discipline Board affirmed the findings of a hearing panel that the petitioner's neglect of a criminal appeal during the year 1983 warranted a suspension of three months and that his neglect of a second appeal, compounded by his failure to cooperate or respond truthfully to the inquiries of a United States Magistrate, warranted a consecutive suspension of twelve months. Those acts of misconduct occurred in 1983 and 1984.

A subsequent order was entered by the Attorney Discipline Board in a separate matter suspending the petitioner's license to practice for three years effective August 10, 1987. Matter of Leonard R. Eston, DP 24/87, Brd. Opn. 2/8/88. The Board affirmed the findings of a hearing panel that the petitioner appeared In various legal matters as an attorney during a sixty-day suspension which became effective May 28, 1986.

In the reinstatement proceedings below, the burden was upon the petitioner to establish his eligibility for reinstatement by presenting clear and convincing evidence of his compliance with the criteria set forth in MCR 9-123(B). The hearing panel found that, with one minor exception to which they apparently attached no great significance, the petitioner had satisfied the criteria in MCR 9.123(B)(1-4). The panel concluded, however, that the petitioner failed to establish that his conduct since the order of discipline had been exemplary and above reproach [MCR 9.123(B)(5)]; that he has a proper understanding of and attitude toward the standards that are imposed on members of the Bar and will conduct himself in conformity with those standards [MCR 9.123(B)(6)]; and that he can safely be recommended to the public, the courts and the legal profession as a person f it to be consulted by others, and to represent them and otherwise act In matters of trust and confidence, and in general to aid in the administration of justice as a member of the Bar and as an officer of the court [MCR 9.124(B)(7)].

We are aware ofthe standard of review which must be applied in these cases. As stated most recently by the Supreme Court in Grievance Administrator v August, _____ Mich, _____ Docket No. 88132, 8/29/91, the findings of the hearing panel are to be reviewed for proper evidentiary support on the whole record. In re Freedman, 406 Mich 256; 277 NW2d 635, (1979); In re Grimes, 414 Mich 483; 326 NW2d 380 (1982). As In the reinstatement case involving Irving August, we do not challenge the factual findings of the hearing panel. There is evidentiary support for their findings regarding his contacts with police officers from Oak Park and Detroit, the incidents involving Ms. Carolyn Keemer and his poor driving record.

Rather, we are not persuaded that the record supports the panel's ultimate determination that this petitioner should not now be reinstated. As noted by the Court in Matter of August, supra, the Board must review the panel's decision f or adequate evidentiary support but, at the same time, the Board possesses a measure of discretion with regard to its ultimate decision. In re Daggs. 414 Mich 304, 318-319; 307 NW2d 66 (1981).

The requirement of MCR 9.123(B)(5) that the applicant's conduct since the order of discipline has been exemplary and above reproach has never been interpreted by the Board as requiring that a reinstatement petitioner be certified as a candidate for sainthood. In Matter of J. Russell Hughes, Jr., ADB 84-89, Brd. Opn. 6/29/90, for example, the Board reversed a hearing panel's decision to deny reinstatement based upon the petitioner's plea to a trespassing misdemeanor and his Involvement In various civil lawsuits during his suspension. The Board stated In that case that it was not persuaded that those incidents presented . cumulative evidence of a lack of good judgment of a type or degree suf f icient to warrant continuation of a suspension which has now been In effect for approximately two and one-half years". Matter of J. Russell Hughes, Jr., supra p. 2.

In other cases, the Board has considered a panel's decision to deny reinstatement based, in part, upon the petitioner's arrearage in child support obligations and failure to engage in an active search for employment. In both cases, the panels f ound that these constituted examples of conduct which was not "exemplary and above reproach" as required by MCR 9.123(B)(5). Matter of Allen N. Davey, 90-118-RP, Brd. Opn. 8/16/91; Matter of David B. Huthwaite, DP 78/85, Brd. Opn. 8/30/87. In Huthwaite, supra, the Board noted that while it was distressed by the failure to pay child support it could not conclude that the failure to discharge ones private obligations would necessarily ref lect upon the ability to serve the public as a member of the legal profession. With regard to the petitioner's unemployment, the Board stated:

> "We are not able, from the record before us, to predict with confidence that an attorney who has relied upon the generosity of his family while suspended might pose a greater or lesser danger to the public if reinstated than a suspended attorney who obtained regular employment during that period"

It is clear from prior opinions that the Board has examined the petitioners' conduct during the period of suspension with an eye toward the reasonable likelihood that such conduct will be repeated in the future and that it will bear upon the petitioner's ability to conduct himself or herself in accordance with the standards Imposed on the legal profession.

It is axiomatic that the goal of discipline proceedings Is not primarily to punish the errant lawyer but to protect the public, the courts and the legal profession. MCR 9.105. Matter of Trombley, 398 Mich 377 (1976). We wholeheartedly agree with the observation that protection" and .punishment" are not irreconcilable concepts and that the line between them may necessarily be crossed in some cases. Matter of Grimes, 414 Mich 483; 326 NW2d 380, 383 (1982). We also believe, however, that care should be given to ensure that enforcement of the rules does not result In decisions which are unnecessarily punitive.

Petitioner Eaton has been suspended f rom the practice of law in this state since July 29, 1987, a period of more than four years - The acts for which he was disciplined occurred more than seven years ago. The record in this case warrants a reminder to the petitioner that the privilege of practicing law carries with it the obligation to conduct his personal and professional lives with circumspection. The record does not, In our opinion, warrant dental of his petition for reinstatement. Applying the appropriate standard of review, we do not believe that the panel's ultimate conclusion to deny reinstatement was supported by the evidence.

DISSENTING OPINION

John F. Burns, George E. Bushnell, Jr., and Hanley M. Gurwin

The majority opinion, while relying upon pointed references to an "appropriate standard of review", is, in fact, an attempt to substitute the Board's judgment for the unanimous opinion of the panel which heard and considered the evidence. The panel's conclusion that petitioner Eston has failed to establish his eligibility for reinstatement is amply supported by the evidence in this case and should be affirmed.

The Supreme Court has provided some guidance to the Board and the hearing panels in considering reinstatement petitions in the recent case of Grievance Administrator v August,_____ Mich, _____ Docket No. 88132, 8729-791. From that opinion, the majority recites the familiar standard of review that the findings of the hearing panel are to be reviewed f or proper evidentiary support on the whole record, but places greater reliance upon the Court's observation that "while the Board reviews that judgment for adequate evidentiary support, the Board at the same time possesses a measure of discretion with regard to its ultimate decision. MCR 9.118(D), In re Daggs, 411 Mich 304, 318-319; 307 NW2d 66 (1981)". In order to reach its decision to reverse the hearing panel's findings, the majority has, we f ear, exercised a f ar greater measure of discretion than contemplated by

the Court. In the Instant case, the panel's findings go to the ultimate issue In this proceeding--whether or not this petitioner is now fit to be entrusted with the license to practice law and whether he can now be recommended to the public and the courts as a person fit to be entrusted with the responsibilities of an officer of the court.

The hearing panel, which had the first-hand opportunity to observe the demeanor of the witnesses who presented testimony, summarized the petitioner's contacts with police officers from Oak Park and Detroit in 1988 and 1990 for incidents involving screaming, profanity and disorderly conduct. More significantly, the panel received the testimony of the petitioner's former attorney, Carolyn Keemer, who testified that her disagreements with the petitioner during the period of suspension resulted In his striking her in the face with a blow sufficient to require four stitches (Tr. p. 196), that he telephoned her at her home on October 31, 1987 and threatened to kill her (Tr. p. 199), that in February 1988 he kicked and banged on her office door in an attempt to gain entrance to her office (Tr. p. 204-207) and that he slapped her on approximately April 20, 1988 (Tr. p. 210). Notwithstanding the petitioner's attempts to attack Ms. Keemer's credibility, the panel was entitled to consider the weight to be given to her testimony.

Throughout these proceedings, the petitioner's attitude toward witnesses and the parties has been aggressive and confrontational. He testified to the panel that "I have problems with judges . . . prosecutors and police". (Tr. p. 146) "I'm kind of paranoid", "I feel the police are picking on me". (Hrg. Pnl. Rept. p 4)

Based upon their direct observation of petitioner Eston, the panel concluded that this was an individual who had not met his burden under the rules of showing that his conduct since the order of discipline had been exemplary and above reproach, that he currently has a proper understanding or proper attitude toward the standards imposed on members of the Bar and that he will conduct himself in conformity with those standards In the future, and that he can now safely be recommended as a person f It to act In matters of trust and confidence and to aid in the administration of justice.

The record before the panel is replete with Incidents from which the reasonable person could infer that the petitioner has a fundamental lack of respect for the rights of those with whom he has professional or personal contact.

Whether the acts for which the petitioner was disciplined occurred six months ago or six years ago, the hearing panel properly focused on its duty to assess the petitioner's fitness and character as it now exists.

It is this finding of the petitioner's current unfitness for reinstatement which has evidentiary support In the record. Even if we were inclined to exercise virtually unlimited discretion by substituting our own judgment for that of the panel, we would reach the same result. The questions concerning the petitioner's conduct which are raised by this record prevents a finding that he has established his eligibility f or reinstatement by clear and convincing evidence.