GRIEVANCE ADMINISTRATOR,
Petitioner/Appellee,
v
PETER R. BARBARA, P-10418,
Respondent/Appellant.

File No. DP 62/86

Decided: February 8,1988

Board Members Martin M. Doctoroff and Hanley M. Gurwin filed an opinion affirming the hearing panel order of revocation.

Board Members Remona A. Green and Patrick J. Keating filed an opinion to remand the case to a hearing panel for further evidence on the issue of mitigation.

Board Members Robert S. Harrison, Charles C. Vincent, M.D., and Odessa Komer took no part in the consideration of this case.

No majority of the Board concurring, the order of the panel is affirmed.

OPINION TO AFFIRM

(Martin M. Doctoroff and Hanley M. Gurwin)

The hearing panel unanimously concluded that Respondent's license to practice law in Michigan should be revoked following proceedings conducted under the provisions of MCR 9.120 and based upon Respondent's guilty plea to two charges of obtaining money under false pretenses and one charge of attempting to obtain money under false pretenses in the State of Nevada. We believe that the misconduct established in this case, when considered In light of this Respondent's prior history of discipline, is grounds for revocation and we would affirm the hearing panel's decision.

Respondent is a suspended attorney, having been suspended since February 26, 1981, the effective date of a Consent Order suspending his license for three years and one day and until the satisfaction of certain conditions including full restitution to clients. That Consent Order, which was approved by the Attorney Discipline Board, was the result of an agreement between the Respondent and the Grievance Administrator in which the Respondent admitted charges that he had failed to make timely delivery of funds to fifteen clients.

On May 8, 1986, the Grievance Administrator filed a copy of a Judgment of Conviction dated March 12, 1986 establishing Respondent's plea of guilty in the 8th Judicial Court of the State of Nevada to the crimes of obtaining money under false pretenses and attempting to obtain money under false pretenses. According to the Court documents filed by the Administrator, the crimes were allegedly committed in May and August of 1985.

In accordance with MCR 9.120, the Respondent was ordered to show cause before a hearing panel why a final order of discipline should not be entered. Respondent Barbara notified the panel that he wished to present certain mitigating information to the panel but that he was incarcerated and without funds to engage the assistance of counsel. This request was brought before the Board and we ruled that fundamental concepts of due process did allow the appointment of counsel in the narrowly drawn circumstance where the Respondent was incarcerated and indigent.

Respondent's appointed counsel filed a petition in September 1986 seeking an extension of time to file an answer to the Order to Show Cause and for payment of the expense of having the Respondent evaluated by a psychiatrist and/or clinical psychologist. The motion was based upon Respondent's allegation that there was an "extreme likelihood that Respondent suffers from a psychiatric/ psychological condition which condition has materially impaired Respondent at all material times". This request was opposed by the Grievance Administrator on the grounds that the felonies for which Respondent was convicted required the element of intent to be established beyond a reasonable doubt and that the Respondent was estopped from presenting evidence purporting to show that his mental ability was materially impaired or that his culpability was reduced by reason of a diminished capacity.

The hearing panel entered its order October 14, 1986 denying Respondent's petition and the Respondent appeared before the panel with his appointed counsel for show cause proceedings on October 29, 1986. At that hearing, Respondent represented to the panel that he was not prepared to proceed because he was unable to engage the services of an expert. He did however, make an "offer of proof" in mitigation that the criminal acts were the result of a compulsion resulting from a condition described as "gambling addiction". It was specifically argued to the panel that Mr. Barbara offered to establish that he did not have free will and intent at the time the crimes were committed.

The hearing panel Order of Revocation was filed February 3, 1987 and was accompanied by the panel's report which concluded that no evidence had been submitted which would constitute a defense to the misconduct which was established conclusively by the conviction or which would constitute mitigation. The panel further ruled that even if the facts claimed in Respondent's offer of proof were established, they would not constitute a defense or mitigation.

Respondent now argues that the hearing panel's failure to appoint and compensate a psychiatrist effectively precluded him from offering the mitigating evidence of his alleged "gambling addiction". This, he argues, constituted a denial of due process which should be remedied by returning this matter to a hearing panel for further consideration of that mitigating evidence.

Based upon our review of the proceedings below, we believe that the hearing panel acted appropriately in declining to appoint and compensate a psychiatrist and we agree with their conclusion that the "gambling addiction" defense offered by the Respondent should not have been considered.

Mitigation in disciplinary proceedings -has been described as "as any considerations or factors that may justify a reduction in the degree of discipline to be imposed". Standards for Imposing Lawyer Sanctions, Sec. 9.31 (1986). The Attorney Discipline Board has defined mitigation

as circumstances "such as do not constitute a justification or excuse of the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of [respondent's] moral culpability", Matter of Ross John Fazio, DP 105/80, (Brd. Opn. p. 146, 1981), citing Louisiana State Bar Association v Shaheen, 338 SO2d 1347, 1351 (LA 1976).

The mitigating effect of a mental impairment may, in some cases, be offered to show that a respondent is eligible for probation under MCR 9.121(C). That Rule provides, however, that the assertion in mitigation must be made in response to a formal complaint filed under sub-rule 9.115(B). As noted above, proceedings based on a criminal conviction are not instituted by the filing of a formal complaint under that sub-rule and entry of an order of probation was not an option available to the hearing panel in this case.

Nevertheless a respondent who has been convicted of a criminal offense may call to the panel's attention those mitigating circumstances which, in the respondent's view, should be considered in assessing the appropriate level of discipline. In this case, however, Respondent seeks to go beyond the generally accepted definition of the term "mitigation" and seeks to do that which the Court Rules have prohibited, that is, to challenge the very basis of his criminal conviction. Respondent argues that he should have been given an opportunity to establish that he had a diminished capacity at the time that he obtained money by false pretenses in the State of Nevada and that his plea of guilty must therefore be considered in light of that diminished capacity. As explained to the Board by his counsel, Respondent asks that we consider how "his guilty plea related to such guilt as he was capable at the time" (emphasis added [Brd. Hrg. 5/20/87 Tr. p. 7]).

We do not believe that such distinctions may be drawn under MCR 9.120(A)(3) which directs that the panel consider a certified copy of the Judgment of Conviction as "conclusive evidence of the commission of the crime". Even if we accept Respondent `s assertion that the claim of a "diminished capacity" was not available to him under the laws of the State of Nevada and is therefore raised for the first time in these disciplinary proceedings, we are presented with no authority for the proposition that the hearing panel or this Board could attempt to look behind the Nevada conviction. We are not empowered by the Court Rules to consider whether Mr. Barbara had the requisite intent under principles of Nevada criminal law to properly plead guilty to the crime of obtaining money by false pretenses in that state. The hearing panel below was charged with the responsibility of determining how best to protect the public and the legal profession in light of Mr. Barbara's conviction of that particular crime. The panel properly confined its deliberations to the disciplinary consequences of the conviction.

Neither this opinion nor the action (or inaction) of the Board in this matter should be construed as a decision that a respondent does not have a right to present appropriate mitigation in cases arising from a criminal conviction. A cursory review of factors identified by the American Bar Association Committee on Professional Sanctions reveals a number of factors which could be raised by a respondent as mitigation in a criminal conviction case. We find nothing in the record below which would support a conclusion that the Respondent was denied an opportunity to address the panel, in person or through his counsel, as to generally recognized mitigating factors.

We understand Respondent's argument that the panel's refusal to appoint an expert to conduct a psychiatric evaluation amounted to such a denial. We do not believe, however, that the due process argument can be advanced to that length. We agreed with Respondent that, in certain narrowly limited circumstances involving a respondent who is both indigent and incarcerated, the appointment of counsel may be appropriate under the most fundamental basic principles of due process and equal protection. We find no authority, however, for the notion that those principles require the State Bar of Michigan, under the requirements of MCR 9.128, to underwrite the expense of obtaining expert testimony.

In the final analysis we must consider whether the revocation imposed by the hearing panel was appropriate in light of the circumstances presented in this case. We are presented with a respondent whose license to practice law in Michigan has been suspended since February 1981 as the result of a Consent Order of Discipline in which Mr. Barbara admitted his failure to make timely delivery of their funds to fifteen separate clients. Although the original three-year suspension period has expired Respondent has not been eligible to apply for reinstatement in large part because of his inability to fulfill the restitution requirements of that 1981 order. As a suspended attorney, he has now engaged in conduct involving the obtaining of money by false pretenses, conduct which by definition involves elements of fraud and dishonesty. It was within the jurisdiction of the criminal courts in Nevada to determine the extent of Mr. Barbara’s punishment for those acts. We are charged with the responsibility of protecting the courts, the public and the legal profession and we must agree with the hearing panel that the revocation of Mr. Barbara's license is consistent with that goal.

(Honorable Martin M. Doctoroff and Hanley M. Gurwin concurred in this minority opinion.)

OPINION TO REMAND

(Remona A. Green and Patrick J. Keating)

We adopt the procedural history of this case which appears in the Opinion of our colleagues, Martin M. Doctoroff and Hanley M. Gurwin. We disagree, however, with their indifference to the hearing panel's failure to afford this Respondent a meaningful opportunity to make a full and fair presentation of mitigating circumstances. We would remand this case to a new hearing panel for a hearing on mitigation.

There is no question that the hearing panel was bound by MCR 9.120(A)(3) to accept a certified copy of Respondent's Nevada conviction as conclusive evidence that he did, in fact, commit the crimes with which he was charged. It is self-evident that the Michigan Attorney Discipline Board or its hearing panels cannot presume to apply principles of Nevada criminal law to Mr. Barbara's guilty plea in light of what he now claims is newly discovered evidence of a diminished capacity. Unless and until the Nevada courts set aside that conviction, we must accept the conviction at face value.

We are not precluded, however, from considering the effect that such diminished capacity might have as a mitigating factor. This Board has accepted the definition of mitigation as those circumstances which may not be considered as justification or an excuse "but which, in fairness and mercy may be considered as extenuating or reducing the degree of [respondent's] moral culpability", Matter of Ross John Fazio, DP 105/80, July 10, 1981 (Brd. Opn. p. 146), (Citing Louisiana State Bar Association, v Shaheen, 338 SO2d 1347, 1351 (LA 1976). The Board has specifically recognized the mitigating effect of psychiatric or emotional impairment, even if the respondent does not meet all of the conditions which would entitle him or her to an order of probation in accordance with MCR 9.121(C). For example, in a case decided by this Board in September 1985, we imposed a suspension for three years and one day in a case involving the misappropriation of $61,000 from a probate estate and the filing of false accountings with the Probate Court. We recognized in that case that the medical testimony had established respondent's genuine mental impairment but had not sufficiently established that the impairment was susceptible to treatment within the meaning of the Court Rule allowing probation. Nevertheless, we noted that discipline would have been more severe but for the mitigating effect of respondent's chronic depression arising from chemical imbalances in the central nervous system. Schwartz v Keidan, DP 87/84, September 30, 1985 (Brd. Opn. p. 391).

In another case more closely related to the facts before us, the Board has specifically considered the mitigating effect of a psychiatric disability in a case arising from a criminal conviction. In Matter of Joseph Freed, File No. 36487-A, July 3, 1980 (Brd. Opn. p. 88), respondent and the Grievance Administrator appealed a one-year suspension imposed following his plea of nolo contendere to three counts of failure to pay federal income taxes. In that case, the hearing panel received and considered the report of a psychiatrist who concluded that the respondent was a manic depressive, did not have the criminal intent to rob the government, and felt a psychotic compulsion to litigate because of a long feud with the Internal Revenue Service. In that case, the Board agreed that the respondent's emotional problems may have aggravated his tax quarrel but had not

necessarily diminished his ability to represent clients. The one-year suspension imposed by the panel was reduced to a suspension of 120 days.

We also consider the recognition of physical or mental disability or impairment as a mitigating factor and the ABA standards for imposing lawyer sanctions formulated by the American Bar Association's Joint Committee on Professional Sanctions and adopted by the ABA House of Delegates in February 1986.

Our Supreme Court has reminded us that although the "quasi-criminal" character of these proceedings allows for variances between the disciplinary proceedings and the rigorous standards applied in the trial of criminal cases, it is nevertheless fundamental that an attorney whose privilege to practice law is at stake is entitled to a full and fair hearing, Matter of Jaques, 401 Mich 516; 258 NW2d 443, 447 (1977). There, the Court cited with approval the U.S. Supreme Court's ruling that

> "due process. . .is a term that 'negates any concept of inflexible procedures universally applicable to every imaginable situation', Cafeteria Workers v Macelroy, 367 US 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed. 2d 1230 (1961). Determining what process is due in a given setting requires the Court to take into account the individual's stake in the decision at issue as well as the state's interest in a particular procedure for making it". Hortenville Joint School District #1 v Hortenville Education Association, 426 US 482, 494, 96 S. Ct. 2308, 2315; 49 L.Ed. 2d 1 (1976).

Applying that standard to the proceedings below, we believe that the procedural rules were applied with inflexibility in light of Mr. Barbara's important individual stake in the outcome.

Respondent's request for additional time to obtain a psychiatric evaluation was presented to the hearing panel together with a request that such expert evaluation be provided by the panel or the Board. Both requests were denied. In light of the representations to the Board that Respondent Barbara is no longer incarcerated and is now gainfully employed, we need not consider whether or not the appointment of such an expert should be made at Board expense. We do not fault the hearing panel for its denial of Respondent's requests. It did not have clearly defined authority to appoint an expert and it is clear under the circumstances that the grant of additional time would have been of little or no value to Respondent without the appointment of the expert.

Under the present circumstances, however, we see no reason why Respondent should not be afforded the opportunity to appear before the hearing panel to present such evidence, including psychiatric evaluations or other medical evidence, which he wishes to present as mitigation. We would remand this matter to a new hearing panel for such a hearing.

(Board Members Remona A. Green, Patrick J. Keating concurred in this minority opinion.)