GRIEVANCE ADMINISTRATOR,
Appellant,
v
JAMES DEL RIO, P-12655
Petitioner/Appellee.

File No. DP 94/86

Argued: July 22, 1987
Decided: August 11, 1987

OPINION OF THE BOARD

This matter involves an appeal by the Grievance Administrator from the decision of Wayne County Hearing Panel #1 granting a Petition for Reinstatement. By a majority vote, the Panel concluded that the Respondent had successfully demonstrated his compliance with the criteria set forth in MCR 9.123(B) and that, having "paid his debt to the bench and Bar," the Petitioner should be declared to be eligible for reinstatement subject to his recertification by the Board of Law Examiners. The dissenting panel member would have denied reinstatement based upon Petitioner's admitted failure to reimburse costs ordered to be paid as the result of Petitioner's previous, unsuccessful attempt to gain readmission in proceedings before another hearing panel.

The Board reverses the Hearing Panel Order of Reinstatement and orders that the Petition for Reinstatement be denied. To the extent that the Hearing Panel majority based its decision on a finding that the Petitioner's disqualification from the practice of law for a period of nine years constitutes the payment of a debt to the bench and Bar, we conclude that the panel erroneously applied a test which does not appear in the Court Rules. Furthermore, our review of the record below fails to persuade us that the Petitioner presented clear and convincing evidence that his conduct since the order of discipline has been exemplary and above reproach, that he now has a proper understanding of and attitude toward the standards that are imposed on members of the Bar or that he can now safely be recommended to the public, the courts and the legal profession as a member of the Bar as required by MCR 9.123(B)(5-7).

Background:

The Petitioner, James Del Rio, was admitted to the practice of law in Michigan in May, 1972. In November of that year, he was elected to the Recorder's Court for the City of Detroit. In October 1976, the Michigan Judicial Tenure Commission filed a complaint and an amended complaint alleging twenty-five (25) charges of judicial misconduct by the Petitioner. That complaint was assigned to a Master who filed a report in January, 1977 concluding that Mr. Del Rio was unfit to hold judicial office. In an Order dated July 29, 1977, the Supreme Court denied the recommendation of the Judicial Tenure Commission that Petitioner be permanently enjoined from holding judicial office and instead ordered that he be suspended from his judicial position for a period of five (5) years.

In March 1977, the State Bar Grievance Administrator filed a Formal Complaint based upon specific acts in the report filed by the Judicial Tenure Commission and an Order was entered November 23, 1977 finding that misconduct prejudicial to the administration of justice had been established and that Petitioner's license to practice law in this state should be suspended through July 29, 1982 and until reinstatement under the applicable rules.

On October 28, 1983, Petitioner Del Rio filed a Petition for Reinstatement in accordance with GCR 1963, 973 [now MCR 9.124] and the petition was assigned to Wayne County Hearing Panel #3. That hearing panel filed a Report and Order Denying the Petition for Reinstatement, basing its decision in large part upon its consideration of an Affidavit of Indigency filed by the Petitioner in the Supreme Court stating that he was unable to bear certain printing costs in connection with an appeal of the disciplinary proceedings and that all his funds and resources had been depleted. This Affidavit was filed November 22, 1978. The Hearing Panel considered that Affidavit in light of Petitioner's residential loan application submitted to a savings institution in California in July, 1978 alleging a net worth of $173,987. Using that Application, Petitioner had obtained a mortgage of $74,000 and purchased a residence in California using $16,000 of his own funds. That Hearing Panel concluded that the representations to the savings institution and to the Supreme Court could not both have been true and constituted evidence that a fraud had been perpetrated upon the Court, upon the lender, or both.

Following its consideration of a Petition for Review filed by Mr. Del Rio, the Attorney Discipline Board affirmed the Hearing Panel Order Denying Reinstatement on March 11, 1985. Petitioner's Application for Leave to Appeal to the Supreme Court was denied September 23, 1985 and his subsequent Motion for Reconsideration was denied by the Court on March 26, 1986.

Approximately two months later, on May 26, 1986, Petitioner filed the Petition for Reinstatement which is the subject of these proceedings and that Petition was assigned to Wayne County Hearing Panel #1. The hearing required by MCR 9.124(C) was conducted by the Panel on January 15, 1987. It is the record of those proceedings and the pleadings and exhibits filed with the Panel's report which we now consider in determining whether or not the Panel's decision to grant reinstatement has legal and evidentiary support.

Discussion:

At all times relevant to these proceedings, an attorney whose license to practice law has been suspended for more than three years or whose license has been revoked, is not entitled to an automatic reinstatement of his or her license but must petition the Supreme Court, appear before a hearing panel, and demonstrate eligibility by clear and convincing evidence in accordance with the procedure described in MCR 9.123(B) and MCR 9.124. More specifically, MCR 9.123(B) sets forth nine criteria which must be established by the petitioner.

We affirm the unchallenged findings of the Hearing Panel that Petitioner Del Rio does desire in good faith to be restored to the privilege of practicing law in Michigan [MCR 9.123(B)(1)]; that the term of his suspension has elapsed [MCR 9.123(B)(2)]; and that he has not practiced or attempted to practice law contrary to his Order of Suspension [MCR 9.123(B)(3)].

MCR 9.123(B)(4) requires that the Petitioner demonstrate that "he or she has complied fully with the order of discipline." The Hearing Panel found that the previous reinstatement proceedings which were eventually concluded in March, 1986 included an Order Assessing Costs in the amount of $2057.14 and the Petitioner frankly admits that those costs have not been paid. In the view of the dissenting Panel member in this case, the failure to pay those costs conclusively establishes that the Petitioner has not fulfilled the requirements of MCR 9.123(B)(4) and his Petition should be denied for that reason alone.

While that is a reasonable interpretation of that sub-rule, we conclude that there is ambiguity in the Rule and that denial of the Petition would not be warranted solely for that reason. The sub-rule in question directs that the Petitioner demonstrate that he has complied with "the order of discipline" (emphasis added). The Rule does not speak of "any" or "all" prior orders, only of "the order of discipline." It may well be that the drafters of this Rule did not contemplate the possibility that a petitioner for reinstatement would be the subject of other orders and a change in that Rule may be warranted. Nevertheless, in the proceedings which gave raise to the requirement that Mr. Del Rio file a Petition for Reinstatement, the discipline order in question would appear to be the two page Order of Discipline dated November 23, 1977 which ordered "that respondent will, forthwith, pay to the State Bar of Michigan the sum of $1257.00." (Tr. p. 91) The Hearing Panel in this case received into evidence a copy of Mr. Del Rio's check, dated April 30, 1984 in the amount of $1257.00 paid to the order of the Attorney Grievance Commission as payment in full of those costs. (Administrator's Exhibit #9, Tr. p. 92).

As we shall note below, we believe that we are entitled to consider Petitioner's attitude toward his obligation to pay the amount of $1257.00 "forthwith" as evidenced by his eventual payment of that amount six and one half years later and we are entitled to consider Petitioner' s attitude toward his obligation to pay the costs assessed in the prior reinstatement matter as evidenced by the fact that those costs remain unpaid today. However, it appears that within the strictest reading of MCR 9.123(B)(4), Mr. Del Rio has complied with the Order of Discipline in this case, although he has not complied with a subsequent order.

This Petitioner is subject to the requirement of MCR 9.123(B) (8) that he must be recertified by the Board of Law Examiners before he may be reinstated to the practice of law. In accordance with Rule 9.124(C), the Panel did condition reinstatement on compliance with that sub-section. There is no evidence in the record that the Client Security Fund of the State Bar of Michigan has honored any claims resulting from Petitioner's misconduct and Rule 9.123(B)(9) is therefore not applicable.

Our attention must therefore be focused upon the requirements of MCR 9.123(5-7) which provide that Petitioner must establish by clear and convincing evidence that:

> (5) His or her conduct since the Order of Discipline has been exemplary and above reproach;

(6) He or she has a proper understanding of and attitude toward the standards that are imposed on members of the Bar and will conduct himself or herself in conformity of those standards; and

(7) He or she can safely be recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and to represent them or otherwise act in matter 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.

The Hearing Panel chairman, at Page 35 of the transcript of the January 15, 1987 proceedings, specifically called Petitioner Del Rio's attention to the requirements that he establish the elements of Rule 9.123 by clear and convincing evidence and the Petitioner's attention was specifically called to sub-sections 6 and 7. In the supplemental brief filed by Petitioner's counsel, it is urged that since the Panel found that Petitioner was eligible for reinstatement, they must have been satisfied that he had demonstrated those elements and that the Board need not concern itself further with those findings. In our consideration of the findings of a Hearing Panel, however, we are guided by the standard of review clearly enunciated by the Supreme Court. The 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 (1977). We are unable to find evidentiary support in this record for a conclusion that Petitioner sustained that burden as to sub-paragraphs 5, 6 and 7 of Rule 9.123(B).

Petitioner testified in his own behalf and he did not present the testimony of any other witnesses. He offered two exhibits into evidence consisting of the Attorney Grievance Commission's itemized statement of costs incurred in the first reinstatement proceeding and a copy of the transmittal letter from the Grievance Commission showing that that itemization was delivered to him in January, 1987. In our review of the Petitioner's direct testimony, we note his statement to the Panel that he felt that his diligent work habits as a judge were an embarrassment to other judges, that "I tried not to be an embarrassment to the profession and the history of what I did and what I have done since then," and that "the only thing I can offer, by way of saying that I am fit person, the -- between fifty and one hundred letters here. . ." [referring to letters from various organizations and individuals] (Tr. p. 38).

It is not clear from the record to which letters Petitioner referred. We note that the Grievance Administrator's written report which is required to be prepared by MCR 9.124(B), contains copies of six letters submitted on Mr. Del Rio's behalf in 1986. The Administrator's report filed in the prior reinstatement proceeding and made a part of the record in this case contains approximately fifteen letters of support delivered to the Administrator in 1983. While letters of support submitted by friends or acquaintances of a reinstatement petitioner may have some value, they are not, by themselves, clear and convincing evidence of petitioner's fitness to resume the practice of law within the meaning of the Court Rule. All letters submitted to the Attorney Grievance Commission prior to the hearing on a Petition for Reinstatement are included, without comment, in the Grievance Administrator's written report. The Administrator's report submitted to the Panel in this case contains a specific disclaimer in its introduction that "the Grievance Administrator does not vouch for the factual accuracy of the information obtained, nor does he make any representations, either explicit or implicit, concerning the credibility and reliability of the sources of the information

contained herein." In the case of letters of support which may or not be solicited by the petitioner, there is no opportunity for the panel to inquire as to the relationship between the writer and the petitioner or the basis upon which the writer purports to have knowledge of the petitioner's good character.

At page 46 of the transcript, the Petitioner was asked to summarize any further information which he could present to the Panel and responded,

> "I don't think I-- --I think I would just simply be repeating myself, other than I think the public has looked at me as though I am a person that they trust, if they would-- --if out of 139,000 voters who vote for someone, and I have received 55,000 of those votes, I think someone has some confidence in me."

The record does not disclose whether that reference to Petitioner's popularity with the electorate refers to his election to a seat on the Detroit Recorder's Court in 1972 or his unsuccessful bid for a seat on the Detroit City Council in 1986. In either event, we believe that Petitioner's statement indicates a misconception concerning the reinstatement process. A license to practice law may be restored to a suspended attorney by the Supreme Court or its adjudicative arm, the Attorney Discipline Board, only upon a finding that the petitioner is in fact fit to be trusted as an officer of the Court, a member of the Bar who will serve the public with competence, dignity and honor. The license to practice law in Michigan can never be awarded or restored as the result of a popularity contest.

Under the rules governing reinstatement proceedings, the burden of proof is placed upon the Petitioner alone. While the Grievance Administrator is required by MCR 9.124(B) to investigate the petitioner's eligibility for reinstatement and to report his or her findings in writing to the hearing panel, there is no express or implied presumption that a petitioner is entitled to reinstatement as long as the Administrator is unable to uncover damaging evidence. In this case, our finding that Petitioner Del Rio has failed to meet his burden of establishing eligibility for reinstatement by clear and convincing evidence would be the same if the record were devoid of evidence tending to cast doubt upon his character and fitness since his suspension. Unfortunately, however, the record below does raise such doubts.

As noted above in the factual background to these proceedings, this Petitioner's conduct during that period since his suspension has already been found wanting. Wayne County Hearing Panel #3, which considered Petitioner's first attempt at reinstatement, filed its report on August 14, 1984 which concluded that his "Affidavit of Indigency" filed with the Michigan Supreme Court on November 22, 1978 was fundamentally at odds with Petitioner's application to Central Federal Savings and Loan Association, San Diego, California, in which the Petitioner listed total assets of $193,687.00, liabilities of $19,700.00 and net worth of $173,987.00. The Panel found that the application or the Affidavit, or both, were "deceptive and materially false and misleading" and that Petitioner Del Rio had therefore not sustained his burden under GCR 972.2(5-7) [now MCR 9.123(B)(5-7)]. The Panel's conclusions were affirmed by this Board and the Supreme Court declined Petitioner's Application for Leave to Appeal.

We do not rule that a denial of a Petition for Reinstatement by a hearing panel necessarily constitutes a bar to subsequent consideration of another petition and we do not rule that the adverse finding of the previous hearing panel in this case, standing alone, would necessarily be determinative of the outcome in this case. Nevertheless, it is a factor which appears in the record and must be taken into account.

In order to afford the parties every reasonable opportunity to call the Board's attention to evidence in the record which might be viewed in a light favorable to this Petition, the Board requested that counsel for the respective parties file additional briefs within one week of the review hearing held on July 22, 1987. In the pleading filed on behalf of Petitioner, a specific exchange between the Petitioner and Panel Member Shirley Saltzman is cited as evidence demonstrating Petitioner's "proper understanding of and attitude toward the standards that are imposed on members of the Bar and [that he] will conduct himself in conformity with those standards." MCR 9.123(B)(6):

> MS. SALTZMAN: Mr. Del Rio, you made a comment a moment ago that when you were a judge in Recorder's Court, the hours you worked were considerably longer than those of many of the other judges and, perhaps, most of the other judges.
>
> MR. DEL RIO: Yes.
>
> MS. SALTZMAN: Number 6 in this Rule 9.123(B)(6) indicates that persons seeking reinstatement must have a proper understanding and attitude toward the standards that are imposed upon members of the bar and would be able to conduct himself in conformity with those standards. Is that the kind of thing you are talking about:
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> MR. DEL RIO: That is exactly the kind of thing I was talking about.

That testimony by Mr. Del Rio seems to suggest that in the event he is returned to the bench, he would lower his own standards to conform to a less demanding schedule which, he alleges, is followed by other judges. Rule 9.123(B)(6) speaks of the standards which are imposed on members of the Bar by the applicable Court Rules and the Code of Professional Responsibility. It does not speak to standards of attendance or productivity. We fear that Petitioner has exhibited a misunderstanding of that requirement and has exhibited an apparent willingness to lower his standards to the level of those around him rather than to strive to meet or exceed the ethical standards which govern our profession.

We also fear, from the record before us, that Petitioner's attitude toward the standards imposed on members of the Bar is more accurately reflected by his seeming indifference to his obligation to comply with the orders of the Board or its hearing panels. Specifically, we refer to the Hearing Panel Order of Discipline, dated November 23, 1977, assessing costs in the amount of $1257.00 to be paid "forthwith" and the fact that the Petitioner did not reimburse that sum until April 30, 1984.

Similarly, we note that the Hearing Panel Order Denying Reinstatement, dated August 14, 1984 includes an assessment of costs in the amount of $2057.14. Notwithstanding Petitioner's protests that he made a verbal request for an itemization, the fact remains that no effort was made to appeal or stay that portion of the Order, no written request for an itemization was ever submitted, no arrangements for partial payments were attempted, and the entire sum remains unpaid to this day.

Finally, we must consider the evidence submitted by the Grievance Administrator showing that, despite Petitioner's protests that he has been without funds since 1984 with which reimbursement could have been made, he nevertheless expended in excess of $12,000.00 in the fall of 1985 for an unsuccessful campaign to gain a seat on the Detroit City Council. More importantly, we must consider the nature of Petitioner's sworn testimony in response to the questions posed by the Grievance Administrator on that subject.

At page 70 of the hearing transcript, Petitioner was asked how much he had spent out of his own contributions and he answered;

> A. Well, I entered the race and I said that I could spend no more than $250.00. That is what I had to spend.
>
> Q. Is that what you spent, $250.00?
>
> A. Well, I spent $250.00 of my own money. There were contributions, however, coming in. . . .

When shown his campaign finance report filed October 10, 1985, he then acknowledged a direct campaign contribution by himself in the amount of $3000.00. Asked to acknowledge that he made a contribution of $3000.00 to his own campaign, and not $250.00, Mr. Del Rio replied:

> A. That is a double-pronged question. I also made a contribution of $250.00 to my campaign, which may or may not have been part of the $3000.00. (Tr. p. 38)

Petitioner was then shown Exhibit #8, a finance report filed December 5, 1985 showing another contribution by him in the amount of $859.82. He answered, "yes" to the question "So to your campaign you contributed a total of $3859.00?" (Tr. p. 78)

Petitioner was then reminded of an additional $8400.00 which he paid to his own campaign October 21, 1985, bringing his total contribution to his campaign to $12,259.82. Petitioner acknowledged the accuracy of that figure. We cannot say that Petitioner's incomplete answers to the questions posed by the Administrator form the basis for much confidence that he can now safely be recommended to the public, the courts and the legal profession as a person fit to act in matters in trust and confidence or to aid in the administration of justice as a member of the Bar and as an officer of the court.

In the Board's consideration of the standards which must be applied in a reinstatement case, we are guided by the language adopted by the Supreme Court in Matter of Leonard Ziskie, File No. DP 92/82, Sup. Crt. No. 72247, March 7, 1987. In that case, the reinstatement petitioner was disbarred in 1966 for perpetrating a fraud on his client, misrepresentation and concealment, failure to answer a Formal Complaint and misappropriation of client funds. The hearing panel denied reinstatement noting that although restitution was not specifically directed in the Order of Discipline, his failure to reimburse his clients for the misappropriated funds reflected negatively on his character and fitness. In an opinion dated July 18, 1983, the Board reversed the panel concluding that restitution was not a prerequisite for reinstatement and that "disbarment for seventeen years has been sufficient discipline." (In the Matter of Leonard Ziskie, File No. 92/82, July 18, 1983, Brd. Opn. p. 287). The Board's opinion was, in turn, reversed by an Order of the Supreme Court issued March 7, 1984, specifically adopting the strong dissent filed in that case by Board member Leo A. Farhat. We think Mr. Farhat's observations, adopted by the Court, are applicable to this case.

> Petitioner made no effort whatsoever to fulfill his moral and legal obligations. The reasons asserted for non-payment of these obligations are weak if not specious and, of themselves, give rise to very serious doubts about petitioner's judgment and attitude . . .
> On the other hand, the sheer length of time of a reinstatement petitioner's disbarment certainly should not compel us to end his professional exile. We face the overriding responsibility of protecting the public and deterring in the strongest fashion possible any future misconduct of this nature.

In accordance with the language adopted by the Court in Ziskie, we find that Petitioner Del Rio's delayed payment and non-payment of his cost obligations are factors which must be considered in assessing his judgment and attitude. Furthermore, we must conclude that the sheer length of time of Petitioner Del Rio's suspension should not diminish our responsibility to require strict compliance with MCR 9.123(B). Following Ziskie, we must rule that Petitioner's absence from the legal profession does not constitute the payment of a debt to the Bar or that the passage of nine years since his suspension is a critical factor in consideration of his petition.

Conclusion:

Petitioner, James Del Rio, has failed to satisfy the requirements of MCR 9.123(B) that he demonstrate his fitness to practice law by clear and convincing evidence. Specifically, we find that there is an absence in the record below of clear and convincing evidence submitted in support of the requirements of Rule 9.123(B)(5-7). Not only has the Petitioner failed to carry his burden, but the record contains substantial evidence that this Petitioner's conduct since his suspension from the practice of law in 1977 has not been exemplary and above reproach, that his understanding of and attitude toward the standards imposed on members of the Bar are defective, and there remain substantial indications that Petitioner cannot be recommended to the public, the courts or the legal profession as a person fit to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney, counsellor and officer of the court.