GRIEVANCE ADMINISTRATOR,
Petitioner/Appellant,
v
WILLIAM D. HUNTER, P-30911,
Respondent/Appellee.

File Nos. DP 197/84; DP 176/85

Argued November 11, 1986
Decided: January 30, 1987

OPINION OF THE BOARD

The Hearing Panel addressed ten counts of misconduct filed against Respondent in two separate Formal Complaints. DP 197/84 comprised eight counts arising out of four cases handled by Respondent. The Complaint alleged that Respondent commingled funds belonging to a third party contractor and converted them to his own use, perpetrated a fraud upon the Bankruptcy Court, misappropriated the funds of the client, and failed to adequately, competently or zealously pursue a probate action entrusted to him. This Formal complaint further charges Respondent with violating his duty to fully and fairly disclose all material and relevant facts in his answers to three Requests for Investigation. According to the Grievance Administrator, Respondent violated DR 1-102(A)(3-6); DR 1-103(A); DR 1-102(A)(5-6); DR 2-101(A)(3) and MCR 9.104(1-4)(6-7) and MCR 9.113.

Respondent was charged in two further counts in DP 176/85 with misrepresentation and failure to adequately, competently and zealously represent the interests of a client in a bankruptcy suit, in violation of DR 1-102(A)(4-6); DR 6-101(A)(3) and DR 7-101(A)(B). In addition, Respondent again allegedly breached his responsibility to properly and candidly execute an Answer to the Request for Investigation.

The Panel found that Respondent was guilty of the misconduct alleged and concluded that a suspension of one year was warranted. In light of the multiplicity and gravity of the charges, the Grievance Administrator has urged that a one year suspension is insufficient. Respondent has taken the position that the discipline ordered is excessive because he breached no duty intentionally. Furthermore, he contends that the evidence does not support such a severe sanction. Although the Respondent admits mishandling of client funds and neglect of legal matters, he blames disorganization and lack of effective supervision of his office.

We affirm the factual findings of the Hearing Panel and determine that those findings have evidentiary support in the record below. The gravity of Respondent's misconduct, however, warrants an increase in the discipline imposed by the Hearing Panel and we therefore modify the Order of Discipline by increasing discipline to a suspension of two years.

Counts I and II of Formal Complaint DP 197/84 pertain to Respondent's retention and personal use of an insurance check issued in the joint names of Mr. Hunter, his client Elizabeth

Edwards, and Venus Cleaners, as compensation for services rendered by the cleaners to Edwards subsequent to a fire at her home. He has not disputed that the check, in the amount of $1914.44, was rightfully due and owing to the proprietor of the cleaners, Mr. George Benian.

Respondent testified that he obtained Edwards' signature n the check and put the check in his office safe where it was, to use his phrase, "out-of-sight, out-of-mind for awhile", (Hrg. Tr. p 91). He admitted that the check was removed from the safe and deposited in his professional "payroll" account but maintained that he was not personally responsible for the commingling of funds. Rather, he claimed that his para-legal inadvertently deposited the proceeds in the payroll account. By the time the purportedly discovered the "error" the funds had been depleted. While there was some inconsistency between the testimony at the hearing of Mr. Hunter and Mr. Benian regarding Benian's subsequent efforts to obtain those funds, Respondent admitted that he was untruthful when he told Benian that he could not deliver the funds because his client had refused to endorse the check. In fact, the check had been endorsed and Respondent delayed paying Benian because he no longer had sufficient funds in his account (Tr. 93-95). With regard to Count III of the Complaint which charged that Respondent filed an Answer to the Request for Investigation in that matter which was deliberately misleading, Respondent admitted that statements in his Answer were not true because "I didn't want the Grievance Commission to know about the embarrassing situation that had happened'. (Tr. 96)

Count IV relates to a Chapter 13 Bankruptcy suit instituted on behalf of Respondent's client, Nancy Johnson, and centered around the apparent alteration of certain figures on a proposed repayment plan after the plan had been approved and signed by the bankruptcy trustee. According to Respondent, the altered document was sent to the Court for entry by his secretary inadvertently". The Hearing Panel determined that the alteration of the document by the Respondent or his employee constituted a breach of his duty as an attorney.

Based upon the evidence, the Panel concluded that Respondent committed professional misconduct as alleged in Count V in Complaint DP 197/84 by his failure to honor his promise to a client to refund the sum of $160.00 which she had paid to him for his assistance in purchasing an automobile. Mr. Hunter admitted at he failed to answer the Request for Investigation in that Matter, as alleged in Count VI of the Complaint and in violation of MCR 9.104(7) and MCR 9.113.

Counts VII and VIII pertain to the Request for investigation of Respondent's client Milton Simms and Respondent's failure to answer it. Respondent accepted a probate matter involving a relatively simple transfer of title in November of 1982 but did not institute any action for approximately two years. Respondent maintained that he was dilatory because his client did not punctually pay his fees and because Respondent's office was inundated with paper work. Nevertheless, the Panel concluded that the neglect of that legal matter and the failure to answer the Request for Investigation both constituted acts of misconduct.

The Panel also considered two additional Counts in a second Complaint consolidated for hearing, Formal Complaint DP 176/85. In its Report, the Panel concluded that the Respondent failed to list all of client's assets in a Bankruptcy Petition, that he failed to have his client review the Petition and schedules for accuracy, and that he failed to appear at the first meeting of creditors.

With regard to that matter, Respondent did file an Answer to the Request for Investigation but the Panel found that his statement that he did not sign his client's name or instruct his employee to do so constituted a falsehood.

Respondent's Brief begins and ends with the admission that he is guilty of "negligence, inattention to files, insufficient supervision of the staff . . . misrepresentation to George Benian and to the Grievance Commission, arising out of embarrassment. For this he was wrong." He argues, however, that these lapses were largely unintentional and resulted from an office "swamped with paper" and plagued by staff turnover. Respondent raises the further mitigating effect of the sudden death of his mother in September 1984.

With regard to the "disorganized office" defense, the Board has, in the past, stated that a violation "cannot be excused simply because it was carried out by office personnel. Attorneys may be responsible, for discipline purposes, for the acts and omissions of their employees who must be properly trained and supervised, especially with regard to the handling of client property." Schwartz v Kavanaugh, Sept. 30, 1985 (Brd. Opn. p. 384)

In considering the mitigating effect of Respondent's emotional distress following the death of his mother in September 1984, we note that the misappropriation of funds in the Benian matter occurred well before the filing of the Request for Investigation in July 1984, that the Bankruptcy Petition alterations were made in February 1984 and that Respondent was consulted by both Mr. Simms and Dr. Jordan Gates during the year 1983.

Central to Respondent's arguments on appeal, however, is a discussion of the Panel's factual findings and Respondent's argument that his conduct was not as serious as the Panel found it to be. There are indeed inconsistencies between the testimony of Respondent and several witnesses. However, the Board has traditionally "afforded deference" to the Hearing Panel's assessment of credibility, See Schwartz v Sauer, January 1985 (Brd. Opn. p. 359), and has generally accepted the Panel's factual findings if they have "ample support in the record". See Schwartz v Flowers, February 1984 (Brd. Opn. p. 305). See also State Bar Grievance Administrator v Crane, 400 Mich 484; 255 NW2d 624 (1977); State Bar Grievance Administrator v Estes, 390 Mich 585; 212 NW2d 903 (1973).

We note that in this case, the Hearing Panel Report did not simply refer to the allegations of misconduct as set forth in the Complaint, but listed specific findings of fact as to each Count. We find therefore that the Hearing Panel findings have proper evidentiary support on the whole record and should be affirmed.

In determining whether or not the discipline imposed by the Hearing Panel was appropriate, the Board considers the seriousness of those charges sustained by the Panel that Respondent commingled funds by depositing the Edwards/Venus Cleaners check in his payroll account rather than in his client trust account and that his subsequent use of those funds constituted a misappropriation. The repeated depletions of a professional account used to hold client funds constitutes, at the very least, prima facia misconduct, Schwartz v Glaser, File No. DP 106/84, September 1985 (Brd. Opn. p. 379). Such misconduct alone could warrant a severe sanction. In

Re Geralds, 402 Mich 387; 263 NW2d 241 (1978) (Three year suspension for failure to preserve identity of client funds, using same for own gain without client's permission, and converting client's money)

If the check In the Edwards/Venus Cleaners matter was inadvertently deposited in a payroll account by an employee, we would be willing to consider the mitigating effect of that circumstance. The record discloses, however, that Respondent was eventually made aware of the situation and that he did not take immediate steps to rectify the error but instead delayed repayment of the funds by making false statements to the rightful recipient of that money. Furthermore, neither Respondent's lack of supervision of his staff nor any "inadvertence" can justify his deliberately untruthful statements contained in his Answer to the Request for Investigation.

While we do consider the mitigating effect of Respondent's prior unblemished record, that mitigation is, unfortunately, outweighed by the aggravating effect of the additional acts of misconduct which comprised the remaining counts in these Complaints, including neglect of client matters, failure to carry out contracts of employment, failure to honor promises, and failure to answer Requests for Investigation. Under those circumstances, an increase to a suspension of two years is warranted.

Members Martin M. Doctoroff, Remona A. Green, Hanley M. Gurwin, Charles C. Vincent, M.D. concur.

Members Robert S. Harrison and Odessa Komer did not participate in the deliberation or decision in this case.

Member Patrick J. Keating, dissenting, would affirm the one year suspension.

DISSENTING OPINION

Patrick J. Keating

I agree with the majority in this case that deference should be shown to the factual findings of the Hearing Panel inasmuch as they were uniquely able to observe the testimony and to weigh the evidence presented. Therefore, I agree that the panel's factual findings should be affirmed. I would also, however, grant deference to the Hearing Panel's decision with regard to the appropriate level of discipline. While Respondent displayed serious errors of judgment, especially in his failure to respond truthfully and candidly to his clients and to the Grievance Administrator, I am persuaded that the suspension of one year ordered by the Hearing Panel is appropriate in light of Respondent's prior unblemished record and the nature of the misconduct which has been established. I respectfully dissent and would affirm the Hearing Panel Suspension of One Year.