

GRIEVANCE ADMINISTRATOR,
Petitioner/Appellant

v

CAROL A. DEAN, P-23997
Respondent/Appellee.

File No. DP 142/84; DP 170/84; DP 192/84

Decided: September 30, 1986

PRESENT: Patrick J. Keating, Chairman
Martin M. Doctoroff, Vice-Chairman
Charles C. Vincent, M.D., Secretary
Remona A. Green, Member
Hanley M. Gurwin, Member
Robert S. Harrison, Member
Odessa Komer, Member

OPINION OF THE BOARD

The Respondent, who has been licensed to practice law in Michigan since 1977, comes before the board as the result of three Formal Complaints filed by the Grievance Administrator and consolidated for hearing in a single proceeding. The Hearing Panel concluded that misconduct was established by the Defaults entered against the Respondent and that she should be reprimanded for that misconduct. On the basis of mitigating evidence submitted by the Respondent, including testimony relating to the Respondent's psychological reaction to the physical and emotional impairments associated with multiple sclerosis, the Panel concluded that Respondent's misconduct was substantially caused by those psychological factors and that she had established her eligibility for an Order of Probation in accordance MCR 9.121(C). The Hearing Panel ordered that the Respondent be allowed to continue the practice of law subject to probationary conditions for a period of one year, including a continuation of a program of psychological therapy, modification of the nature of her law practice and the review and supervision of her practice by her therapist who, in this case, is a licensed member of the Bar.

The Petition for Review filed by the Respondent claims that the Hearing Panel abused its discretion in refusing to set aside a Default filed against the Respondent and urges that this matter be remanded so that she might submit evidence to refute some, but not all, of the charges of misconduct. She further argues that the Hearing Panel was entitled to enter an Order of Probation or an Order of Reprimand but that it was precluded by the Court rules from imposing a Reprimand and Probation in the same case. Review is also sought in this case by the Grievance Administrator who urges that the serious nature of misconduct deemed admitted by the Respondent warrants the imposition of lengthy suspension.

Based upon its review of the record and its consideration of the arguments presented by the parties, it is the ruling of this Board that the Hearing Panel Order of Discipline shall be affirmed with certain modifications, as follows:

- 1) The Hearing Panel did not abuse its discretion in failing to set aside the Default which was entered in DP 192/84, and that action by the Panel will not be disturbed;
- 2) The Hearing Panel Order is clarified to the extent that the Reprimand for misconduct is limited specifically to Complaint DP 170/84;
- 3) The Hearing Panel Order will be further clarified to the extent that the Order of Probation applies only to Complaints DP 142/84 and DP 192/84;
- 4) The Order of Probation shall be modified to provide for continued therapy with a psychologist for a period of one year and the submission of progress reports to the Board regarding such therapy, but eliminating the provision requiring that the psychologist supervise the nature of Respondent's law practice and office management.

Discussion

Formal Complaint DP 142/84 was filed against the Respondent in October 1984. That Complaint charged three counts of professional misconduct: 1) neglect of a legal matter for approximately six months; 2) deliberate misrepresentations concerning the status of the case; and 3) failure to answer a Request for Investigation. Upon her failure to answer that Complaint, a Default was entered and a second Complaint, DP 170/84 was filed in November 1984 charging that failure to answer a Formal Complaint is, itself, an act of misconduct. A Default was entered in that case. In January 1985, a third Formal Complaint was filed against this Respondent, containing seven counts of professional misconduct, and this matter was consolidated with the two pending files in which Defaults had already been entered. The third Complaint, DP 192/84 charged that Respondent neglected another legal matter, repeatedly misrepresented the status of the case to her client, failed to answer a Request for Investigation, engaged in a deliberate conflict of interest, neglected a legal matter entrusted to her by another client and misrepresented the status of that case, and submitted an Answer to a Request for Investigation which was deliberately misleading. Respondent's Default for failure to answer that Formal Complaint was filed March 20, 1985.

The Respondent has candidly admitted that she did not answer any of the three Formal Complaints and has expressed her willingness to accept the consequences for her failure to answer the first two Complaints. It is with regard to the third Complaint, DP 192/84, that the Respondent has directed her argument that the Hearing Panel abused its discretion by its failure to grant the Respondent's Motion to Set Aside the Default.

The Board has carefully reviewed the legal arguments ably presented by both counsel on this issue and affirms the Hearing Panel ruling that the Respondent has failed to establish “good cause” for her failure to answer the Complaint as that term is used in MCR 2.603(D). Contrary to the position which is apparently urged by the Respondent, we are not persuaded that the party who has filed the Default, in this case the Grievance Administrator, bears the burden of showing that a Default should not be set aside. Rather, it falls upon the party seeking to have the Default set aside to establish such “good cause”. Levitt v Kacy Manufacturing Company, 142 Mich App 603 (1985). The Panel's refusal to set aside the Default was not error.

The Respondent's Default having been entered in all three Complaints, the Hearing Panel correctly ruled that the Default in each case was equivalent to an admission to the allegations of misconduct (see also In the Matter of Daune Elston, DP 100/82, 1982 (Brd. Opn. p. 238). Those acts of misconduct, including multiple acts of neglect and deception present a pattern of misconduct which would, in the absence of substantial mitigation, ordinarily result in a suspension of the license to practice law.

In its Report, the Hearing Panel directly addressed the issue of mitigation and afforded great weight to the testimony of Respondent's therapist, Ronald D. Jones. We agree with the Panel that by virtue of his license to practice law and his current practice in clinical psychology, Mr. Jones is uniquely qualified to direct Respondent's therapy toward the satisfaction of her professional responsibilities and to offer insight into the relationship between her psychological conditions and her professional problems. Mr. Jones' testimony was presented to the Panel to establish those criteria set forth in MCR 9.121 and we affirm the Panel's conclusion that this Respondent demonstrated by satisfactory proof that her ability to practice law competently during the period when the misconduct occurred was materially impaired by physical and mental disability; that the impairment substantially contributed to that conduct; that the cause of the impairment is susceptible to treatment; and that the respondent intends to undergo treatment and to submit a detailed plan for such treatment.

However, while we share the Panel's acceptance of Mr. Jones' unique qualifications to assess the impact of Ms. Dean's illness on her practice of law, we are not convinced that his status as a licensed member of the Bar in Michigan necessarily qualifies Mr. Jones to actively supervise Ms. Dean in the day-to-day management of her law practice. It is our expectation that the Courts, the legal profession, and most importantly, the public, will be adequately protected by Ms. Dean's continuing program of psychological therapy with Mr. Jones as outlined in the Hearing Panel Order. We therefore modify that Order by eliminating the further requirement that Ronald Jones actively supervise the management of her cases and files.

Finally, we must decline to adopt the view urged by the respondent that the Hearing Panel was forced to choose between an Order of Reprimand and an Order of Probation and could not combine both sanctions in a single Order of Discipline. We do, however, modify the Hearing Panel Order to the extent that the Respondent is Reprimanded for her failure to answer a Formal Complaint, as established in Complaint No. DP 170/84 and the Order of Probation is specifically limited to the acts of misconduct alleged in Complaints DP 142/84 and DP 192/84.

Patrick J. Keating, Chairman; Martin M. Doctoroff, Vice--Chairman; Charles C. Vincent, M.D., Secretary; Remona A. Green; Hanley M. Gurwin; Robert S. Harrison; Odessa Komer concurred.