

GRIEVANCE ADMINISTRATOR,
Petitioner/Appellant,
v
BRUCE H. KEIDAN,
Respondent/Appellant.

File No. DP 87/84

Decided: September 30, 1985

BOARD OPINION

Respondent pled nolo contendere before a hearing panel to charges of taking about \$61,000 from a probate estate, and to filing false and fraudulent accountings with a probate court in two estates. He presented evidence in mitigation. The panel suspended him for eighteen months. On review before the Board, Respondent moved to amend his Answer to conform to proofs suggesting that he may be eligible for probation under MCR 9.121, and further requested that he be placed on probation. We grant Respondent's Motion to Amend his Answer to conform to the proofs, but find that he does not satisfy the criteria for probation set forth in the applicable rule. Respondent is suspended for three years and one day.

I.

MCR 9.121(C) governs probation in discipline proceedings:

- (1) If, in response to a formal complaint * * * the respondent asserts in mitigation and thereafter demonstrates by satisfactory proof that:
 - (a) during the period when the conduct which is the subject of the complaint occurred, his ability to practice law competently was materially impaired by physical or mental disability or by drug or alcohol addiction;
 - (b) the impairment was the cause of or substantially contributed to that conduct;
 - (c) the cause of the impairment is susceptible to treatment, and;
 - (d) he * * * in good faith intends to undergo treatment, and submits a detailed plan for such treatment, * * * the board * * * may enter an order placing the respondent on probation for a specific period not to exceed two years.

There are two principal cases on probation, In re McGuire, No. DR 146/81 (Mich ADB 1983), in which probation was granted, and In re Hills, No. DP 48/82 (Mich ADB 1983), in which

probation was denied. McGuire was remanded by the Board to a master on the probation issue. Evidence gathered by the master showed that Respondent had rheumatoid arthritis, and had been an active alcoholic at the time of misconduct. There was ample medical testimony that the alcohol abuse was partly an attempt to cope with extreme physical pain and that the misconduct, conversion of funds from an estate, was contrary to his true character. McGuire had joined Alcoholics Anonymous after the misconduct, and his prognosis, with treatment, was good.

The Board found that the master's report contained "substantial medical evidence" for probation; especially absent any rebuttal medical or psychological evidence. The Board also held that a grant of probation was discretionary. McGuire had been suspended for four teen months before the issuance of the Board's decision and that period was made his term of suspension as an adjunct to probation.

Hills was decided after McGuire. The Respondent in Hills was charged with neglect, and making misrepresentations to his client and to the Grievance Administrator. There was "documented support in the record for the claim that Respondent's deceitful conduct was due to a personality adjustment problem manifested to a limited degree." Hills had "a misapplied sense of conscience and an obsessive need to meet the expectations of colleagues and clients regardless of self-harm and limited productive capacity." His conduct was atypical of his past career.

The case was remanded by the Board to a master to hear mitigating evidence. The master sua sponte suggested probation because of Hill's psychological difficulties. but the Board did not think that these difficulties fell within the scope of the probation rule: "The existence of a limited area of psychological immaturity does not reach the level of mental impairment required for probation under the court rule." Hills had only a "personal inability to cope with unforeseen stresses in private practice," and "a mental conflict."

To repeat the requirements of MCR 9.121(c), a Respondent must show: (1) physical disability; (2) mental disability; (3) drug addiction; (4) alcohol addiction. McGuire exhibited both physical disability and alcohol addiction. Hills attempted to show mental disability, but his "limited psychological immaturity" was insufficient. We found that he suffered a personality adjustment problem which did not rise to the level of a mental disability. In the present case, Respondent does not claim drug or alcohol addiction but only mental disability. His depression manifested itself in physical pain, but at its core was a mental problem. While it might be argued that Keidan's problems were more debilitating than Hills, this fails to satisfy the probation rule requirements of causal relationship between the physical or mental impairment and the misconduct.

II.

Respondent may have demonstrated a genuine mental impairment, but we are particularly concerned that: (1) his impairment may not be susceptible to treatment; and (2) the impairment may not have caused or substantially contributed to his misconduct.

A distinguished psychiatrist, Dr. Blumer, testified for Respondent at the panel hearing. Dr. Blumer has treated Respondent since 1979. He diagnosed Respondent as having a chronic pain

disorder with depression. Respondent has been on high doses of antidepressive medication, but lesser doses since 1982, after the misconduct ended. He still has fatigue, lack of energy, inability to enjoy life, and insomnia. According to Dr. Blumer, the principal progress in therapy since 1979 is that Respondent has not taken his own life. His condition is very chronic; in the words of psychiatrist “does not respond to the usual psychotherapeutic maneuvers,” but must be managed through medication. Respondent has suffered from such headaches and disorders for more than twenty years. The testimony, then, indicates that Respondent will probably always be in pain, and on medication, and depressed.

The court rule specifies the “cause of the impairment” must be susceptible to treatment, and not simply the symptoms. MCR 9.121(C) (1)(b). Here, the cause of the impairment is neither traumatic nor mechanical, but depression arising from chemical imbalances in the central nervous system. Only the chronic depression, not the chemical problem at root, can be regulated with medication. The rule does not require that the ultimate cause be curable, but that it be successfully treatable so as to remove the danger that Respondent will again be impelled to commit misconduct. In contrast, McGuire's illnesses were “intermittent,” and not ever-present as here. McGuire's arthritis was treatable and there was a “positive prognosis for recovery.” Further, McGuire's alcoholism, which might be termed the proximate cause of his misconduct, was under control.

Assuming for a moment that the “proximate cause” of Respondent Keidan’s, misconduct was continuous depression and associated pain (a finding we cannot make on this record), we have no reasonable assurance that the depression and pain can be successfully managed. Treatment need not be so definitive as to wholly extinguish the causes of impairment. Nevertheless, treatment must provide at least some noticeable improvement over the level of functioning which occurred at the time of misconduct, and this Respondent appears to be no better off for his treatment now than he was during the months of misconduct in 1981 and 1982.

Apart from failure to satisfy the treatment test of the probation rule, Respondent has not met the "causation" or "substantial contribution" requirements. There is no question that at the time of the wrongful takings, Respondent was in financial difficulty. This was testified to by Respondent’s friend, Attorney Goldstein, Dr. Blumer, and Respondent. The financial problem, then, was indisputable one element of the misappropriation. Respondent claims that the impairment was a second and necessary element. Grievance Counsel argues that the financial difficulty was the only important cause, and that the impairment did not even substantially contribute to the taking.

Mr. Goldstein, Respondent’s friend, testified that Respondent told him he had economic problems when he took the estate’s money, but did not mention pain or depression. Respondent testified that he started having financial problems about six months before the misconduct began he said he could have gotten money elsewhere but because of his poor judgment, never considered other possibilities. He admittedly knew when he took the money that it was wrong, but still misappropriated it due to diminishing receipts from his practice.

Dr. Blumer testified that at the time the takings began, Respondent was on very high levels of medication, and was unusually depressed and suicidal. The high drug intake “could certainly” have impaired Respondent's judgment, in the doctor’s opinion. There was, further, “a relationship”

between Respondent's impairment and the takings. On the other hand, Respondent was not disoriented. He realized at the time the wrongfulness of his actions. The financial problem played a large role; in fact, it was "obvious" to the doctor, he took the money due to financial distress. Finally, the doctor admitted that people who commonly take money as a symptom of depression are manic-depressives in the manic stage; Respondent is not a manic-depressive but only a depressive without a manic cycle.

Although Dr. Blumer testified that there was "a relationship" between the impairment and the misconduct, his testimony fell short of characterizing the impairment as a "cause" or a "substantial contribution." After examining the entire record, we find that the disability was indeed neither a cause nor a substantial contribution within the meaning of MCR 9.121(C)(1)(b), when viewed in relation to the overshadowing factor of economic distress. Respondent suffered his most unfortunate illness for many years without engaging in a breach of trust. It was only when certain circumstances, notably financial failure, coincided that he committed misconduct admittedly directly linked to the economic problem.

Finally, probation is wholly discretionary with the Board, McGuire, and if the elements of the rule are satisfied the Board "may enter an order placing the respondent on probation * * *." [Emphasis added.] MCR 9.121(C)(1). Not only is there substantial doubt here about the connection between Respondent's impairment and his misconduct, but there is doubt whether treatment will effect an improvement. In these circumstances, it would be a gross abuse of our discretion to grant probation.

III.

In deciding upon a suspension of three years and one day, we consider the following evidence in mitigation. Testimony indicated that Respondent has repaid the money taken. Respondent previously had an unblemished record and is genuinely remorseful. He is under psychological and psychiatric therapy, and is active in a community group and has also been active in bar activities. Dr. Blumer's testimony, while insufficient to support probation, certainly has a mitigating impact. Respondent was in a cycle of tension, depression, high medication, and poor judgment. If not for this mitigation, discipline would have been even more severe. Respondent is suspended for three years and one day.