

GRIEVANCE ADMINISTRATOR,  
Petitioner/Appellant,  
v  
HUBERT J. MORTON, JR., P-25940,  
Respondent/Cross-Appellant.

Case Nos. DP 135/86; ADB 14-87

Decided: December 29, 1988

BOARD OPINION

The respondent's license to practice law was suspended for thirty days by a hearing panel which found that he practiced law in violation of a previous order of suspension and filed a false affidavit of compliance with the Supreme Court. Upon consideration of the appeals filed by the respondent and the Grievance Administrator, the hearing panel's factual findings and legal conclusions are affirmed. The order of discipline is modified and increased to a suspension of 120 days.

As the result of a prior disciplinary proceeding, the respondent's license to practice law was suspended for ninety days effective March 5, 1986. The complaint filed by the Grievance Administrator charged that respondent violated that order by appearing as an attorney in Wayne County Circuit Court in a civil case on March 7, 1986 and filing pleadings in that case on March 10 and March 11, 1986. The complaint further charged that he filed an affidavit with the Supreme Court on June 9, 1986 which falsely stated that he fully complied with the suspension order. The panel concluded that these allegations were deemed to be admitted by virtue of the default which was entered for the respondent's failure to file a timely answer to the complaint. We first address the respondent's argument that the hearing panel abused its discretion by failing to set aside the default.

The complaint was served by regular and certified mail on January 12, 1987. The return receipt was signed by Mr. Morton on January 13, 1987 and a default was filed February 3, 1987. The motion set aside default which was mailed by the respondent on February 4, 1987 was not accompanied by an affidavit of meritorious defense as required by MCR 2.603(D)(1). This deficiency was pointed out in the Administrator's reply of February 17, 1987. It was not until April 1, 1987 that the respondent filed an affidavit and proposed answer. At separate hearings before the panel on June 25, 1987 and October 1, 1987, the panel considered the arguments put forward by the respondent that he was able to establish facts showing a meritorious defense. On both occasions, the panel rules that the respondent's proposed defense failed as a matter of law. The hearing panel acted properly in declining to set aside the default. Throughout these proceedings, the respondent has essentially admitted that various pleadings and orders were filed and that he provided legal services or filed an affidavit of compliance on certain dates specified in the complaint. The only

issues before the panel were the legal effect of the Supreme Court's order of March 5, 1986 denying the respondent's application for leave to appeal and the legal consequences of the respondent's subsequent motion for reconsideration.

The panel correctly ruled that the respondent's affidavit did not set forth facts legally sufficient to defend against the Grievance Administrator's charges that the respondent's license to practice law was suspended on March 5, 1986 and that he committed professional misconduct by engaging in the practice of law after that date. Although the respondent's default was not set aside, it is clear that the respondent was afforded an opportunity at each of the three hearings before the panel to argue the merits of his defense.

As noted above, the factual basis for the Grievance Administrator's complaint is not in dispute. The respondent was charged in a prior disciplinary proceeding, Case No. DP 57/83, with violation of an earlier discipline order. The hearing panel ordered that his license be suspended for sixty days and that suspension was affirmed by the Board in an order dated August 1, 1985. Both parties filed timely applications for leave to appeal to the Supreme Court and it is agreed by both parties that the suspension of the respondent's license was stayed while the appeals were pending. On March 5, 1986, the Supreme Court entered an order denying application for leave but, without further comment, increasing the respondent's suspension from sixty to ninety days. Mr. Morton acknowledges receiving that order within a day or two and he concedes that he performed legal services on March 7, 10 and 11. His defense rests on the argument that the automatic stay of discipline remained in effect after the Court denied his application for leave to appeal and he "assumed" that his filing of a motion for reconsideration on March 26, 1986 created a further automatic stay.

We affirm the panel's ruling that the respondent had no reasonable grounds for making such an assumption. The Court Rules dealing with practice before the Supreme Court are clear. A motion for rehearing of an "opinion" results in a stay in accordance with MCR 7.313(D)(2). A motion for reconsideration of an "order" filed under MCR 7.313(E) does not create a stay.

The respondent testified that he thought that motions for rehearing or reconsideration were basically the same thing and he assumed that the difference was just a matter of semantics. (Hrg. 6/25/87 Tr. p 45) In fact, the label placed by respondent on his subsequent motion was not determinative. The order issued by the Supreme Court on March 5, 1986 was clearly not an opinion as defined by MCR 7.317(A). Just as clearly, it was an order which was effective on the date it was entered [MCR 7.317(D)] and the filing of respondent's subsequent motion did not stay the effect of the order [MCR 7.313(E)].

A good deal of confusion arose at the hearing as the result of respondent's argument that the issue of whether or not a stay is created by filing a motion reconsideration had already been decided in the respondent's favor in a previous case. That argument is without merit. In a previous case, DP 28/84, Mr. Morton was charged with violating yet another ninety-day suspension and he claimed in that case that he had assumed he was entitled to an automatic stay of discipline when he filed a motion for reconsideration of an order entered by the Attorney Discipline Board. Two hearing panels ruled that the Grievance Administrator's complaint should be dismissed because the applicable court rules were ambiguous. [That ambiguity was corrected by the adoption of MCR 9.118(D), effective June 1, 1987.]

We are satisfied that the issue in that case involved only the effect of a motion for reconsideration of a Board decision and not the effect of a motion for reconsideration filed with the Supreme Court. The rules with regard to automatic stays in the Supreme Court have always been clear and we agree with the panel that the respondent, a licensed attorney, had no reasonable grounds for his claimed reliance on "assumptions" not supported by the clear language of the rules themselves.

Under other circumstances, the respondent's violation of the order of suspension might have been mitigated, although not exonerated, if he had established reasonable grounds for a good faith belief that a stay of discipline remained in effect after the Supreme Court's order on March 5, 1986. Respondent's affidavit of compliance filed June 9, 1986 creates a significant obstacle in that regard. That affidavit, signed by the respondent and filed with the Supreme Court clerk in accordance with MCR 9.123(A), contained his statement that he had "fully complied" with the terms of an order suspending his license to practice law for ninety days. We are unable to find in the record a satisfactory explanation for the inconsistency between the sworn statement in that affidavit and respondent's testimony to the panel. If, as respondent has testified, he had a good faith belief that the March 5, 1986 order of the Supreme Court was accompanied by an automatic twenty-one day stay of discipline and that the stay was further extended by the filing of his motion for rehearing, a subsequent ninety-day suspension period could not possibly have expired when the respondent filed his affidavit of compliance on June 9, 1986. Conversely, if the respondent filed that affidavit under a good-faith belief that he had successfully completed a ninety-day suspension, simple arithmetic would establish that his actions on behalf of a client from March 7-11, 1986 were undertaken while his license was suspended.

We agree with the panel's observation in its report that the respondent's claim of good faith is further undermined by an examination of the respondent's prior disciplinary record. This is not the first time the respondent has been charged with practicing law while his license was suspended. In his answer to formal complaint DP 28/84, respondent asserted the position that a motion

for rehearing acted as an automatic stay of discipline. In pleadings filed in April 1985, the Grievance Administrator placed the respondent on notice of the Administrator's disagreement with that argument. That case was eventually dismissed by two hearing panels which agreed that the rules governing appeals to the Board were somewhat ambiguous. Nevertheless, the panel noted, "respondent was aware of the Grievance Administrator's position and was or should have been aware of the distinction in the current rules which are not ambiguous. He chose to apply his own (by then challenged) interpretation and proceeded until the Administrator objected. This time there is not basis for claiming a good-faith mistake . . . he chose to ignore the rule and to denominate pleadings as best served his interest. Respondent must follow the rules."

Unfortunately, respondent's failure to comply with the rules is a recurring theme in a dismal disciplinary history and it is for that reason that we increase the discipline in this case.

Respondent Morton's first contact with the Board was in 1981. In Case No. DP 24/81, the Board reduced a hearing panel order of suspension to a reprimand for his neglect of a legal matter on behalf of a client, his failure to return certain documents and his failure to make a full or timely answer to the Grievance Administrator's Request for Investigation. In February 1982, the respondent was suspended for sixty days for his failure to pursue his client's interests and his failure to cooperate with the successor attorney retained by the client. Respondent's conduct in that case was aggravated by his failure to answer the formal complaints and his failure to appear before the panel. (Case Nos. DP 140/81, 119/81, 86/81 and 63/81.)

In January 1983, respondent was again suspended for sixty days. In that case, the Board considered respondent's failure to answer Requests for Investigation and formal complaints. We determined at that time that a reprimand was not appropriate and we stated:

"In assessing the appropriate level of discipline, the Board must deal with the exacerbating factor of respondent's previous history of discipline including a Board Order of Reprimand and a hearing panel suspension of sixty days. The record of these proceedings is replete with examples of respondent's attitude regarding these proceedings and includes failure to answer to timely file answers, failure to appear and failure to make timely payment of costs . . . a review of respondent's previous contacts with this agency will clearly show that he has reason to be familiar with the requirements of the court rules and points to a pattern of misconduct and an attitude of carelessness regarding these matters." (Brd. Opn. DP 166/81, DP 11/82, DP 56/82, effective January 6, 1983.)

Respondent's failure to file timely responses to two more Requests for Investigation resulted in our decision to affirm a hearing panel order suspending respondent's license to practice law for ninety days, effective September 27, 1983, in Case Nos. DP 233/83, DP 257/82. Respondent's violation of that suspension resulted in an additional ninety-day suspension effective March 5, 1986 in File No. DP 57/83 and it is respondent's violation of that suspension which brings him before the Board in this case.

This case also involves a second complaint, ADB 14-87, which was consolidated for hearing. That complaint charges that respondent's failure to file a timely answer to complaint DP 135/86 constituted a separate act of misconduct in violation of MCR 9.104(1-4,7) and Canon 1 of the Code of Professional Responsibility, DR 1-102(A)(5,6). Although the hearing panel's report is silent as to that complaint, the record below is clear that there was no timely answer to the first complaint. Respondent's failure to answer that complaint is an aggravating factor in this case and is entirely consistent with the respondent's unfortunate attitude toward the disciplinary process.

We are not persuaded by the record before us that the respondent's five prior disciplines have had any appreciable effect on his understanding of or attitude toward his obligations to the legal profession and the rules governing these proceedings. We therefore increase the suspension period to 120 days. The respondent must establish his eligibility for reinstatement in accordance with the criteria set forth in MCR 9.123(B).

All concur.