

IN THE MATTER OF JAMES H. KENNEDY
A Member of the State Bar of Michigan,
Respondent.
No. 36454-A

Decided: May 27, 1980
[Memorandum Opinion]

OPINION OF THE BOARD

FACTS

The Grievance Administrator charged Respondent with neglect, failure to seek the lawful objectives of his client, and failure to carry out a contract of employment. The Hearing Panel ordered a Reprimand. The Grievance Administrator petitioned for review, claiming such leniency was an abuse of the Panel's discretion because of Respondent's past record of misconduct. We agree, and amend the discipline to a 121-day suspension.

The Complaining client was forced to retire from Chrysler in 1974. He then contacted Respondent to sue Chrysler for various work-related injuries. Respondent testified that he filed a claim with the Workmen's Compensation Board. Panel Tr. at 15-16. Respondent once appeared for trial, apparently in November, 1976, but the presiding judge had a special rule requiring depositions to be completed before trial. Respondent did not know of this rule, since only that particular judge observed it, and the case was dismissed to allow the remaining depositions to be taken.¹ Tr. at 16. Respondent believes that he then requested the file back from the court, and turned the case over to another attorney, since Respondent was temporarily limiting his practice to assist in a judge's election campaign. Panel Tr. at 17.

Complainant has since moved to Pennsylvania, although his son still resided in the Detroit area. Respondent testified that he spoke with complainant and his son several times, and told at least the son that another attorney would be handling the case. Panel Tr. at 17-18. Respondent is also certain that he advised both men that the case had been dismissed, Panel Tr. at 18, and informed the son that he was attempting to get a new court date. Panel Tr. at 18. Complainant's son testified that he tried to contact Respondent about once a week while the case was pending, but was unable to talk with him on most occasions. Panel Tr. at 40. He said that Respondent did not tell him the case had been dismissed, as far as the son understood, but used "technical" terminology. Panel Tr. at 41. The son first clearly learned about the dismissal from his fiance's attorney-father, upon the latter's investigation. Panel Tr. at 44. The Complainant stated in his Request for Investigation that he wrote and called Respondent many times after moving out of Michigan, but never received an answer in writing, and only once spoke to Respondent on the telephone. Complainant asserts that Respondent told his son in June, 1978, that he would have a court date in October of that year, but avoided speaking to the son after that. Respondent does not recall mentioning a particular court date. Panel Tr. at 32. Before obtaining a Request for Investigation form, Complainant tried one last time to speak with Respondent, but was told he wasn't in; the final message went unanswered.

The Worker's Compensation case file reveals that a pre-trial conference was called at some point, Panel Tr. at 24, but Respondent could not recall whether he or an associate had attended that conference. Panel Tr. at 24. The firm name was eventually withdrawn from the case, and Respondent was substituted as the sole attorney. Panel Tr. at 24. The case was ultimately dismissed again, according to the file, in April, 1977, for the failure of the plaintiff to appear on the trial date.² The file also noted that plaintiff's counsel did not appear for pretrial conference, and had requested two adjournments. Panel Tr. at 25. A new petition for hearing was filed by another law firm in November, 1978, Panel Tr. at 26, and Chrysler has apparently since agreed to settle with complainant. Panel Tr. at 35.

DISCUSSION

Respondent was suspended for one year in 1970, and reprimanded in 1979. The Board is concerned with what appears to be a pattern of misconduct manifesting the need for more serious discipline. We also note that Respondent did not appear at the Board's Review Hearing, though he had been given notice. Board Tr. at 3. Counsel for the Grievance Administrator pointed out at the Board Review Hearing that the 1970 suspension was due to "a series of complaints similar to the one involved in this case and similar to one he received a previous reprimand on [1979], failure to represent, failure to keep in contact with clients after being requested for information." Board Tr. at 6. Respondent also failed, and has failed in the past, to answer the Request for Investigation, though the resulting default was here set aside by the Hearing Panel.

Neglect, failure to communicate with clients, and failure to respond to inquiries of the Grievance Administrator are frequent grievances. The Board takes such matters earnestly, especially in the case of an attorney who has repeated such misconduct. We, therefore, find the Hearing Panel abused its discretion by ordering a reprimand in this case, and we suspend Respondent for 121 days.

FOOTNOTES

1. But see State Bar Exhibit #1, letter to Respondent from the firm of Lacey & Jones, attorneys for Chrysler, dated July 20, 1976. "This matter has now been rescheduled for trial at the Detroit Bureau before Judge Foster on November 30, 1976, at 9:00 a.m. Under Judge Foster's procedural rules, depositions must be taken and filed prior to the trial date."
2. The case file (State Bar Exhibit -1) reveals the following sequence of dates in the case:
 - (a) Initial Petition for Hearing before the Workmen's Compensation Board mailed January 21, 1975, signed by Respondent.
 - (b) Notice of Pretrial Conference, dated April 16, 1975, mailed to Respondent's firm.
 - © Consent to substitution of Respondent as attorney, dated October 10, 1975.
 - (d) Letter described in note 1, supra.
 - (e) Dismissal for failure to appear for trial, or pretrial, and note that two adjournments have been requested. May 9, 1977.
 - (f) Second petition for hearing, signed by new counsel. November 22, 1978.

D. B. LEWIS, DISSENTING

I would affirm the reprimand imposed by the Hearing Panel, because: (1) there is no evidence of an abuse of discretion by the panel; and (2) the facts demonstrate that a 121-day suspension is unwarranted.

GCR 967.4 explains that the Board may "affirm, amend, reversed or nullify the order of the Hearing Panel in whole or in part or order other discipline." Yet, this broad power of review notwithstanding, good practice would dictate that the Board avoid amendment of panel decisions which have a rational basis and adequate support in the record.

The Grievance Administrator claims in his Petition for Review that the panel's exercise of leniency was an abuse of discretion. "Discretion" implies a choice, or exercise of will, in a determination made among competing considerations. For an abuse to occur in the reaching of such

a determination, the result must be an obvious violation of fact and logic. The result must show a “perversity” rather than an exercise of will, a defiance of judgment, and the influence of “passion or bias.” Spalding v Spalding, 355 Mich 382, 384-85, 94 NW2d 810, 811-12 (1959); Wendel v Swanberg, 384 Mich 468, 185 NW2d 348 (1971).

The above seems to be, in view of the frequency with which it has been followed, the accepted definition in Michigan of “abuse of discretion.” See, e.g., People v Worden, 91 Mich App 666, 284 NW2d 159 (1970); People v Williams, 386 Mich 565, 194 NW2d 337 (1972); Sanyo v Great Lakes Steel Corp., 93 Mich App 91, 286 NW2d 50 (1979); Johnkowski v Johnkowski, 50 Mich App 542, 213 NW2d 856 (1973); Grist v Upjohn Co., 16 Mich App 452, 168 NW2d 389 (1969). The report of the hearing panel and the record of proceedings do not reveal this kind of “abuse.”

A suspension longer than 120 days is a particularly harsh departure from the panel assessment, since the Respondent must now follow a complicated process for reinstatement. See GCR 972.2. The facts here do not support such severity. Although the Panel found that Respondent failed to communicate with Complainant and Complainant’s son, this lack of communication was not total, and Respondent did make some efforts to reach them from time to time. Hearing Panel Tr. at 17-18, 30-32, 40. Respondent received no money from Complainant, Hearing Panel Tr. at 33-34, and the claim has ultimately been settled. Hearing Panel Tr. at 35. These mitigating facts may be less than compelling, but they provide some support for the Panel's decision. The Board should not alter such a decision in the absence of a genuine abuse of discretion; nor should it, without good cause, so sternly amend discipline imposed by the Panel. The Order of the Panel should be affirmed.