

**SUBSEQUENT HISTORY:**  
06/28/10 - Application for  
Leave To Appeal Denied by  
MI SCT.

STATE OF MICHIGAN

## Attorney Discipline Board

FILED  
ATTORNEY DISCIPLINE BOARD  
10 JAN 21 PM 2:49

In the Matter of the Reinstatement Petition  
of Phillip E. Smith, P 20700,

Petitioner/Appellant.

Case No. 08-165-RP

Decided: January 21, 2010

*Appearances:*

Carl J. Marlinga, for Petitioner (before the hearing panel)  
Thomas W. Hall, Jr., for Petitioner/Appellant (before the Attorney Discipline Board)  
Emily A. Downey, for Grievance Administrator/Appellee

### **BOARD OPINION**

Petitioner, Phillip E. Smith, was licensed to practice law in Michigan in 1958. His license was revoked, effective August 22, 1985, following his conviction in the Livingston County Circuit Court for the crime of embezzlement over \$100.00, a felony. *Grievance Administrator v Phillip E. Smith*, Case No. DP 4/84. When the revocation order was entered, petitioner's license had been continuously suspended since November 4, 1981, the effective date of a 120 day suspension ordered by the Attorney Discipline Board, based upon a hearing panel's finding that petitioner had neglected a personal injury case resulting in prejudice to the client and had neglected a probate estate for several years resulting in monetary damages to the estate. *Grievance Administrator v Phillip E. Smith*, ADB Case No. 35166-A. During the interim period between that suspension and the revocation of his license, petitioner was also the subject of another discipline order suspending his license for 30 months, effective May 10, 1983, for continuing to engage in the practice of law and holding himself out as an attorney in good standing in violation of the previous suspension order. *Grievance Administrator v Phillip E. Smith*, Case Nos. DP 65/82; DP 123/82.

The petition for reinstatement filed in this matter on November 20, 2008, represents petitioner's second attempt to return to the active practice of law.<sup>1</sup> The present reinstatement petition was filed with the clerk of the Michigan Supreme Court on November 20, 2008, and assigned to Tri-County Hearing Panel #82. In lieu of granting the Grievance Administrator's motion to dismiss the petition for reinstatement, the hearing panel ordered petitioner to provide copies of documents which were required to be submitted contemporaneously with the reinstatement petition. The public hearing on the reinstatement petition was conducted on March 16, 2009. The evidence presented at that hearing, along with the hearing panel's findings and conclusions forming the basis for its denial of the reinstatement petition, are set forth in the hearing panel's report filed July 21, 2009. (That report is attached to this opinion as an appendix.)

Petitioner now seeks review of the hearing panel's decision and the Board has conducted review proceedings in accordance with MCR 9.118. For the reasons set forth below, we affirm the hearing panel order of July 21, 2009, denying the petition for reinstatement.

As stated in prior opinions of the Attorney Discipline Board, including our recent opinion in *Matter of the Reinstatement of Gregory Wilkins*, Case No. 08-139-RP (ADB 2010),

The question before the Board in [a reinstatement] review proceeding is not whether there is evidentiary support in the record for petitioner's argument that he met his burden of proof under MCR 9.123(B)(4),(5),(6) and (7). It is well settled that in reviewing a hearing panel's decision, the Board must determine whether or not the *hearing panel's* decision has proper evidentiary support in the whole record. *In Re Reinstatement of Arthur R. Porter, Jr.*, 97-302-RP (ADB 1999), citing *In Re Reinstatement of Leonard R. Eston*, 94-78-RP (ADB 1195), and *Grievance Administrator v August*, 438 Mich 296, 304; 475 NW2d 256 (1991).

An attorney seeking reinstatement from an order of revocation or a suspension of 180 days or more must establish each of the applicable criteria in MCR 9.123(B) by clear and convincing evidence. In this case, the hearing panel's findings that petitioner failed to meet that burden of proof are set forth in the panel's report filed July 21, 2009. Among other things, the panel noted petitioner's poor fiscal responsibility during the period of his disqualification, including a \$1,500.00 civil judgment assessed against him in 1995 that remains unsatisfied and petitioner's inability to

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<sup>1</sup> Petitioner sought reinstatement in 2003. The hearing panel's order denying reinstatement was entered August 28, 2003, and affirmed by the Attorney Discipline Board in an order entered January 27, 2004.

comply, in his own licensing matter, with the procedural requirements involved in the filing of a petition for reinstatement.

Based upon our review of all of the testimony and exhibits presented to the hearing panel, we are satisfied that there is ample evidentiary support for the panel's conclusion that petitioner has failed to meet his burden of establishing eligibility for reinstatement by clear and convincing evidence by failing to establish the criteria listed in MCR 9.123(B)(5), (6) and (7).

Although not discussed in great detail in the panel's findings and conclusions, it must be noted that any consideration of the requirement in MCR 9.123(B) that a reinstatement petitioner must establish that his or her conduct since the order of discipline has been exemplary and above reproach, must take into account petitioner's two *additional* felony convictions subsequent to the revocation of his license in 1985. In 1989, petitioner was convicted of the crime of false pretenses, for accepting \$1,000.00 from a prison inmate's mother on the pretense that he could provide legal assistance to her son. Petitioner was sentenced to seven months in prison in that matter. The record discloses that petitioner was again convicted in 1995 of the crime of retail fraud for which, he testified, he was imprisoned for approximately 18 months.

It is undeniable that a significant period of time has elapsed since the revocation of petitioner's license to practice law in 1985 and, indeed, a relatively significant period of time has now elapsed since petitioner's third felony conviction in 1995. However, as the Board stated in *In Re Reinstatement of Arthur R. Porter, Jr., supra*, pp 8-9:

We have previously underscored the fact that the passage of the time specified in a discipline order or court rule, does not, in light of the other reinstatement requirements, raise a presumption that the disciplined attorney is entitled to reinstatement because she has "paid her debt" or he has "served his time."

Under the rules governing reinstatement proceedings the burden of proof is placed upon the petitioner alone. While the Grievance Administrator is required by MCR 9.124(B) to investigate the petitioner's eligibility for reinstatement and to report his or her findings in writing to the hearing panel, there is no express or implied presumption that a petitioner is entitled to reinstatement as long as the Administrator is unable to uncover damaging evidence. In this case, our finding . . . would be the same if the record were devoid of evidence tending to cast doubt upon his character and fitness since his suspension. [*Reinstatement of Arthur R. Porter*, citing *In Re Reinstatement of James Del Rio*, DP 94/86 (ADB 1987).]

Petitioner's closing statement to the hearing panel that "he has been punished enough" misses the point of this proceeding. Instead the question before the hearing panel, and now the Board, is whether petitioner can now be safely recommended to the public, the courts, and the legal profession as a person fit to be entrusted with the responsibilities and obligations that accompany the license to practice law. The hearing panel concluded that petitioner did not meet that test in this reinstatement proceeding. Based upon our review of the whole record, we affirm that decision.

Board members William J. Danhof, Thomas G. Kienbaum, William L. Matthews, Andrea L. Solak, Rosalind E. Griffin, M.D., Carl E. Ver Beek, Craig H. Lubben, and Sylvia P. Whitmer concur in this decision.

Board Members James M. Cameron, Jr. did not participate.

## Attorney Discipline Board

FILED  
ATTORNEY DISCIPLINE BOARD

09 JUL 21 PM 2:48

In the Matter of the Reinstatement Petition  
of PHILLIP E. SMITH, P 20700,

Case No. 08-165-RP

Petitioner.  
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**REPORT OF TRI-COUNTY HEARING PANEL #82**

**PRESENT:** Harvey I. Wax, Chairperson  
Mark L. Teicher, Member  
Joshua A. Lerner, Member

**APPEARANCES:** Emily A Downey, Associate Counsel  
for the Attorney Grievance Commission  
  
Carl J. Marlinga,  
for the Petitioner

**I. EXHIBITS**

Grievance Administrator's Exhibit 1 - Transcript of Reinstatement Interview<sup>1</sup>

**II. WITNESSES**

Thomas Bruno  
Phillip E. Smith, Petitioner  
William D. Leyman

**III. PANEL PROCEEDINGS**

This reinstatement petition was filed with the Clerk of the Michigan Supreme Court on November 20, 2008 and assigned to Tri-County Hearing Panel #82 in accordance with MCR 9.124(D). On January 5, 2009, counsel for the Grievance Administrator filed a motion to dismiss the petition, citing petitioner's failure to attach several documents required by MCR 9.124(B) to his personal history affidavit. In lieu of granting the Grievance Administrator's motion, this panel ordered petitioner to provide copies of the requested documents, including, but not limited to, several years of tax returns, on or before February 13, 2009. In the same order, the panel further extended the time within which the Grievance Administrator could file its investigative report. Consistent with the panel's order, the Grievance Administrator filed its report on February 26, 2009. Thereafter, on March 5, 2009, petitioner participated in an investigative interview.

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<sup>1</sup> The transcript of the reinstatement interview will be referred to in this report as "Tr I." The transcript from the public hearing will be denoted as "Tr II."

The panel held a public hearing on March 16, 2009. Present at the hearing were the members of Tri-County Hearing Panel #82: Harvey I. Wax, Chairperson; Mark L Teicher, Member; and Joshua A. Lerner, Member. Carl J. Marlinga appeared on behalf of petitioner and Associate Counsel Emily A. Downey appeared for the Grievance Administrator.

In his opening statement, petitioner's counsel, Carl J. Marlinga, referred to petitioner's failed attempt to seek reinstatement five years earlier. Counsel acknowledged that in those proceedings, petitioner failed to take responsibility for his three felony convictions and he was denied reinstatement, in part, due to the lack of insight into his actions. Marlinga stated that it would be shown that in the past five years, petitioner had gained insight into his criminal convictions, accepted his guilt and was now able to avoid similar mistakes in judgment that had previously resulted in the revocation of his license to practice law. In her opening statement, Ms. Downey questioned whether petitioner could establish, by clear and convincing evidence, the criteria set forth in MCR 9.123(B)(5), (6) and (7).

Petitioner's first witness, psychologist Thomas Bruno, was sworn in and testified that in 2007 he was asked to perform a psychological evaluation of petitioner. Mr. Bruno understood that petitioner had been convicted of three felonies and that his license to practice law was revoked in 1985. Mr. Bruno met with petitioner for approximately fifteen hours over the course of five months. Nothing in the results of a personality test caused any concern with respect to petitioner's psychological well-being. In Mr. Bruno's opinion, petitioner had taken personal responsibility for his actions and he understood that his conduct, viewed by third-parties, was perceived as criminal. (Tr II, pp 14-16, 44-45.) Part of Mr. Bruno's interaction with petitioner was therapeutic. (Tr II, p 22.) Through their therapy sessions, petitioner had fully embraced the fact that his criminal convictions were justified. (Tr II, pp 29, 44.) Mr. Bruno further opined that petitioner was of good moral character and he had no reservations about recommending petitioner for the practice of law. (Tr II, p 32.)

On cross-examination, Mr. Bruno admitted that he did not know that prior to the 1985 revocation of his law license, petitioner had been disciplined on two other occasions. (Tr II, p 33.) Although Mr. Bruno had not treated petitioner recently, he had recommended that petitioner continue in counseling. (Tr II, p 36.) When questioned by members of the panel, Mr. Bruno explained that, in his opinion, petitioner could handle the pressures associated with the practice of law. (Tr II, p 40.) Mr. Bruno further testified that petitioner had finally expressed remorse for his conduct. (Tr II, p 47.)

Next, petitioner was sworn in and testified that he was seventy-five years old and was licensed to practice law in 1958. His license was revoked in 1985 after he was convicted of a felony. Petitioner explained that in 1984 he was found guilty of embezzlement when he borrowed funds from a client to build an ice rink. Petitioner claimed that he had not practiced law since his disbarment. (Tr II, p 50.) However, he was convicted of obtaining money under false pretenses when a jury found that he was holding himself out as an attorney. During his testimony, petitioner admitted that he could see how the individual he was assisting could have thought he was a lawyer. (Tr II, p 69.) In 1995, petitioner was charged and convicted, as a habitual offender, of retail fraud. Petitioner explained that it was never his intent to shoplift and that on that day his actions were misperceived. (Tr II, pp 70-73.) When asked if he accepted that he was rightfully convicted of the crimes, petitioner stated that "based upon what the [jury] heard," he was. However, petitioner further explained that he did not have the *mens rea* to be found culpable of the charged offenses. (Tr II, p 60.) Petitioner testified that he did not have any other difficulties with the law since 1995. (Tr II, p 73.)

With respect to his employment history since the revocation of his law license, petitioner testified that he has worked for several attorneys in northern Michigan as a paralegal. In this capacity, he performed legal research, prepared briefs and had some client contact under the supervision of an attorney. (Tr II, p 75.) Petitioner also taught law at Jackson Community College and Davenport College. In addition to these law-related positions, petitioner also coached the Ithaca High School Varsity tennis teams. In anticipation of taking a bar examination, petitioner had reviewed federal and state advance sheets, read Lawyer's Weekly, and maintained a subscription to the New York Times. He also believed that there were several potential clients in his community should he get his law license reinstated. (Tr II, p 78.)

On cross-examination, petitioner admitted that a civil judgment was entered against him in 1995 in the case of *Stein v Smith*, in the amount of \$1,500.00. Petitioner did not satisfy this judgment and, according to petitioner, the time within which the plaintiff could have collected on the judgment had expired. However, petitioner testified that he still intended to pay the judgment when he was financially able. (Tr II, pp 83-84.) Petitioner also admitted that due to poor bookkeeping in the past year, he had over-drafted on his checking accounts resulting in insufficient funds charges and negative daily balances. (Tr II, p 84.) In his investigative interview, petitioner admitted that between August of 2006 and December of 2008, he over-drafted on one account eighteen times. On another account, between 2003 and 2009, he over-drafted twenty-eight times. (Tr I, p 27.) As recently as December of 2008, in this account, petitioner had eight continuous days of overdraft charges. (Tr I, p 27.) On yet another account, between May and June of 2008, petitioner had four overdrafts and maintained a negative daily balance for seven days. (Tr I, pp 21-24.)

Petitioner acknowledged that he had only provided the Grievance Administrator with tax returns from 2007. Petitioner testified that in February of 2009, three months after he filed his petition for reinstatement, he sent a correspondence to the IRS requesting copies of his tax returns from 1985 to the present. Petitioner had not yet received a response to his request as of the date of the public hearing. Petitioner did not request the tax documents earlier because he did not know that this was required of him. (Tr II, p 85.) Petitioner testified that the tax return issue did not come up or was not required of him in his 2003 petition for reinstatement. (Tr II, p 85.)

The final witness, William D. Leyman, was sworn in and testified that he has known petitioner since 1980 and was the person to whom petitioner owed the \$7,500.00 that was at issue in petitioner's 1984 embezzlement conviction. (Tr II, p 102, 105.) Mr. Leyman testified against petitioner in that trial, however, he was unable to remember any details surrounding that case. Mr. Leyman did not feel that he was cheated out of any money and he was paid all that was owed to him. (Tr II, p 104.) At the public hearing, Mr. Leyman testified that petitioner had a "real good" reputation for honesty in their community. Further, Mr. Leyman recommended that petitioner be reinstated to the practice of law and stated that, should the need arise, he would seek out petitioner for legal counsel. (Tr II, p 103.)

After Mr. Leyman testified, the parties presented their closing arguments. Counsel for petitioner simply argued that petitioner had accepted responsibility for his criminal convictions. Counsel for the Grievance Administrator expressed her concern that petitioner had not established by clear and convincing evidence the criteria necessary to support reinstatement of his license to practice law. Counsel noted petitioner's poor fiscal responsibility, his failure to satisfy a 1995 civil judgment against him, and his two felony convictions after the revocation of his license. Counsel for the Grievance Administrator also cited petitioner's failure to provide the necessary tax returns for every year since the order of discipline.

In rebuttal, petitioner's counsel argued that petitioner had sustained the over-drafts in his checking accounts because of his dire economic predicament. Petitioner submitted that if his license were reinstated, he might be able to achieve a level of income necessary to meet his obligations. After considering closing arguments, this panel took the matter under advisement. This panel report now ensues.

#### **IV. FINDINGS AND CONCLUSIONS**

In order to enter a finding that an attorney suspended for more than 179 days should be eligible for reinstatement, a hearing panel must find that the following criteria under MCR 9.123(B) have been established by clear and convincing evidence:

1. He or she desires in good faith to be restored to the privilege of practicing law in Michigan;
2. The term of the suspension ordered has elapsed or five years have elapsed since revocation of the license;
3. He or she has not practiced or attempted to practice law contrary to the requirement of his or her suspension or revocation;
4. He or she has complied fully with the order of discipline;
5. His or her conduct since the order of discipline has been exemplary and above reproach;
6. He or she has a proper understanding of an attitude toward the standards that are imposed on members of the bar and will conduct himself or herself in accordance with those standards;
7. Taking into account all of the attorney's past conduct, including the nature of the misconduct which led to the revocation or suspension, he or she nevertheless can safely be recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence, and in general to aid in the administration of justice as a member of the bar and as an officer of the court.
8. He or she is in compliance with the requirements of subrule (C), if applicable; and
9. He or she has reimbursed the client security fund of the State Bar of Michigan or has agreed to an arrangement satisfactory to the fund to reimburse the fund for any money paid from the fund as a result of his or her conduct. Failure to fully reimburse as agreed is ground for revocation of a reinstatement.



It is the unanimous decision of this panel, upon review of this rule and the evidence and testimony presented, that petitioner has not met his burden under MCR 9.123(B).

We first note petitioner's poor fiscal responsibility. In recent years, petitioner has had an impressive number of over-drafts, several insufficient funds charges, and multiple days of negative balances in his banking accounts. We recognize that petitioner's income has been limited, however, we note that petitioner attributed his banking difficulties simply to "bad bookkeeping." We also find of concern, the \$1,500.00 civil judgment assessed against petitioner in 1995 that remains unsatisfied. Petitioner has made absolutely no effort to discharge this obligation. Petitioner's conduct reflects poorly on his ability to manage a potential client's legal matters. Moreover, it is clear that petitioner does not understand the standards that are imposed on members of the bar.

We also rely, in part, on the testimony of petitioner's psychologist, Thomas Bruno. Mr. Bruno testified that he did not want to see petitioner's efforts in therapy be just for purposes of impressing this reinstatement panel. As Mr. Bruno articulated, "I want this to be something he's going to put in practice." (Tr II, p 32.) Mr. Bruno recommended that petitioner continue in therapy. When asked why additional counseling was warranted, Mr. Bruno testified: "[To] make sure that he's maintaining himself in his program, not running into any difficulties, things like that." (Tr II, p 36.) Despite Mr. Bruno's recommendations, there was no evidence presented that petitioner had continued in any treatment plan.

Finally, we note petitioner's failure to comply, in his own licensing matters, with the procedural requirements involved with filing a petition for reinstatement. Although MCR 9.123(B)(1)-(9) sets forth several criteria for reinstatement that must be satisfied, MCR 9.123(B) specifically provides that in addition to the nine criteria, a petitioner must also comply with the requirements of MCR 9.124. Pursuant to MCR 9.124, a petitioner is charged with the responsibility of providing to the Grievance Administrator, among other things, copies of his federal, state and local tax returns. These returns are to be attached to the personal history affidavit and served upon the Administrator. Petitioner neglected to attach the required documents to his affidavit. In December of 2008, counsel for the Grievance Administrator sent correspondence to petitioner's counsel regarding the deficiencies in the affidavit. Then, in January of 2009, a motion to dismiss was filed. On January 28, 2009, this panel denied the Grievance Administrator's motion and granted petitioner additional time, until February 13, 2009, to provide the tax documentation. Although petitioner eventually requested from the IRS copies of his tax returns dating back to 1985, this action was taken months after his petition for reinstatement was filed. Notwithstanding the IRS request, the tax documents have never been provided. Petitioner testified that he did not provide the tax documents because he did not know that this was required of him. To date, petitioner has only provided his 2007 tax returns despite being given additional time to comply with the court rules. Petitioner's conduct reflects a total disregard for and lack of understanding of the rules of court in this state.

In light of the foregoing evidence, we conclude that petitioner's conduct since the order of discipline has not been exemplary and above reproach. Further, he has not demonstrated that he has a proper understanding of and attitude toward the standards imposed on members of the bar. Finally, there is insufficient evidence to conclude that respondent could be safely recommended to the public, the courts, and the legal profession as a person fit to practice law. Respondent has not complied with the eligibility requirements set forth in MCR 9.123(B)(5), (6) and (7).

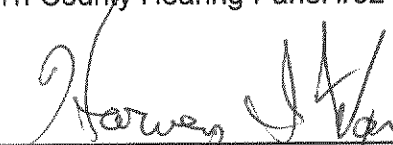
For the reasons set forth above, petitioner's reinstatement petition is denied.

**V. ITEMIZATION OF COSTS [MCR 9.128 - As Amended July 29, 2002]**

Attorney Grievance Commission: (See Itemized Statement filed 03/30/09)	\$ 486.55
Attorney Discipline Board: Hearing held March 16, 2009	\$ 514.50
Administrative Costs	<u>\$ Already assessed and paid</u>
<b>TOTAL:</b>	<b>\$1,001.05</b>

**ATTORNEY DISCIPLINE BOARD**  
Tri-County Hearing Panel #82

By:

  
\_\_\_\_\_  
Harvey I. Wax, Chairperson

DATED: July 21, 2009

# Order

June 28, 2010

140939

GRIEVANCE ADMINISTRATOR,  
Petitioner-Appellee,

v

PHILLIP E. SMITH,  
Respondent-Appellant.

Michigan Supreme Court  
Lansing, Michigan

Marilyn Kelly,  
Chief Justice

Michael F. Cavanagh  
Elizabeth A. Weaver  
Maura D. Corrigan  
Robert P. Young, Jr.  
Stephen J. Markman  
Diane M. Hathaway,  
Justices

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SC: 140939  
ADB: 08-165-RP

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On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.



s0621

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 28, 2010

*Corbin R. Davis*

Clerk