

STATE OF MICHIGAN

Attorney Discipline Board

In the Matter of the Reinstatement Petition  
of Irving A. August, P10296

Petitioner/Appellant,

v

Grievance Administrator,

Appellee.

Case No. ADB 241-88

Decided: July 22, 1992

MAJORITY BOARD OPINION

On December 22, 1989, the Board entered an order reversing a hearing panel order dated August 17, 1989 denying the petition for reinstatement filed by petitioner Irving A. August. The Grievance Administrator's application for leave to appeal the Board's decision was granted by the Supreme Court. On August 29, 1991, the Court issued its opinion which included a discussion of the appropriate standard of review to be employed by the Board as well as the Court's clarification that the nature of the offense and the time elapsed since its commission and since disbarment are relevant and important considerations in determining whether a disbarred attorney should be reinstated. The Board's order of December 22, 1989 was vacated and the matter was remanded to the Board for consideration in light of the Court's opinion.

On remand, the Board concluded that the record in this case should be supplemented by further evidence regarding the petitioner's conduct since his last appearance before the reinstatement panel on April 14, 1989. In an order dated December 2, 1991, the Board appointed former Supreme Court Justice Otis M. Smith as a master with instructions to conduct a further hearing conforming as nearly as practicable to a hearing under the provisions of MCR 9.124(C) to receive evidence, for the period commencing April 14, 1989, bearing upon the petitioner's eligibility for reinstatement. This hearing was conducted by the Master on March 4, 1992. Although the Grievance Administrator's role was not clearly specified in the Board's Order Appointing Master, the requirements of MCR 9.124(B) were followed by the Administrator to the extent that a further notice of the proceedings before the Master was published in the Michigan Bar Journal and an investigative report was prepared and filed. That report included a sworn interview of the petitioner conducted on December 12, 1991. The report of the Master was filed April 23, 1992.

Applying the standards enunciated by the Court in this case, the Board has reviewed the hearing panel decision of August 17, 1989, as well as the Master's report, for proper evidentiary support on the whole record. Grievance Administrator v August, 438 Mich 296, 304; 304 NW2d 256 (1991); In re Freedman, 406 Mich 256; 277 NW2d 635 (1979); In re Grimes, 414 Mich 483; 326 NW2d 380 (1982). As noted by the Court, there is no challenge in this case to the factual findings of the hearing panel, but rather to the panel's ultimate determination in its order of August 17, 1989 that the petitioner should not then be reinstated.

In its opinion of December 22, 1989, the Board noted that it did not necessarily disagree with the argument that "[T]here may be certain types of misconduct which are, by their very nature, so very reprehensible and inimical to basic principles of justice that the offending attorney's license should be permanently revoked." Matter of Irving A. August, ADB 241-88, Brd. Opn. 12/22/89, page 3. Nevertheless, the Board observed, "Disbarment is not necessarily permanent in Michigan and the Supreme Court has not ruled that it should be, even in the most extreme cases." Citing Matter of the Reinstatement of Joseph Covington, ADB 128-87, Brd. Opn. 8/29/88, page 3.

That issue remains to be resolved in Michigan. In its opinion to remand August's case to the Board, the Court recognized that while a number of jurisdictions hold that there is conduct so egregious that it should preclude reinstatement to the practice of law, "[W]e need not rule on that question because we are not prepared to say that this is such a case." Grievance Administrator v August, supra at 313.

More than two and one-half years have now elapsed since the issue of petitioner's eligibility for reinstatement was considered by the Board in its opinion of December 22, 1989. During that time, there has been no change in the seriousness of petitioner's crimes or in the Board's characterization of that misconduct. As stated in its previous opinion in this case, the Board continues to view the petitioner's conduct as a subversion of the system of justice which must be included in the category which we have chosen to describe as "[r]anking among the most grave and offensive to come before the Board. Brd. Opn. 12/22/89, page 3.

There has been a change in the time elapsed since the commission of the offense and since disbarment. The relevant period of time in the indictment leading to the petitioner's conviction is October 3, 1979 to October 30, 1980. The petitioner's disbarment was deemed to be effective June 28, 1983. Therefore, in accordance with the Court's instructions, our re-examination of the petitioner's eligibility for reinstatement includes consideration of the twelve years which have elapsed since the petitioner engaged in criminal conduct and the nine years which have now elapsed since the revocation of his license to practice law.

The hearing panel majority which denied reinstatement in 1989 stated that they were not convinced that petitioner's subsequent conduct, no matter how exemplary, "[h]as sufficiently ameliorated the taint placed upon

the legal profession, by commission of the crimes in question, to the extent that he could now be safely recommended as a person of trust." Panel Opinion, 8/17/89, pages 18-19 (Emphasis added) . Approximately three years have elapsed since that panel decision. In light of the Court's recognition that the Board reviews a panel's decision for adequate evidentiary support but at the same time possesses a measure of discretion with regard to its ultimate decision, Grievance Administrator, v August, supra at 304, we have re-examined the petitioner's eligibility as it now exists in 1992.

In addition to the other applicable requirements of MCR 9.123(B), the Master has reported that the petitioner has established, based upon his conduct since April 14, 1989 and his testimony to the Master, that he can, as required by MCR 9.123(B)(7), 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.

We are mindful that the petitioner's conduct and character has undergone an unusually high level of scrutiny including sworn interviews conducted at the office of the Attorney Grievance Commission on two separate occasions, the publication of two notices in the Bar Journal regarding his request to be reinstated, the preparation of two investigative reports by the Grievance Administrator's staff, and the petitioner's testimony during public proceedings before a hearing panel and a master in 1989 and 1992.

The Board has re-examined the petitioner's eligibility for reinstatement in light of the record of the proceedings before the hearing panel, the nature of the petitioner's criminal conduct, the length of time which has elapsed since the commission of those acts, the nine years which have elapsed since the petitioner's disbarment and the findings of the Master. We conclude that the petitioner has established his eligibility for reinstatement under the applicable rules and the standards previously enunciated by the Court in this case.

We fully recognize, as did the Court, that application of MCR 9.123 (B) involves an element of subjective judgment. Grievance Administrator v August, supra at 311. The inherently subjective nature of several of the requirements for reinstatement is unavoidable. We have considered the record in this case not only in light of the Court's instructions but in light of the paramount concern in every proceeding before this body-the protection of the public. Matter of Trombly, 398 Mich 377; 247 NW2d 873, 876 (1976). We are satisfied that the petitioner's reinstatement may now be granted.

John F. Burns, George E. Bushnell, Jr., C. Beth DunCombe, Elaine Fieldman, and Theodore P. Zegouras

Miles A. Hurwitz did not participate in this decision.

DISSENTING OPINION

Linda S. Hotchkiss, M.D.

I respectfully dissent from the Board's decision to grant reinstatement in this case. In large part, my reasons are stated in my dissenting opinion In Matter of the Reinstatement Petition of Irving A. August, ADB 241-88, Brd. Opn. 12/22/89. At that time, the Board considered a Searing panel decision to deny reinstatement in which the panel majority found that reinstatement of a former attorney whose crime went to "(t)he very heart of the administration of the judicial system and to the jugular of the judiciary" would only "[f]urther erode an already diminished public confidence in the legal system". At that time I said,

The fundamental goal of this disciplinary system is, according to MCR 9.105, "the protection of the public, the courts and the legal profession." The hearing panel decision in this case was clearly consistent with that goal . . . .

I agree with the panel majority that reinstatement in this case will inevitably erode public confidence in the legal system and that consideration was relevant to the finding that the petitioner cannot be safely recommended to the public as a person fit to act in matters of trust and confidence.

When this matter was first considered by the Board in 1989, I voted to affirm the hearing panel's conclusion that the passage of seven years had not ameliorated the taint on the legal profession caused by the petitioner's crimes. Notwithstanding the language in the Supreme Court's opinion regarding the subjective nature of MCR 9.123(B)(7), I find nothing in the record now before the Board from which one could infer that the passage of two and one-half more years has washed that taint away.

The special master appointed by the Board is to be commended for his efforts on the Board's behalf. Neither party to these proceedings has objected to the contents of the master's report and I believe that it fairly reflects the evidence which was presented. However, the master recognized that his findings were limited to that evidence which was relevant to the petitioner's conduct since April 1989. It has now been shown that, among other things, the petitioner is an excellent husband and father, that he has conducted his personal and business affairs for the last three years without a negative incident and that he would very much like to be a lawyer again.

The panel which first considered this reinstatement petition concluded unanimously that the petitioner's conduct from 1982 to 1989 had been exemplary and above reproach and that he had a proper attitude of and understanding toward the obligations of an attorney. The proceedings before the master provide a basis for extending those conclusions through March 1992. However, those proceedings do not alter the fundamental question presented--whether or not sufficient time has now passed in light of the especially reprehensible nature of the petitioner's conduct.

Like my colleagues on the Board and the majority on the Court, I am also not prepared to say that this is a case where permanent disbarment is required and that the petitioner should never be reinstated. Having voted to affirm the hearing panel majority in 1989, I am not prepared to reverse the panel's decision simply because two and one-half more years have passed.