

STATE OF MICHIGAN

Attorney Discipline Board

In the Matter of the Reinstatement Petition of

Richard L. Banta, II, P-39845,

Petitioner/Appellant,

v

Grievance Administrator,

Respondent/Appellee,

Case No. 01-27-RP

Decided: March 25, 2002

BOARD OPINION

Appearances: Cynthia C. Bullington for the Grievance Administrator/Appellant
Richard L. Banta, II, *in pro per* for Respondent/Appellee

Petitioner's license to practice law was suspended for a period of 181 days, by consent, effective September 3, 1998 after pleading no contest to violating MRPC 8.4(a)-(c) by breaking and entering (entering a building, location of his former law office, without consent of the owner, in violation of MCL § 750.115) and malicious destruction of property (setting fire to that same building, in violation of MCL § 750.73.) Petitioner became eligible to file his petition for reinstatement in March, 1999, but did not do so until February 23, 2001. The hearing panel granted the petition, with conditions. The Grievance Administrator has filed a petition for review of the hearing panel's order of reinstatement. Having conducted review proceedings, the Board has determined that the record as a whole fails to provide evidentiary support for the hearing panel's findings that Mr. Banta demonstrated, by clear and convincing evidence, that he had complied with the requirements for reinstatement set forth in MCR 9.123(1)-(9). Therefore, the decision of the hearing panel granting Mr. Banta's petition for reinstatement is vacated.

I.

Standards for Reinstatement & Standard of Review

An attorney whose license to practice law has been revoked or suspended for more than 179 days is not eligible for reinstatement until the attorney has petitioned for reinstatement under MCR 9.124 and has established by clear and convincing evidence that he or she has met the requirements

of MCR 9.123(B). On review, the Board must determine whether or not a hearing panel's findings have 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 1995) and Grievance Administrator v August, 438 Mich. 296, 304; 475 NW2d 256 (1991). See also, In re McWhorter, 449 Mich 130, 132; 534 NW2d 480 (1995). As this Board explained in Porter, *supra*:

Subrule 5 of MCR 9.123(B) requires that the suspended or disbarred attorney's "conduct since the order of discipline has been exemplary and above reproach." In [In Re Reinstatement of Leonard R. Eston, 94-78-RP (ADB 1995)] we adopted a panel member's opinion defining these terms:

"exemplary" [means] "serving as a pattern or model for imitation; worthy of imitation." To be "above reproach" connotes behavior consistently superior to that which one might ordinarily expect.

Subrule 6 "is primarily directed to the question of the applicant's ability, willingness and commitment to conform to the standards required of members of the Michigan State Bar." August, 438 at 310; McWhorter, 449 Mich at 138 n 10.

Subrule 7 focuses on "the public trust" which the Court, the Board and hearing panels, have "the duty to guard." Id. This inquiry involves the nature and seriousness of the misconduct, evidence of rehabilitation, and essentially culminates in a prediction that the petitioner will abide by the Rules of Professional Conduct.

Taken together, subrules (5)-(7) require scrutiny of the reinstatement petitioner's conduct before, during, and after the misconduct which gave rise to the suspension or disbarment in an attempt to gauge the petitioner's current fitness to be entrusted with the duties of an attorney. Our Supreme Court has recognized that application of MCR 9.123(B) involves "an element of subjective judgment." August, 438 Mich at 311. [Porter, *supra*, pp 9-10; footnotes omitted.]

II.

Nature of the Misconduct Giving Rise to Petitioner's Suspension

As part of his plea agreement on the criminal charges which gave rise to his suspension, Mr. Banta was ordered to pay restitution to Mr. Kirby Wilson, in the amount of \$52,922.48. Mr. Wilson previously shared office space with Mr. Banta. According to the petitioner, Mr. Wilson had locked him out of the offices, and "one night I just got fed up with it, and broke in the door . . ." (3/20/01 Richard Banta, II Deposition Tr, II, p 5.) Mr. Banta claims that he was intoxicated at the time he broke into the building and does not have any recollection of how the fire started. Kirby Wilson testified, at the reinstatement hearing, that he told Mr. Banta not to come back to the office until he paid the rent that was owed. Mr. Wilson further testified that Mr. Banta had been informally evicted from the premises for six to eight months prior to the fire. Mr. Wilson also stated that he found

cigarette burns on Mr. Banta's desk "a couple of times" and "there was constantly alcohol, beer bottles, but more specifically glasses" of alcohol in Mr. Banta's office, and that he had observed Mr. Banta's consumption of alcohol in the law office.

Mr. Wilson also testified that, in his own opinion, the fire was not accidental. He based his opinion on the presence of kerosene cans and the smell of lighter fluid in the office, as well as the fact that Mr. Wilson's law books were removed from the office that night and later found in Mr. Banta's garage.

Mr. Banta's plea was conditioned on completion of a probationary period. Mr. Banta was also ordered to pay restitution to Kirby Wilson in the amount of \$52,922.48. The petitioner paid \$10,000. The remainder of the restitution order was vacated on May 19, 1999 by Wayne County Circuit Judge Timothy Kenny upon petitioner's motion. Mr. Banta claims the restitution order was amended because the City of River Rouge had purchased the building and had ordered it condemned and demolished. The building was not insured at the time of the fire.

Mr. Banta stated that he had served notice of the hearing to vacate restitution on Kirby Wilson. However, Mr. Wilson testified that neither he nor his mother, Jeanne Wilson (the record owner of the building), were served with notice of the hearing. Mrs. Wilson also testified that she did not receive any notice of the hearing to vacate the order of restitution. The court file contained only a proof of service on the prosecutor in Mr. Banta's criminal case. Petitioner did not dispute the Grievance Administrator's assertion that the court file did not contain a proof of service on either Kirby Wilson or Jeanne Wilson and the court records introduced in this matter do not contain such documents.

III.

Petitioner's Conduct While Suspended

Following his suspension from the practice of law, Mr. Banta sought employment with the River Rouge Public Schools. He was hired in August, 1998, as an "Educational Assistant," and was assigned to the Ann Visger School. His conduct as a school employee includes: his failure to timely pay his fees to the State of Michigan for certification as an educational assistant; a loud and disruptive confrontation with another teacher in front of students and parents; a parent complaint that he referred to a child by saying, "oh, that's a bad one"; suspensions for failing to complete his lesson plans as required; and termination due to allegations of physical contact which left marks on one girl's buttocks; and allegations (supported by another child as witness) that Mr. Banta engaged in inappropriate touching and sexual comments directed to a 5th Grade girl. Mr. Banta did not offer anything to support his claim that his behavior was exemplary, besides his own viewpoint that it is "hard to disprove" allegations of sexual misconduct.

Also, Mr. Banta's actions with respect to the restitution he was originally ordered to pay to the Wilsons in his criminal case raise questions regarding his fitness which were not addressed in these proceedings. "Under the rules governing reinstatement proceedings, the burden of proof is placed upon the Petitioner alone." Grievance Administrator v James Del Rio, DP 94/86 (ADB 1987), p 6. The Board is entitled to consider Mr. Banta's attitude toward his obligation to pay restitution as evidence of his compliance with the subsections of MCR 9.123(B)(5)-(7). Cf. Del Rio, supra, p 4 (Board entitled to consider petitioner's attitude toward his obligation to pay costs of discipline proceedings and previous reinstatement attempt). Mr. Banta's actions in moving for an order to vacate more than eighty percent of the original amount of damages raise the question whether Mr. Banta escaped responsibility for his actions. It is true that the circumstances regarding repair of the building and replacement of the contents may have changed after the city condemned, and demolished, the building. However, the owner of the building, Jeanne Wilson, and her son, Kirby Wilson, the *de facto* landlord, were apparently not repaid for the damage caused by Mr. Banta. At least, it appears from this record that respondent has not fully compensated the victims of his criminal conduct.

Finally, we note that in an understandable and minimally necessary attempt to provide some corroboration for his own general assertions of fitness, Mr. Banta subjected himself to an independent medical evaluation as part of the reinstatement process. Unfortunately, the report does not provide the requisite assurance. The exam was conducted on May 18, 2001 by Elliot Luby, M.D. A psychological profile exam, the Minnesota Multiphasic Personality Inventory ("MMPI-2") was administered. The MMPI-2 outcome regarding Mr. Banta noted personality characteristics such as impulsivity, pleasure-seeking, proneness to rule infractions, and high risk behaviors that might make Mr. Banta vulnerable to clashes with authority figures at times. The recommendations stated by Dr. Luby were that:

[t]he Attorney Grievance Commission will have to take into consideration his history of antisocial acting out evident in high school, the army¹, and more recently in the 1998 offense [suspension from the practice of law]. Alcohol will have to be a serious consideration for him, because he becomes disinhibited under its influence. Clearly, Mr. Banta has no major mental illness. I would like to have seen more anxiety in this man, but he betrayed very little. I, of course, can make no recommendations concerning reinstatement, but I believe I have given you a picture of his personality. [Dr. Luby's Report at 3-4, Petition for Reinstatement, Supplemental Book, pp 91-92.]

Dr. Luby also noted his diagnostic impression that petitioner had a "personality disorder with

¹ Mr. Banta left the Army AWOL in 1974 and was "given an undesirable discharge" after "going up and down in rank." Mr. Banta claims he went AWOL because "the Army did not keep its promises to him."

impulsive and some antisocial traits.” As with other aspects of petitioner’s record, Dr. Luby’s report is not unequivocally negative. For example, petitioner was said to have above average intelligence and “a high degree of self confidence and the ability to deal with life.” However, the report *seems* to suggest that petitioner’s belief “that his old problems are behind him” is not accurate. Based on our review of the record, and the proceedings conducted herein, we cannot say with sufficient confidence that respondent’s problems are indeed behind him.

IV.

Conclusion

As we have stated above and in numerous other opinions, the petitioner for reinstatement bears a substantial burden. Petitioner may well be able to establish his eligibility for reinstatement in the future. He may be able to address the areas of concern we have identified above. However, the Board is unable to conclude, in this case, that the record as a whole supports a finding that Mr. Banta has established, by clear and convincing evidence, that: he can safely be recommended as a person fit to practice law; that he understands the standards imposed on lawyers and will conduct himself accordingly; and that his conduct has been exemplary and above reproach. MCR 9.123(B)(5)-(7). Therefore, the panel’s order of reinstatement is vacated and petitioner shall cease and desist the practice of law. The accompanying order so directing shall take effect 21 days from the service of this opinion and order, and petitioner shall comply with all applicable provisions of MCR 9.119 as if an order of suspension had been entered this date pursuant to MCR 9.115(J)(3).

Board Members Wallace D. Riley, Theodore J. St. Antoine, Nancy A. Wonch, Rev. Ira Combs, Jr., William P. Hampton, Marie E. Martell and Ronald L. Steffens concurred in this decision.

Board Member Marsha M. Madigan, M.D., did not participate.