

STATE OF MICHIGAN

Attorney Discipline Board

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ATTORNEY DISCIPLINE BOARD

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In the Matter of the Reinstatement Petition
of Thomas A. Mengesha, P 59421,

Petitioner/Appellant

Case No. 15-41-RP

Decided: November 8, 2016

Appearances:

Michael A. Schwartz, for Petitioner/Appellant

Alan M. Gershel, for the Grievance Administrator/Appellee

BOARD OPINION

Tri-County Hearing Panel #21 of the Attorney Discipline Board entered an order in this matter denying the petition for reinstatement filed by petitioner Thomas A. Mengesha. Petitioner sought review of that decision by the Attorney Discipline Board in accordance with MCR 9.118. The Board has conducted review proceedings, including review of the record before the panel and consideration of the briefs and arguments presented by the parties at a review hearing before the Board. For the reasons set forth below, we affirm the order of the hearing panel.

Petitioner, in his capacity as the trustee of the Robert Schultz Trust, took personal loans in the total amount of approximately \$95,000 from the trust without disclosing the terms of the loans in writing to Mr. Schultz, or obtaining Mr. Schultz's consent to the loans in writing. Additionally, the loan arrangement between petitioner and the trust did not provide for a rate or schedule for the return of the personal loans taken by petitioner. Petitioner pled no contest to the charges contained in the amended formal complaint in Case No. 12-45-GA, specifically, that he committed professional misconduct when he entered into a business transaction with a client in which the transaction and terms were not fair and reasonable to the client and were not fully disclosed and transmitted to the client in a manner that can reasonably be understood by the client, in violation of MRPC 1.8(a)(1); entered into a transaction with a client in which the client does not consent to the transaction and its terms in writing, in violation of MRPC 1.8(a)(3); and, violated the Rules of Professional Conduct, in violation of MRPC 8.4(c).

Petitioner's license to practice law was suspended by consent for 180 days, effective December 18, 2012. The Order of Suspension and Restitution with Condition (By Consent) issued by the panel required petitioner to pay restitution of \$101,871.09 to Robert M. Schultz and included a condition that petitioner would not be eligible to petition for reinstatement until he made full restitution to Mr. Schultz.¹

Petitioner filed his petition for reinstatement on April 20, 2015, asserting that he was in compliance with MCR 9.123(B) and the order of discipline issued by Tri-County Hearing Panel #8. The matter was assigned to Tri-County Hearing Panel #21 and a hearing was held before the panel on July 22, 2015. At the hearing, the Grievance Administrator took the position that petitioner had “a systemic ongoing inability to accept responsibility,” and that there were “some very significant and serious red flags” which the panel should consider. (Tr 7/22/15, pp 126, 128.) Petitioner's counsel argued that petitioner had been candid and forthright with the panel and that “with the exception of that one blemish . . . he's led a good honorable life.” (Tr 7/22/15, p 125.)

In its report, issued October 29, 2015, the hearing panel concluded that petitioner had failed to meet his burden of proof under MCR 9.123(B)(6) and (7), and thus that there was no need to address whether petitioner's conduct since his suspension has been exemplary and above reproach, under subsection (5).²

¹ On January 14, 2014, the parties and the Board were notified by the State Bar of Michigan Client Protection Fund that the fund had made payment to the Robert Schultz Trust in the amount of \$75,000.00. On March 21, 2014, an order was entered amending the order of discipline. The amendment noted that petitioner would not be eligible for reinstatement until he made restitution to the Robert Shultz Trust in the amount of \$26,871.09 and until he reimbursed the Client Protection Fund of the State Bar of Michigan (CPF) \$75,000.00 or agreed to an arrangement satisfactory to the Fund to reimburse the Fund for any money paid from the Fund as a result of his conduct. Petitioner entered into a payment plan with the CPF and currently pays \$50 per month. He has also paid the remaining \$26,871.09 in its entirety to Mr. Schultz.

² MCR 9.123(B), in relevant part, states:

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:

(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 and attitude toward the standards that are imposed on members of the bar and will conduct himself or herself in conformity with those standards;

On review, the Board must determine whether there is proper evidentiary support in the record to support the hearing panel's decision to grant or deny a petition for reinstatement. *In Re McWhorter*, 449 Mich 130, 136; 534 NW2d 480 (1995). However, the granting or denial of a petition for reinstatement under MCR 9.123(B) involves “an element of subjective judgment” and the ultimate “discretionary question whether the Court is willing to present that person to the public as a counselor, member of the state bar, and officer of the court bearing the stamp of approval from this Court.” *Grievance Administrator v Irving A. August*, 438 Mich 296, 311; 475 NW2d 256 (1991). *In re Reinstatement Petition of Keith J. Mitani*, 12-2-RP (ADB 2013).

In the October 29, 2015 report, the hearing panel specifically found that there was a discrepancy between how petitioner described his underlying misconduct and the actual nature of the misconduct as reflected in the language of the disciplinary order and the cited rule violations:

The [panel report in Case No. 12-45-GA], which was based on Mengesha’s plea of no contest, found that he had engaged in professional misconduct by “entering into a business transaction with a client which transaction and terms are not fair and reasonable to the client and are not fully disclosed and transmitted to the client in a manner that can reasonably be understood by the client, in violation of MRPC 1.8(a)(1).” See Report of Tri-County Hearing Panel #8 (Nov. 26, 2012), § II (a). Mengesha views his discipline as having been based on a much narrower basis, for “Not reducing to writing the terms of the agreement of the loan and getting his [client's] consent in writing to the terms of the loan.” Hearing Tr. 80; see also *id.* at 80-81 (Mengesha stating that his view of what he did wrong was to “not reduce things to writing the way that was required to be by the Rules of Professional Ethics and Conduct and that was a violation.”). [HP Report, p 4.]

The panel viewed this discrepancy as very significant. In fact, it was one factor leading to the panel’s inability to “find that he ‘has a proper understanding of and attitude toward the standards that are imposed on members of the bar and will conduct himself or herself in conformity with those standards,’ MCR 9.123(B)(6), or that he can safely be recommended to act as an attorney. MCR 9.123(B)(7).” *Id.*

Petitioner's characterization of his misconduct was not the only issue causing concern about his eligibility for reinstatement, however. The Grievance Administrator's investigative report, and

(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.

supplemental investigative report, both flagged issues regarding petitioner's finances, personal bankruptcy, his “gift” of approximately \$30,000 from the sale of his mother-in-law's home, and his child support arrearage. The hearing panel’s report noted that petitioner conceded that pleadings filed on his behalf contained “significant inaccuracies,” and that, beyond testifying that he brought those inaccuracies to his attorney's attention, he failed to produce any evidence of his attempts to have corrective action taken. More important, however, is the hearing panel's assessment of petitioner's credibility:

Based on his demeanor at the hearing, we have serious doubts as to [petitioner's] credibility that he had sought to correct the inaccuracies in the bankruptcy filings . . . he did not, in preparation for the reinstatement hearing, review the order of suspension entered against him . . . we find that if [petitioner's] level of engagement where his own interests are directly involved is so low that he failed to take these basic steps, then we have grave doubt as to his fitness to return to practice representing others. [HP Report, p 8.]

In reinstatement proceedings, just as in proceedings initiated with the filing of a formal complaint, we typically defer to a hearing panel's assessment of witness demeanor and credibility. *In re McWhorter*, 449 Mich 130, 136 n 7 (1995). There is no reason to suggest that we should not exercise such deference here.

Finally, while it may not have been articulated as an enumerated factor in the panel's ultimate determination to deny reinstatement, we find it worth mentioning that, in our view, exemplary conduct could include evidence that petitioner's improved financial circumstances prompted him to voluntarily increase the amount of his monthly payments to the CPF.

The hearing panel's report contains proper evidentiary support for the panel's decision to deny the petition for reinstatement. In addition, the report sufficiently demonstrates an exercise of subjective judgment, which included a thorough assessment of petitioner's character, demeanor, and credibility. Therefore, we affirm the hearing panel’s decision to deny reinstatement.

Board members Louann Van Der Wiele, Dulce M. Fuller, Rev. Michael Murray, John W. Inhulsen, Jonathan E. Lauderbach, and Barbara Williams Forney concur in this decision.

Board members Lawrence G. Campbell, Rosalind E. Griffin, M.D., and James A. Fink, were absent and did not participate.