

# Attorney Discipline Board

FILED  
ATTORNEY DISCIPLINE BOARD

GRIEVANCE ADMINISTRATOR,  
Attorney Grievance Commission,

2021-Sep-23

Petitioner/Appellee,

v

Case No. 19-27-GA

D. MICHAEL CHERRY, P 23882,

Respondent/Appellant.

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## ORDER AFFIRMING HEARING PANEL ORDER MODIFYING CONDITIONS

Issued by the Attorney Discipline Board  
333 W. Fort St., Ste. 1700, Detroit, MI

On June 27, 2019, Tri-County Hearing Panel #103 issued an Order of Reprimand With Conditions (By Consent) subjecting respondent to certain conditions as agreed to by the parties and as set forth in the order. Approximately ten months later, on April 22, 2020, respondent, through newly-retained counsel, filed a Motion to Modify Consent Order of Discipline requesting that the conditions set forth in the hearing panel's June 27, 2019 order be eliminated, or alternatively, that the panel require and approve conditions relevant to the established misconduct.

The Grievance Administrator objected to modification of the conditions and to respondent's characterization of the conditions as not being relevant to the established misconduct and requested that, if the hearing panel deemed modification was necessary, that they impose conditions comparable to the original conditions set forth in their June 27, 2019 order. The Administrator recommended three options for modification, opining that the panel should pick the third.<sup>1</sup> Respondent again requested that the hearing panel eliminate all of the conditions set forth in the June 27, 2019 order, or alternatively, impose a single condition proposed by respondent.<sup>2</sup>

After unsuccessfully encouraging the parties to confer regarding a possible resolution, the panel issued an Order Modifying Conditions on December 8, 2020, that selected the Administrator's third recommended option for modification and extended the time frames referenced in the panel's original order from 18 months to 22 months.

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<sup>1</sup> The three options for modification suggested by the Grievance Administrator were: (1) respondent comply with LJAP's monitoring agreement for 24 months; (2) respondent comply with LJAP's monitoring agreement for 18 out of the 24 months; or, (3) respondent attend psychotherapy/cognitive behavioral therapy twice per month, in addition to seeing a psychiatrist once per month, and to submit to random drug testing once per month, for 22 months.

<sup>2</sup> Respondent proposed that he treat with his doctor under terms the doctor establishes, for 18 months.

On December 28, 2020, respondent filed a timely petition for review and for a stay, which resulted in an automatic stay of the hearing panel's December 8, 2020 order. On review, respondent requests that the panel's December 8, 2020 order modifying conditions be eliminated without any further proceedings because the parties' original agreement has been breached and the modified conditions imposed in the panel's December 8, 2020 order are not relevant to the established misconduct. The Administrator requests that we affirm the hearing panel's December 8, 2020 order or "impose a sanction [we] deem appropriate."

The Attorney Discipline Board has conducted review proceedings in accordance with MCR 9.118, including review of the evidentiary record before the panel and consideration of the briefs and arguments presented by the parties at a virtual review hearing conducted on April 21, 2021. For the reasons discussed below, we affirm the hearing panel's December 8, 2020 order modifying conditions in its entirety.

The formal complaint filed by the Grievance Administrator alleged that respondent committed professional misconduct by engaging in conduct involving a violation of a criminal law. The complaint contained factual allegations that indicated that on or about August 3, 2018, the Grosse Pointe Farms Department of Public Safety (the police) responded to a disturbance near respondent's home. The police obtained a warrant, searched respondent's home, and discovered four small baggies with residue powder of cocaine, three charred glass crack pipes, a pink straw with white powder residue on it, one Xanax bar, and one Xanax pill. (Formal Complaint ¶¶ 5-8.)

The Wayne County Prosecutor's Office filed a complaint against respondent in Grosse Pointe Woods Municipal Court, *People v Donald Michael Cherry*, Case No. 18-71583601, for felony possession of cocaine. On or about October 24, 2018, respondent entered a no contest plea to attempted possession of an analogue, in violation of MCL 333.7402(2)(b), a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than \$1,000 or both. On or about November 14, 2018, respondent was sentenced and he requested, and received, a deferred sentence of 18 months of probation pursuant to MCL 333.7411. (Formal Complaint ¶¶ 9-11.) The complaint alleged violations of MCR 9.104(2)-(5); and MRPC 8.4(a) and (b). (Formal Complaint ¶¶ 12(a)-(e)).

Contemporaneously, the parties filed a stipulation for consent order of discipline pursuant to MCR 9.115(F)(5), which contained respondent's admissions to all of the factual statements and to all of the allegations of professional misconduct contained in the formal complaint. The stipulation further reflected the parties' agreement that respondent be reprimanded and subject to conditions, which included the following, in relevant part:

(b) By the end of respondent's probation, respondent **shall enter into an 18-month Monitoring Agreement with the Lawyer's and Judges Assistance Program (LJAP) and comply with the conditions of the Monitoring Agreement.** [Stipulation for Consent Order of Discipline ¶ 3 (b); Emphasis added.]

The hearing panel's June 27, 2019 Order of Reprimand With Conditions (By Consent) contained the above-referenced language, verbatim, in paragraph 2 of the order. The December 8, 2020 order, in relevant part, replaced and modified paragraph 2 of the panel's June 27, 2019 order as follows:

2. By the end of respondent's probation or within 30 days of this order, whichever is sooner, and **for a period of 22 months respondent shall attend psychotherapy/cognitive behavioral therapy twice per month, shall receive treatment once per month from a psychiatrist, and submit to random drug testing once per month.** [12/8/20 Order, p 2; Emphasis added.]

MCR 9.106(3), provides a hearing panel with the ability to impose a reprimand "with such conditions relevant to the established misconduct." Here, the panel accepted the parties' agreement that a reprimand with the conditions as set forth by the parties, was appropriate. In his motion to modify the conditions, respondent argued that the monitoring terms later imposed by LJAP violated the parties' agreement because the monitoring time period was longer than that agreed to by the parties, and because the terms were not "relevant to the established misconduct," as referenced in MCR 9.106(3).<sup>3</sup>

On review, respondent argues that the Administrator materially breached the terms of the parties' stipulation by later advocating for terms longer than the 18 months agreed to by the parties. Respondent further argues that this material breach essentially voids the conditions entirely. The Administrator argues that respondent did not meet his burden, to establish by clear and convincing evidence, that he made a good faith effort to meet the LJAP monitoring condition imposed in the panel's order but that it was impractical to fulfill the condition, so as to be entitled to abatement or modification of the conditions.<sup>4</sup> However, the Administrator's counsel conceded to the panel, and now on review, that modification was warranted.

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<sup>3</sup> In August 2019, respondent completed an LJAP assessment, and psychiatric and neuropsychological evaluations in November 2019 and February 2020, as requested by the LJAP clinical case manager, Tom Grden, MA, LLPC. On February 18, 2020, Mr. Grden notified respondent in writing that a monitoring agreement with LJAP would require respondent to agree to:

- Participate in a two-year monitoring agreement;
- Participate in the Cognitive Behavioral Memory Program through United Psychological Services;
- Abstinance from alcohol and all other non-prescribed psychoactive substances;
- Randomized drug and alcohol screens to substantiate sobriety;
- Monthly meetings with an LJAP Clinical Case Manager;
- Monthly meetings with an LJAP Peer Monitor;
- Continue treatment with Dr. Sidiropoulos;
- Commence treatment with an LJAP approved therapist; and,
- Attendance at one Alcoholics Anonymous meeting per week, and two Narcotics Anonymous meetings per week.

<sup>4</sup> Pursuant to MCR 9.123(E):

When a condition has been imposed in an order of discipline or in an order of reinstatement, the attorney may request an order of abatement discharging the lawyer from the obligation to comply with the condition, or an order modifying the condition. The attorney may so request either before or with the attorney's affidavit of compliance under MCR 9.123(A) or petition for reinstatement under MCR 9.123(B). The request may be granted only if the attorney shows by clear and convincing evidence that a timely, good-faith effort has been made to meet the condition but it is impractical to fulfill the condition.

We review decisions on questions of law *de novo*. *Grievance Administrator v Lopatin*, 462 Mich 235 (2000); *Grievance Administrator v Jay A. Bielfield*, 87-88-GA (ADB 1996); *Grievance Administrator v Geoffrey N. Fieger*, 94-186-GA (ADB 2002). And, the standard of review for questions involving the level of discipline differs from the standard for reviewing factual determinations by a hearing panel. "The Board possesses, of necessity, a relatively high measure of discretion with regard to the appropriate level of discipline. . . to carry out what the Court has described as the Board's 'overview function of continuity and consistency in discipline imposed.'" *Grievance Administrator v David A. Woelkers*, 97-214-GA (ADB 1998), pp 6-7, lv den 602 NW2d 579 (1999).

As noted by respondent, we have previously vacated and modified conditions imposed by hearing panels because they were not "relevant to the established misconduct." See *Grievance Administrator v David A. Reams*, 06-180-JC (ADB 2008) (condition vacated - no basis in record for requiring a practice monitor); *Grievance Administrator v Maria C. Salud*, 13-46-GA (ADB 2014) (condition vacated - psychological evaluation unnecessary, and condition modified - required attendance at tips and tool seminar modified to obtaining a PMRC evaluation.) However, neither of those cases involved a stipulation for consent order of discipline. Rather, the assigned hearing panels imposed certain conditions after full hearings were conducted.

In this matter, respondent argues that the "established misconduct" is the fact that he was charged with attempted possession of a controlled substance analogue, period. Respondent emphasizes that he was not convicted of a crime because judgment was deferred under MCL 333.7411, the Controlled Substance Abuse Act, and he successfully completed the terms of his probation, thus the case was dismissed. These facts regarding the procedural history of respondent's criminal matter are undisputed.

MCR 9.115(F)(5) specifically states, in relevant part, what is required in a stipulation for consent order of discipline:

(5) Discipline by Consent.

(a) In exchange for a stated form of discipline and on the condition that the plea or admission is accepted by the commission and the hearing panel, a respondent may offer to

(i) plead no contest to or admit all or some of the facts and misconduct alleged in the complaint or otherwise agreed to by the parties

\* \* \*

(b) The stipulation shall include:

(i) *admissions*, which may be contained in an answer to the complaint, or a plea of no contest to facts sufficient to enable the hearing panel to determine the nature of the misconduct and conclude that the discipline proposed is appropriate in light of the identified misconduct. (Emphasis added.)

Here, respondent admitted to all of the facts and all of the allegations of misconduct set forth in the formal complaint, in its entirety. Those facts not only included a recitation of the charges, the plea and the sentence imposed in the criminal matter, but also noted that a search warrant had been executed on respondent's home and that during that search, "the police discovered four small baggies with residue powder of cocaine, three charred glass crack pipes, a pink straw with white powder residue on it, one Xanax bar, and one Xanax pill." (Formal Complaint ¶ 7.)<sup>5</sup>

Although there is nothing in the record that explains how the parties determined that LJAP monitoring should be for 18 months, we presume it was because on November 14, 2018, respondent was sentenced in his underlying criminal matter to 18 months of supervised probation, to be reviewed at 12 months.<sup>6</sup> Furthermore, the "diagnostic impression" at the end of the "mental health" and "substance abuse" portions of respondent's LJAP assessment, which was provided to the panel in June 2020 at their request after respondent filed his motion to modify, noted that "a monitoring agreement with LJAP would benefit respondent by providing him structure and support. . . but the length of time and level of care of such an agreement [at least as of August 2019] cannot be specified."

Additionally, Dr. Sidiropoulos' November 25, 2019 assessment of respondent opined that respondent suffered from "cocaine use disorder, mild (abuse only, not dependence, use 1-2 times monthly), in full sustained remission since July 2018," and "alcohol use disorder, mild, by history, in full sustained remission since Aug 2007." Dr. Sidiropoulos concluded that respondent should continue to see Dr. Fenton for psychotherapy and to continue his psychiatric medication management with Grosse Pointe Psychiatric Services and opined that "[respondent] is able to carry out the duties of his job of being a lawyer without any impairment." (Respondent's brief, Exhibit 10.)

We conclude that the modified conditions, namely that for 22 months respondent attend psychotherapy/cognitive behavioral therapy twice a month, receive treatment once per month from a psychiatrist, and submit to random drug testing once per month, are relevant to the established misconduct, as contemplated in MCR 9.106(3). Furthermore, given respondent's displeasure with LJAP's recommendations for monitoring and his specific request that his LJAP clinical case manager be replaced, the Board is not persuaded that the hearing panel's decision to modify the conditions in this matter was inappropriate.

**NOW THEREFORE,**

**IT IS ORDERED** that the hearing panel's Order Modifying Conditions issued on December 8, 2020, is **AFFIRMED**.

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<sup>5</sup> Respondent attached an affidavit to his brief in support of his petition for review that specifically disputes that any of the materials found by the police were his or that he knew those items were even in his house when it was searched. (Respondent's Brief, Exhibit 8.)

<sup>6</sup> It is also undisputed that on February 27, 2020, respondent was discharged from probation three months early for successfully complying with the conditions of his probation.

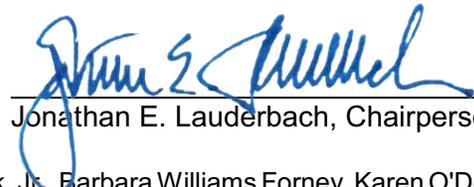
**IT IS FURTHER ORDERED** that, within 30 days of this order, by October 23, 2021, respondent shall begin complying with the following conditions:

1. For a period of 22 months respondent shall attend psychotherapy/cognitive behavioral therapy twice per month, shall receive treatment once per month from a psychiatrist, and submit to random drug testing once per month.
2. Respondent shall remain abstinent from non-prescription controlled substances during the 22 month period referenced above and shall consume prescription medications only under the direction and supervision of a treating physician.
3. Respondent shall provide waivers allowing the Grievance Administrator, or his designee, to communicate with his medical, psychological, and counseling providers concerning his treatment during the 22 month period referenced above. The waivers shall be irrevocable for three years from the date they are signed.
4. Respondent shall provide, or cause to be provided, quarterly reports from his psychological and counseling providers to the Grievance Administrator, or his designee. The report shall generally include a diagnosis, prognosis, and recommendation. All reports shall report whether positive progress is being made.
5. Respondent shall comply with all city, state, and federal laws during the period of these conditions. Respondent shall promptly report to the Grievance Administrator and the Attorney Discipline Board any probation violation charges or show cause orders issued to him by the court in the criminal action, and any arrests or convictions.
6. Respondent shall promptly notify, in writing, the Grievance Administrator and the Attorney Discipline Board of any changes in his address or telephone number during the period of these conditions.

**IT IS FURTHER ORDERED** that respondent shall, on or before **October 22, 2021**, pay court reporting costs incurred by the Attorney Discipline Board in the amount of \$141.50 for the review proceedings conducted on August 18, 2021. Refer to the attached cost payment instruction sheet for method and forms of payment accepted.

ATTORNEY DISCIPLINE BOARD

By:

  
Jonathan E. Lauderbach, Chairperson

Dated: September 23, 2021

Board members Jonathan E. Lauderbach, Michael B. Rizik, Jr., Barbara Williams Forney, Karen O'Donoghue, Linda Hotchkiss, MD, Michael Hohausser, and, Linda Orlans concur in this decision.

Board Member Peter A. Smit dissents and would remand this matter to the hearing panel for hearing.

Board member Gershel was recused and did not participate in the discussion or decision of this matter.