

IN THE CHANCERY COURT FOR WILSON COUNTY, TENNESSEE

Mark Wesley Henderson,)
)
 Petitioner,)
)
 v.) No. 09205
)
 The Board of Professional Responsibility)
 of the Supreme Court of Tennessee,)
)
 Respondent.)

ENTERED
AT 10:20 AM
MAR 23 2010

ENTERED IN MINUTES
328, PAGE 238
MAR 23 2010

MEMORANDUM AND ORDER

The petitioner, Mark Henderson, filed this petition of certiorari on June 19, 2009. He seeks review of a six-month suspension from the practice of law and an attorney fee restitution ordered by a hearing panel of the Board of Professional Responsibility, dated March 18, 2009 and amended by further order dated April 20, 2009. The undersigned judge was assigned to the case by Order of the Chief Justice dated August 28, 2009.

The Court held a pretrial conference on September 22, 2009 and set the petition for hearing on January 14, 2010. The case was continued on petitioner's motion from January 14 to January 28, 2010, and continued again on petitioner's motion to March 17, 2010. The administrative record and transcript of proceedings before the hearing panel were certified to the Court, and on March 17, 2010, the Court heard argument of counsel with reference to the record before the panel. The Court took the case under advisement. Both the petitioner and respondent filed pretrial briefs.

Review before this Court is governed by Tenn. Sup. Ct. R. 9 § 1.3 which states:

1.3 The respondent-attorney (hereinafter "respondent") or the Board may have a review of the judgment of a hearing panel in the manner provided by Tenn. Code Ann. § 27-9-101 et seq., except as otherwise provided herein. The review shall be on the transcript of the evidence before the hearing panel and its findings and judgment. If allegations of irregularities in the procedure before the panel are made, the trial court is authorized to take such additional proof as may be necessary to resolve such allegations. The court may affirm the decision of the panel or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the panel's findings, inferences, conclusions or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the panel's jurisdiction; (3) made upon lawful procedure; (4) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (5) unsupported by evidence which is both substantial and material in the light of the entire record.

In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the panel as to the weight of the evidence on questions of fact. Either party dissatisfied with the decree of the circuit or chancery court may prosecute an appeal directly to the Supreme Court where the cause shall be heard upon the transcript of the record from circuit or chancery court, which shall include the transcript of evidence before the hearing panel.

The Court is informed that the Board adheres to an "informal" stay until the appellate process is exhausted, and therefore Mr. Henderson has continued to practice law since the panel decision. The Court would suggest that in the future all parties conform to Tenn. Sup. Ct. R. 9 § 1.6 regarding the issuance of a stay. The Court is unaware of the authority of the Board on its own to implement an "informal" stay. Tenn. Sup. Ct. R. 9 § 1.6 should govern the issuance of a stay.

The hearing panel based its decision of disciplinary complaints involving Mr. Henderson's representation of Buddy L. Bruner; his representation of Vernon and Michelle Raines; and his failure

to timely respond to requests by the Board.

Buddy Bruner retained Mr. Henderson in a domestic matter. During the time of the Bruner representation, Mr. Henderson worked for the Stallings Law Firm. Mr. Bruner later became dissatisfied with Mr. Henderson's representation and changed lawyers. Mr. Henderson did not timely forward the Bruner file to the new lawyer, and he even charged Mr. Bruner for work performed after he was discharged. Even during his representation Mr. Henderson did not keep Mr. Bruner informed, and the panel found that Mr. Henderson made unwarranted attorney fee charges. The panel not only found the violations above but also concluded that of the \$10,000.00 retainer, \$3,050.00 should be returned to the client.¹

Vernon and Michelle Raines employed Mr. Henderson in a custody matter while he worked at the Stallings Law Firm. Here again, the panel found Mr. Henderson derelict in providing his clients with requested information and billing statements. There was a conflict over the amount of the fee. The Raines contended that the fee was to be \$3,000.00 but reduced to \$1,500.00 if the matter was uncontested. Mr. Henderson contended that the fee was to be \$6,000.00 but discounted to \$3,000.00 if uncontested. The panel found that "the weight of the testimony favors the Raines" and ordered the \$1,500.00 returned.²

The Board addressed the penalty by stating:

Mr. Henderson has previously received both public censure and a six-month suspension as penalties for previous violations of rules prohibiting ethical misconduct. In response to one of these he attended and completed Board of Professional Responsibility's Ethics School seminar (Exhibit 18). He displays a persistent, insistent and

¹ The hearing panel found violations of RPC 1.2(a), 1.4, 1.5, 1.16 and 8.4.

² The hearing panel found violations of RPC 1.4, 1.5 and 8.4.

consistent pattern of failing to respond to the Board's requests for information and this pattern, for some reason, just does not change.

The Hearing Panel concludes a six-month suspension and return of the fees as indicated is appropriate in this cause.

Board of Professional Responsibility findings of March 13, 2009 (filed March 18, 2009).

There is some confusion over the panel's decision regarding the fees because the fees had been paid to the Stallings Law Firm and not to Mr. Henderson. By Amended Findings dated April 2, 2009 (filed April 20, 2009), the panel made clear that, whatever the agreement between Mr. Henderson and the Stalling Law Firm over fees, it was Mr. Henderson's obligation to make restitution to Mr. Bruner and to the Raines.

Contentions of Mr. Henderson

Mr. Henderson states that the Court "review the hearing transcript . . . and determine whether the decision was appropriate." At oral argument on March 17, 2010, Mr. Henderson stated that "he understood that there would be some punishment," but he thought that the six-month suspension was too severe.

A review of the hearing below convinces the Court that the panel's findings are supported by the weight of the evidence. Furthermore, Mr. Henderson does not so much challenge the factual findings as he does the appropriateness of the sanction.

There is no question that suspension as well as restitution are appropriate sanctions. Tenn. Sup. Ct. R. 9 §§ 4.2, 4.7 and 8.4. Furthermore, the panel and the Court are to consider the ABA Standards for Imposing Lawyer Sanctions which include reference to prior disciplinary offenses. *Sneed v. Board of Professional Responsibility*, 301 S.W.3d 603, 617 (Tenn, 2010). Here, the hearing panel noted that Mr. Henderson "has previously received both public censure and a six-month

suspension as penalties for previous violations of rules prohibiting ethical misconduct.” See *Henderson v. Board of Professional Responsibility*, 125 S.W.3d 405 (Tenn. 2003) (six-month suspension for filing false affidavit); Public Censure, July 31, 2003 (petitioner failed to communicate and continued to represent client after termination); Public Censure, Nov. 20, 1998 (petitioner failed to file required appellate brief and in another case failed to communicate with his client).

The petitioner here has shown a pattern and practice of client disregard and violation of the ethical rules. The Court finds that the sanctions imposed by the hearing panel are reasonable, given Mr. Henderson’s history of ethical violations. Given the fact that this is the fourth successful disciplinary proceeding against Mr. Henderson, it is difficult to give much sustenance to any argument that the panel was too harsh; there is more substance to an assertion that a stiffer penalty may have been warranted.

Mr. Henderson also contends that the complaint against him should be dismissed because the hearing panel failed to hold a timely pretrial conference as required by Tenn. Sup. Ct. R. 9 § 13.6 and the hearing panel failed to render a timely decision as required by Tenn. Sup. Ct. R. 9 § 8.3. The Board contends that some of this delay was the fault of Mr. Henderson.

The Court need not resolve the issue of fault as Tenn. Sup. Ct. R. 9 § 23.2 makes clear that the time limits in the disciplinary procedure are “directory” and do not result in dismissal. *Sneed*, 301 S.W.3d at 615. Furthermore, Mr. Henderson has pointed out no prejudice as a result of the violation of these time requirements. Dismissal for failure of a tribunal to timely process or decide cases has seldom been successful. For example, a post-conviction petitioner cannot prevail because the trial court did not comply with statutory time limitations for processing and deciding cases. *Common v. State*, 2007 WL 2409568, at *7 (Tenn. Crim. App. Aug. 23, 2007). This is also true for

the statutory (Tenn. Code Ann. § 20-9-506) requirement of 60 days for a decision in a civil case. *Schaeffer v. Richard*, 306 S.W.2d 340 (Tenn. Ct. App. 1956).

Mr. Henderson also argues that the hearing panel could not order him to make restitution, as the attorney fees paid were paid to the Stallings Law Firm and not to him. This argument ignores the fact that it was Mr. Henderson who represented the complainants. The restitution order of the hearing panel was authorized by Tenn. Sup. Ct. R. 9 § 4.7 (restitution).

Mr. Henderson contends that the hearing panel decision "contains no implementing language" but rather are recommendations and are therefore "a nullity and of no effect." The penalty imposed appears under the "recommended penalty," but it clearly states that "the Hearing Panel concludes a six-month suspension and return of the fees as indicated is appropriate in this case." The Court finds that this language is sufficiently clear as to comply with Tenn. Sup. Ct. R. 9 §§ 8.3 and 8.4.

Mr. Henderson attempts to raise an issue in his trial brief which he did not raise in his petition. He contends that the lawyer for the Board of Professional Responsibility subpoenaed the father of Mr. Raines to the panel hearing but excused the elder Mr. Raines before he could testify. Mr. Henderson, in his brief, asserted that the elder Mr. Raines would have supported Mr. Henderson's factual contention as to the amount of the Raines fee.

There are a number of problems with this assertion:

1. This contention was in Mr. Henderson's brief and not in his petition;
2. The elder Mr. Raines was not offered at the hearing before this Court as a witness, nor was his affidavit filed; and
3. The transcript of the hearing before the panel contains no objection to Mr. Raines

being excused, nor does Mr. Henderson even mention that he would like to have offered the father as a witness. In fact, the record does not even show that Mr. Raines, Sr., was under subpoena by the Board. Mr. Henderson admitted that he did not subpoena him. Assuming the fact to be true that the Board subpoenaed the witness and then released him, there is nothing improper in the release of the witness. Mr. Henderson had every right to also subpoena the witness and failed to do so. *State v. Faulcon*, 2002 WL 1482661, at *2 (Tenn. Crim. App. Feb. 26, 2002) (state without fault when it released witness from its subpoena; defense had every right to subpoena but failed to do so).

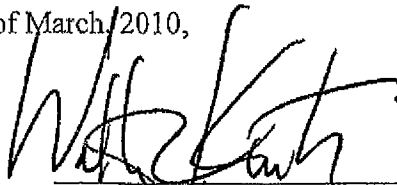
Conclusion

For all the reasons expressed above, the Court affirms the decision of the hearing panel. Tenn. Sup. Ct. R. 9 § 1.3. Mr. Henderson is suspended from the practice of law for six (6) months, and he is to make restitution as ordered by the panel.

Pursuant to Tenn. Sup. Ct. R. 9 § 1.6, the Court will stay this suspension and restitution order for thirty (30) days if no appeal is taken or, if an appeal is taken, until a mandate is returned by the Supreme Court.

Costs of this cause are taxed to Mr. Mark W. Henderson.

This the 22nd day of March, 2010,

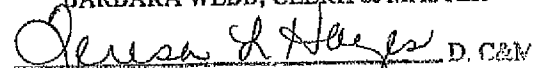


Senior Judge Walter J. Kurtz
STATE OF TENNESSEE, COUNTY OF WILSON

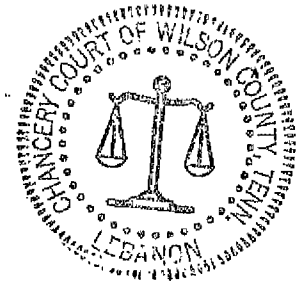
I hereby certify the foregoing to be a true and perfect copy of the original instrument on file in this case.

25th day of March, 2010

BARBARA WEBB, CLERK & MASTER



D. C&M



cc:

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