

IN THE CHANCERY COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS

JOHN R. HERSHBERGER,
Petitioner,

v.

NO. CH-16-0239

BOARD OF PROFESSIONAL
RESPONSIBILITY OF THE
SUPREME COURT OF TENNESSEE,
Respondent.

ORDER

Petitioner, John R. Hershberger, appeals the decision of the Tennessee Board of Professional Responsibility ("Board") pursuant to Tenn. Sup. Ct. R. 9, section 33. Honorable William B. Acree, Jr., Senior Judge, sitting by designation over the Chancery Court of Shelby County, reviewed the Hearing Panel transcript and the official record with exhibits and made its ruling from the same. For the reasons set forth herein, the decision of the Hearing Panel is affirmed.

DISCIPLINARY HISTORY

Petitioner practiced law in Tennessee since 2001. He received the following disciplinary sanctions:

1. January 6, 2011 – private informal admonition;
2. June 22, 2011 – private informal admonition;
3. October 11, 2011 – private reprimand;
4. July 27, 2012 – public censure;
5. May 30, 2014 – two (2) year suspension, with sixty (60) days active and the remainder on probation.

On October 9, 2014, the Board filed a Petition for Discipline against petitioner and an Amended Petition for Discipline on November 6, 2014. On September 10, 2015, petitioner filed his Answer and Affirmative Defenses of Respondent.

On November 5, 2015, a hearing panel ("panel") of the Board conducted a hearing and entered its Findings of Fact, Conclusions of Law and Judgment on December 17, 2015. The panel found petitioner should be publicly censured.

On February 16, 2016, petitioner timely filed his Petition for Writ of Certiorari.

On April 21, 2016, the Board filed its Answer to Petition for Writ of Certiorari.

On April 29, 2016, the Board filed the administrative record with the Chancery Court for Shelby County.

On May 3, 2016, the Tennessee Supreme Court designated and assigned Honorable William B. Acree, Jr., Senior Judge, to hear this matter to its conclusion.

On July 8, 2016, the Court entered an Agreed Scheduling Order setting a final hearing for October 18, 2016.

On October 18, 2016, the Court conducted a hearing which petitioner did not attend. The Court, in its discretion, ordered petitioner to file the transcript of the hearing of the panel by December 1, 2016. The Court announced in open court and by Order entered October 19, 2016 that should petitioner fail to file the transcript by December 1, 2016, the Board's previously filed Motion to Dismiss would be granted. Further, the Court announced its intent to rule on the matter on the record and briefs without oral argument.

On December 1, 2016, petitioner filed the transcript of the hearing of the panel.

FINDINGS OF FACT

Petitioner represented a client whose case was pending in the Western Section of the Tennessee Court of Appeals. Justice Holly Kirby was, at that time, a judge on that court. On August 23, 2013, petitioner went to the home of Justice Kirby and asked to speak with her. Justice Kirby was not at home and petitioner did not speak with her. Petitioner spoke with Justice Kirby's husband and subsequently departed the premises without incident.

The proof presented during the hearing of the panel, consisted of the following:

1. A single sentence contained in an August 31, 2013 email from petitioner to Disciplinary Counsel Betsy Garber describing his choice to go to the home of Justice Kirby "was not my shining moment of foresight, but nothing that transpired was untoward."
2. One paragraph from a two-page September 6, 2013 email from petitioner to Disciplinary Counsel Betsy Garber stating:

I didn't intent to discuss any aspect of the case with Judge Kirby, except to relate that my client is indigent, the case(s) are complex, and he does not have a way to get enough of the record to make his appeal worthwhile. With the follow-up question of "what can I do?" It was an entirely administrative issue having to do with the practical aspect of handling the appeal effectively.

3. Testimony of petitioner.

The facts of the case are undisputed. The panel found petitioner's conduct amounted to a violation of RPC 8.4(a) (Misconduct) by attempting to engage in *ex parte* communication with Justice Kirby in violation of RPC 3.5(b) (Impartiality and Decorum of the Tribunal). The punishment rendered, public censure, is the "absolute mildest discipline" which the panel can render once a petition is filed.¹

¹ As stated by counsel for petitioner during the hearing of the panel November 5, 2015.

STANDARD OF REVIEW

The standard of review for appeals of the Board is set out in Tennessee Supreme Court Rule 9, § 33.1(b), which provides,

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 hearing panel are made, the trial court is authorized to take such additional proof as may be necessary to resolve such allegations. The trial court may, in its discretion, permit discovery on appeals limited only to allegations of irregularities in the proceeding. The court may affirm the decision of the hearing panel or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the party filing the Petition for Review have been prejudiced because the hearing panel's findings, inferences, conclusions or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the hearing panels jurisdiction; (3) made upon unlawful 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 hearing panel as to the weight of the evidence on questions of fact.

Further, “[a]lthough the trial court may affirm, remand, reverse, or modify a Hearing Panel decision, the trial court may not substitute its judgment for that of the panel as to the weight of the evidence on questions of fact.” *Board of Professional Responsibility v. Allison*, 284 S.W.3d 316, 322 (Tenn. 2009). This Court will not reverse the decision of a Hearing Panel so long as the evidence “furnishes a reasonably sound factual basis for the decision being reviewed.” *Hughes v. Board of Professional Responsibility*, 259 S.W.3d 631, 641 (Tenn. 2008) (quoting *Jackson Mobilphone Co. v. Tennessee Public Service Commission*, 876 S.W.2d 106, 111 (Tenn.Ct.App. 1993)).

“When none of the first three grounds for reversal are present, as is the case here, the hearing panel should be upheld unless the decision was either arbitrary or capricious, “characterized by an abuse, or clearly unwarranted exercise, of discretion” or lacking in support by substantial and material evidence.” *Hughes* at 641 (citing *CF Indus. V. Tenn. Pub. Serv.*

Comm'n., 599 S.W.2d 536, 540 (Tenn. 1980)). “An arbitrary [or capricious] decision is one that is not based on any course of reasoning or exercise of judgment, or one that disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion.” *Id.* at 641.

Likewise, a reviewing court should not apply Tenn. Code Ann. § 4-5-322(h)(5)'s “substantial and material evidence” test mechanically. Instead, the court should review the record carefully to determine whether the administrative agencies decision is supported by “such relevant evidence as a rational mind might expect to support a rational conclusion.”.... The evidence will be sufficient if it furnishes a reasonably sound factual basis for the decision being reviewed.

Id. (citing *Jackson Mobilphone Co. v. Tennessee Public Service Commission*, 876 S.W.2d 106 (Tenn.Ct.App. 1993)).

RULING

The petitioner contends the panel erred for the following reasons:

1. The panel erred in deciding his Motion to Dismiss and/or for Summary Judgment;
2. The panel's Judgment did not contain sufficient findings of fact to support its legal conclusion, omitted rulings on evidentiary objections, did not address petitioner's legal argument, and was conclusory;
3. The evidence was not sufficient to support the panel's conclusions of law; and
4. The panel's decision was arbitrary, capricious and without reason.

The petitioner does not contend and there is no evidence that the decision of the panel was in violation of constitutional or statutory provisions, or in excess of the panel's jurisdiction, or made upon unlawful procedure. The petitioner contends the decision was arbitrary and capricious and unsupported by the evidence.

It is undisputed petitioner represented a client with a pending matter in Justice Kirby's court. It is undisputed petitioner went to the home of Justice Kirby. It is undisputed petitioner

asked to speak with Justice Kirby for the purpose of discussing a case. However, in this Court's opinion, petitioner's further intent or potential conversational content is irrelevant.

It is professional misconduct for a lawyer to attempt to violate the Rules of Professional Conduct. *See* RPC 8.4 (Misconduct). RPC 3.5(b) states "a lawyer shall not communicate *ex parte*" with a judge during a proceeding. Based on the undisputed facts, a reasonable person could easily conclude that petitioner violated the Rules of Professional Conduct by attempting to communicate with Justice Kirby at her home. The decision of the panel is supported by the evidence and it is not arbitrary and capricious. The decision is AFFIRMED.

It is so ORDERED this the 16 day of December, 2016.



WILLIAM B. ACREE, JR.
Senior Judge

CERTIFICATE OF SERVICE

I hereby certify that I will dispatch a true and correct copy of the foregoing Judgment to the following at their respective addresses on this ____ day of _____, 2016:

- *Petitioner, pro se*
John Robert Hershberger, Esq.
2950 Oaksedge Cove
Germantown, TN 38138

- *Attorney for the Board of Professional Responsibility*
William C. Moody, Esq.
Disciplinary Counsel – Litigation
10 Cadillac Drive, Suite 220
Brentwood, TN 37027

CLERK