

IN THE CIRCUIT COURT OF KNOX COUNTY, TENNESSEE  
AT KNOXVILLE

CATHERINE F. SHANKS

ROY PATRICK NEUENSCHWANDER,  
Petitioner,

vs.

Docket No. 2-59-14  
CT-005534-13

FILED

NOV 18 2014

*Kelly*

BOARD OF PROFESSIONAL  
RESPONSIBILITY of the Supreme Court  
of Tennessee,  
Respondent.

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ORDER

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This matter came to be heard on the 17<sup>th</sup> day of November, 2014. A Petition for Certiorari was filed by Roy Patrick Neuenschwander, hereinafter "Petitioner," on January 31, 2014, requesting this court for relief from the Judgment of the Hearing Panel, arguing the judgment is arbitrary or capricious. After hearing the presentation and argument of counsel for the Board and Petitioner as well as the record as a whole, this court makes the following findings of fact and conclusions of law:

A. FINDINGS OF FACT

1. The Board filed a Petition for Discipline against the Petitioner on April 16, 2013. An answer was filed May 17, 2013.
2. In March 2009, Petitioner settled a personal injury lawsuit on behalf of client Wanda Payne. Ms. Payne received a total of \$54,405.31. Ms. Payne requested Petitioner keep her money in Petitioner's IOLTA account. Petitioner did so.
3. Petitioner borrowed \$15,000.00 from Ms. Payne's settlement funds in January 2010, with Ms. Payne's oral approval. At a later occasion, Petitioner borrowed another \$15,000.00 from the settlement funds with Ms. Payne's approval (Petition for Discipline and Answer to Petition, paragraphs 17-21).
4. Petitioner did not set forth the essential terms of the loan in writing to Ms. Payne; advise Ms. Payne in writing she should seek independent legal advice; or obtain Ms. Payne's

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consent in a written document signed by Ms. Payne. (Petition for Discipline and Answer to Petition, paragraph 22).

5. Ms. Payne was later hospitalized and died on December 4, 2010. While in the hospital, Ms. Payne told her son, Mr. Egbert, about the loans to Petitioner (Tr. p. 52, l. 20-25; p. 53, l. 1-23). Mr. Egbert retained Petitioner on December 15, 2010, to assist him in Ms. Payne's estate. (Tr. p. 57, l. 2-8).

6. At the time Mr. Egbert hired Petitioner, on December 20, 2010, Petitioner gave Mr. Egbert the balance of Ms. Payne's settlement, and also signed a promissory note to repay the \$30,000 he borrowed in favor of Mr. Egbert. (Petition for Discipline, par. 24, exhibit A to petition; Tr. p. 57, l. 9-23).

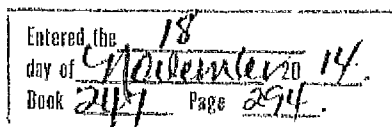
7. Mr. Egbert discharged Petitioner in February 2012, after requesting repayment of the \$30,000.00 several times. (Tr. p. 60, l. 5-60; p. 61, l. 1-20).

8. Petitioner made some partial payments to Mr. Egbert: \$2,000.00 on February 28, 2012 (Tr. p. 68, l. 18-22); \$1,000.00 after Mr. Egbert filed a complaint with the Board (Tr. p. 69, l. 2-7); \$1,500.00 after the Petition for Discipline was filed; \$1,000.00 in February 2014. Petitioner paid an additional \$5,000.00 on November 10, 2014.

9. Mr. Egbert, in order to make repairs to Ms. Payne's home, borrowed money from a bank using his personal residence as collateral. He must now sell his residence to include the loan he took in order to repair Ms. Payne's home. (Tr. p. 63, l. 1-25; p. 64, l. 1-5).

10. A final hearing was held September 25, 2013 and the Hearing Panel issued its final order on November 8, 2013. The Board filed a motion to alter or amend on November 13, 2013. The Hearing Panel entered an order granting in part and denying in part the motion on December 2, 2013.

11. Within the Hearing Panel's final order, the Panel concluded the Petitioner violated several rules of Professional Conduct, including Rule 1.7, conflict of interest; Rule 1.8 (a)(3), conflict of interest; and Rule 8.4, misconduct. The Panel ordered Petitioner suspended for 11 months and 29 days, but permitted Petitioner to serve his suspension on probation conditioned upon his payment of restitution of \$25,500.00 plus interest. This restitution could be paid in monthly installments of \$2,500.00 per month. In addition, the Panel ordered Petitioner to attend a Board of Professional Responsibility recognized continuing legal education program on ethics, trust accounts, and IOLTA.



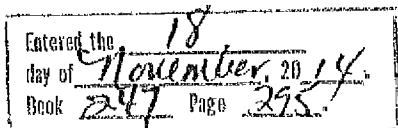
12. The Board answered Petitioner's Petition on March 27, 2014. A scheduling order was entered by the court on August 1, 2014, scheduling deadlines for both parties and a final hearing date.

13. The Board filed a motion to dismiss this matter due to Petitioner's failure to file a transcript of the hearing. During the telephone conference on September 18, 2014, the Board did not oppose the court accepting Petitioner's late filed brief. Further, the court allowed Petitioner three weeks to file a transcript. The transcript was filed October 9, 2014.

## B. CONCLUSIONS OF LAW

1. Having made the aforementioned findings of fact, this court makes the following conclusions of law. First, Tennessee Supreme Court Rule 9, section 33.1(b), states the standard of review for this matter, in pertinent part:

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 Panel's 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.



2. 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 is to the weight of the evidence on questions of fact." *Board of Professional Responsibility v. Allison*, 284 S.W.3d 316, 322 (Tenn. 2009).

3. In particular, 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*, 259 S.W.3d at 641 (quoting *Jackson Mobilphone Co. v. Tenn. Pub. Serv. Comm'n*, 876 S.W.2d 106, 111 (Tenn. Ct. App. 1993)).

4. In *Jackson Mobilphone Co. v. Tennessee Pub. Serv. Comm'n*, 876 S.W.2d 106, 111 (Tenn. Ct. App. 1993), the Court of Appeals provided "the court should review the record carefully to determine whether the administrative agency's decision is supported by 'such relevant evidence as a rational mind might accept to support a rational conclusion.'" (citing *Clay County Manor v. State Dep't of Health & Environment*, 849 S.W.2d 755, 759 (Tenn.1993); *Southern Ry. v. State Bd. of Equalization*, 682 S.W.2d 196, 199 (Tenn.1984)).

5. Rule 1.7 of the Rules of Professional Conduct states, in part, as follows:

"(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or  
(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;  
(2) the representation is not prohibited by law;  
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and  
(4) each affected client gives informed consent, confirmed in writing."

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6. Rule 1.8 (a) of the Rules of Professional Conduct states as follows:

“(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.”

7. Rule 8.4 of the Rules of Professional Conduct states:

“It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence a tribunal or a governmental agency or official on grounds unrelated to the merits of, or the procedures governing, the matter under consideration;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) knowingly fail to comply with a final court order entered in a proceeding in which the lawyer is a party, unless the lawyer is unable to comply with the order or is seeking in good faith to determine the validity, scope, meaning, or application of the law upon which the order is based.”

### C. RULING

1. Plaintiff admits in his brief, “[t]he Board of Professional Responsibility had the jurisdiction to render a decision placing [plaintiff] in suspended status for a period of time and

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requiring payments of restitution over time with interest." Plaintiff also states he will repay the restitution as soon as he is able.

2. In review of the Hearing Panel's decision, this court does not find the panel's findings, inferences, conclusions, or decisions are in violation of constitutional or statutory provisions, in excess of the panel's jurisdiction, made upon unlawful procedure, arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion, or unsupported by evidence which is both substantial and material in light of the entire record. The Court finds the Hearing Panel's findings of fact and conclusions of law are fully supported by the evidence presented in this matter and reversal or modification of the Hearing Panel's decision is simply not warranted.

3. Plaintiff failed to demonstrate the Hearing Panel's conclusions were not supported by substantial and material evidence or their decision was arbitrary and capricious. Plaintiff's suspension and requirements to pay restitution in the monthly amount required by the Hearing Panel is fully supported by the facts and this Court must not substitute its judgment for that of the Panel as to the weight of the evidence on questions of fact.

9. This Court AFFIRMS the decision of the Hearing Panel and assesses costs to Plaintiff.

IT IS SO ORDERED, this the 15 day of October, 2014.



HONORABLE DON R. ASH

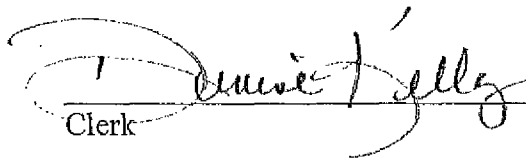
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CERTIFICATE OF SERVICE

I hereby certify the foregoing has been served upon the following by U.S. Mail on this the 18 day of November, 2014:

Roy Neuenschwander  
10207 Technology Drive, Suite 102  
Knoxville, TN 37932-3384

Alan Johnson  
10 Cadallac Drive, Suite 220  
Brentwood, TN 37027

  
Clerk

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