

IN THE CIRCUIT COURT OF DAVIDSON COUNTY, TENNESSEE

AT NASHVILLE
2015 FEB 27 PM 1:29

PAUL J. WALWYN,
Petitioner,

vs.



Docket No.
14C326

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

2015 FEB 27 PM 1:
RICHARD R. BOYER, CL
D.

ORDER

This matter came to be heard on the 2nd day of February, 2015, on the Petition of Certiorari of the Petitioner, Paul Walwyn. After hearing the presentation and argument of counsel for Petitioner and 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 on September 7, 2012. This petition was based upon three separate complaints of misconduct. (Record, p. 1).
2. Regarding the matter of Cristobal Lara, Petitioner filed a notice of appeal from the Williamson County criminal matter which he represented Mr. Lara. Petitioner admits although he could not reach the wife of Mr. Lara for instruction regarding the appeal, Petitioner filed the appeal and paid the filing fee. Further, Petitioner knew he would have to pay for a transcript for the appeal. (Petitioner Brief p. 5). No transcript was filed and the Court of Criminal Appeals ordered Petitioner to file a status update in the matter. (Ex. 1). Petitioner admits he believed Mr. Lara's appeal would be dismissed. Mr. Lara's sentence was for eight (8) years at thirty (30) percent, so his release date would be 2.4 years. (Petitioner Brief p. 5, Transcript p. 126-128). Petitioner admitted he received a copy of the order, but did not file a status update. (Transcript p. 22-23).
3. Further, after Petitioner failed to file a brief in this matter, the Court of Criminal Appeals filed an order giving Petitioner twenty (20) days to file a brief or motion to dismiss on

December 3, 2010. (Ex. 2). Petitioner also admitted he received a copy of this order, but did not file a brief or motion to dismiss within the deadline provided. (Transcript p. 24).

4. Petitioner filed a motion for extension of time on April 18, 2011, which was denied by the Court of Criminal Appeals. (Ex. 3). Again, Petitioner filed a motion for extension of time on June 21, 2011, which the Court of Criminal Appeals permitted twenty (20) days for Petitioner to file a brief or motion to dismiss. (Ex. 5). Petitioner again did not file a brief or motion to dismiss. (Transcript p. 26-27).

5. On January 20, 2012, the Court of Criminal Appeals ordered Petitioner to show cause why he should not be held in contempt. Petitioner appeared on February 22, 2012, asserting he filed the appeal to preserve Mr. Lara's rights on appeal and then had difficulty in communications with Mr. Lara. (Transcript p. 27-30). Mr. Lara had been released on parole, as 21 months had passed since the date of filing the appeal. (Transcript p. 30-31).

6. Petitioner admitted he received all orders and failed to file the pleadings ordered. (Transcript p. 45). The Court of Criminal Appeals held Petitioner in contempt, sentencing him to 48 hours in the Davidson County jail. In so ordering, the Court found Petitioner's actions "intentional and inexcusable." (Ex. 7).

7. Petitioner filed a petition to rehear and application to appeal to the Supreme Court of Tennessee, both of which were denied. (Ex. 10).

8. Before the Hearing Panel regarding this matter, Petitioner testified he violated the Rules of Professional Conduct, was not appropriately diligent, did not comply with the Court of Criminal Appeals orders, and fell behind in calendaring on this case. (Transcript p. 44-48). Petitioner asserted he did not believe he knowingly violated the order of the Court of Appeals; rather, he believed the order asserted Mr. Lara's case would be dismissed. (Transcript p. 45). Petitioner further testified he believed there was no injury or potential injury to Mr. Lara as neither Mr. Lara nor his wife had responded to Petitioner's inquiries regarding their desire to appeal. (Transcript p. 45-48).

9. Petitioner also represented Mr. Matthews in a Criminal matter in Davidson County and in an appeal before the Court of Criminal Appeals. Petitioner failed to file a timely notice of appeal, but filed a motion to excuse this failure. The Court of Criminal Appeals granted Petitioner's request on March 26, 2010, and Petitioner filed a notice of appeal. (Ex. 11, 12, 13).

10. As Petitioner had not filed a transcript in Mr. Matthew's matter, the Court of Criminal Appeals filed an order on October 5, 2010, ordering Petitioner to file a status update. (Ex. 14). Petitioner requested an extension of time to file a transcript, which the Court of Criminal Appeals granted, providing an extension until November 10, 2010. (Ex. 16).

11. The Court of Criminal Appeals filed an additional order for Petitioner to file a status update on February 2, 2011, as Petitioner had not filed a transcript. (Ex. 17).

12. On April 18, 2011, Petitioner filed another request for additional time to file a transcript. (Ex. 18). The Court granted this request by order on April 29, 2011, allowing 15 days to file a transcript. (Ex. 19). Petitioner filed the appellate record on September 12, 2011.

(Transcript p. 59-60)

13. Due to Petitioner's failure to file a brief, the Court of Criminal Appeals ordered, on November 21, 2011, Petitioner to file a brief or motion to dismiss within 20 days. (Ex. 21). Petitioner admitted he received this order but failed to timely file a brief or motion. (Transcript p. 63).

14. On January 20, 2012, the Court of Criminal Appeals ordered Petitioner to show cause why he should not be held in contempt. (Ex. 22). Petitioner appeared on February 22, 2012, admitting he had failed to file appropriate documents despite his receipt of the orders and notices. (Transcript p. 64). The Court of Appeals upheld the conviction of Mr. Matthews as well as the sentence of 17 years. (Ex. 39).

15. The Court of Criminal Appeals held Petitioner in contempt, sentencing him to 48 hours in the Davidson County jail, on February 24, 2012. This contempt sentence was to be concurrent with the sentence of 48 hours in the case regarding Mr. Lara. (Ex. 23).

16. Before the Hearing Panel regarding this matter, Petitioner testified he violated the Rules of Professional Conduct, was not appropriately diligent, did not timely respond to the Court of Criminal Appeals. (Transcript p. 67). The Hearing Panel found there was a lack of diligence in Petitioner filing the appellate brief after the filing of the transcript. (Record p 637).

17. Additionally, Petitioner represented Mr. Hunt, who was convicted in Davidson County on a criminal matter. The sentencing hearing of Mr. Hunt was held in January of 2011. on February 2, 2011, Petitioner filed a Motion for New Trial, and requested additional time to amend the allegations presented therein. (Ex. 29). An amended Motion for New Trial was filed by Petitioner on March 14, 2011, requesting additional time to locate phone records and a

witness. (Ex. 30). Petitioner advised the trial court on April 20, 2011, the additional phone records and witness would not be at the hearing. (Transcript p. 88), and the trial court denied the Motion for New Trial by order on April 25, 2011. (Ex. 31). Petitioner testified before the Hearing Panel, asserting Mr. Hunt's mother and sister came to see Petitioner after the April 25, 2011, order, and stated they wished to hire another attorney to file an appeal. Petitioner testified the family of Mr. Hunt had spoken with several other attorneys. (Transcript p. 200-201).

18. Petitioner testified he did not hear from Mr. Hunt's family until he received a copy of a consumer assistance program complaint filed by Mr. Hunt. (Transcript p. 203-4). Petitioner had not filed a notice of appeal regarding the conviction of Mr. Hunt as of October, 2011.

Petitioner asserts he attempted to have the notice of appeal approved after receiving this letter of complaint. (Transcript p. 205-206). Although Petitioner stated to the Board of Professional Responsibility Consumer Assistance Program by letter of December 1, 2011, he would file a motion to accept a late-file appeal and appeal "at this time," a motion to accept a late-filed appeal was not filed by Petitioner until April 17, 2012. (Ex. 28, 33). Petitioner states this request was granted and Petitioner then asked the court to appoint new counsel to proceed on appeal. (Transcript p. 206).

19. The Court of Criminal Appeals denied Petitioner's motion by order of May 10, 2012. (Ex. 33), finding Petitioner does not provide an explanation for his failure to make this request prior to April 17, 2012. The Court also found Petitioner failed to provide information for the Court to determine whether this waiver is appropriate.

20. After the Petition for Discipline was filed, several motions were filed regarding this petition before the Hearing Panel. As such, the Hearing Panel entered several orders, including an Order Regarding the Respondent's Motion to Compel Disclosure of Communication with Hearing Panel, an Order Regarding Respondent's Motion for Determination of Standard of Proof and Objection on Constitutional Grounds, an Order Regarding Location of Panel Hearings, an Order Regarding "Notice" of Constitutional Challenge and Defense of Constitutional Equal Protection Violations, and an Order Denying Respondent's Motion to Shorten Time for Board to Respond to Discovery Requests. (Record p. 540-551).

21. The Board of Professional Responsibility included evidence of prior discipline in the hearing before the Hearing Panel. This included a public censure on July 22, 2004, for failure to file a timely notice of appeal and for filing a brief before the Court of Criminal Appeals sixty

(60) days late. (Ex. 34). Also admitted was an Order of Enforcement, dated June 19, 2006, for Petitioner's failure to respond to the Board of Professional Responsibility in a timely manner. (Ex. 35).

22. In the fall of 2011, Petitioner's father's health was deteriorating. After Petitioner's father retired as a physician in Nashville, he worked in Petitioner's law office, as Petitioner's father had also attended law school. (Transcript p. 35). Petitioner's father was suffering from heart failure, and Petitioner's father had several vascular surgeries, multiple stints, and amputations. Petitioner's father also suffered from diabetes and went to the hospital once per month until he passed away July, 2012. (Transcript p. 36). Petitioner often spent the night with his father at the hospital. (Transcript p. 37, 132). Petitioner admits this distracted him from complying with the orders and notices of the Court of Criminal Appeals. (Petitioner Brief p. 9).

23. Petitioner put forth the following witnesses to testify on his behalf: Davidson County General Sessions Judge William Higgins (Transcript p. 74-83), Assistant Attorney General Amy Hunter (Transcript p. 105-109), Davidson County Circuit Court Judge Mark Fishburn (Transcript p. 139-145), Attorney Stanley Davis (Transcript p. 147-152), Attorney John Webb (Transcript p. 154-169), and Davidson County General Sessions Court Judge Gale Robinson (Transcript p. 222).

24. The Hearing Panel entered a final judgment on December 16, 2013, finding Petitioner violated Tennessee Rules of Professional Conduct 1.3, 1.4, 3.2, 8.4(a), and 8.4(d). (Record, p. 634). The Panel also determined Petitioner's discipline should be six months of suspension, with 30 days served via suspension and the remaining five months served on probation. (Record p. 643). Probation included several duties and responsibilities and a practice monitor, as well as completing six hours of continuing education courses. (Record, p. 644-645).

25. Petitioner requesting this court to review the following as noted in his brief:

a. The Hearing Panel acted arbitrarily by refusing to define the ethical duty Petitioner owed his clients prior to finding there was a violation.

b. The Hearing Panel abused its discretion by relying on an order of the Court of Criminal Appeals.

c. The Hearing Panel either acted arbitrarily or abused its discretion by refusing to compel the Board of Professional Responsibility to provide comparative sanctions.

d. The Hearing Panel either acted arbitrarily or abused its discretion by, when applying sanctions, failing to make specific findings of (1) a knowing failure to perform services (duties); (2) a pattern of neglect; and (3) injury or potential injury.

e. The Hearing Panel either acted arbitrarily or abused its discretion in failing to mitigate given the Petitioner's major life events at the time of the violations.

f. The Hearing Panel is an unconstitutionally constituted body and its decisions must be void. The Tennessee attorney disciplinary system is unconstitutionally constituted and therefore its actions should be stricken.

B. CONCLUSIONS OF LAW

1. Having made the aforementioned findings of fact, this court makes the following conclusions of law. First, this matter is governed by the 2006 Tennessee Supreme Court Rules. As such, Tennessee Supreme Court Rule 9, Section 1.3 (2006), 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 Chancery 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 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 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).

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)).

C. RULING

1. Petitioner argues the Hearing Panel acted arbitrarily by refusing to define the ethical duty Petitioner owed his clients prior to finding there was a violation. With regard to Mr. Lara, the Hearing Panel found Petitioner had a duty of acting with reasonable diligence and promptness, as well as controlling his work load as to handle each matter competently and found Petitioner violated Rule 1.3 of the Tennessee Rules of Professional Conduct. Further, the Panel found Petitioner was obligated to make reasonable efforts to expedite litigation and did not in violation of Rule 3.2 of the Tennessee Rules of Professional Conduct. However, the Panel did not find a violation of Rule 3.4 of the Tennessee Rules of Professional Conduct, stating the proper application of Rule 3.4 regards the harm to opposing parties and counsel in evidentiary matters. In the Matthews case, the Panel found a violation of Rule 1.3 for failure to abide by the obligations of the rule, but no violation of Rule 3.2. In the Hunt matter, the Panel found a violation of Rule 1.3 for his failure to act with reasonable diligence, and also found a violation of Rule 1.4, as Petitioner acknowledged in his pre-trial brief.

Petitioner argues he did not owe a duty to clients who he did not yet represent on appeal. However, Petitioner filed documents and made representations to the Court of Criminal Appeals in all of the matters reviewed by the Hearing Panel. Petitioner was acting in a client-attorney relationship with these persons.

This court finds the Panel acted appropriately in finding these violations were made by Petitioner.

2. Petitioner also argues the Hearing Panel abused its discretion by relying on an order of the Court of Criminal Appeals. This court specifically finds the Hearing Panel did not rely upon the orders of the Court of Criminal Appeals. This court finds the Panel properly reviewed these orders the same as any other evidence presented before the Panel.

3. Petitioner argues the Hearing Panel either acted arbitrarily or abused its discretion by refusing to compel the Board of Professional Responsibility to provide comparative sanctions. This court finds the Hearing Panel considered Petitioner's motion to limit evidence of damages to those provided in discovery, which requested the hearing panel to limit evidence to that disclosed by discovery, stating the Board had not answered discovery requests made by Plaintiff after the close of discovery. The Panel denied this request, and this court finds the Panel did not abuse its discretion or act in an arbitrary or capricious manner in denying this request.

4. Regarding the Petitioner's argument the Hearing Panel either acted arbitrarily or abused its discretion by, when applying sanctions, failing to make specific findings of (1) a knowing failure to perform services (duties); (2) a pattern of neglect; and (3) injury or potential injury. The hearing panel specifically reviewed the Rules of Professional Liability Petitioner violated, described the behavior of Petitioner, and discussed the Petitioner's argument regarding injury or potential injury. Regarding injury or potential injury, the Hearing Panel stated "the potential injury to a client for violating the rules set forth [within their ruling] is clear. Comment [9] of Rule 9, Section 8.4 sets forth the injury to the legal system when an attorney fails to obey a court order." (Record p. 640).

5. As admitted by the Board of Professional Responsibility and pursuant to *Hyman v. Bd of Prof'l Responsibility of the Supreme Court of Tenn.*, 437 S.W.3d 435 (Tenn. 2014), the facts of this case do not support a finding ABA Standard 7.2 applies.

6. Petitioner further argues the Hearing Panel either acted arbitrarily or abused its discretion in failing to mitigate given the Petitioner's major life events at the time of the

violations. The Hearing Panel found the mitigating factors of the Petitioner's case included "Absence of a dishonest or selfish motive; ... Personal or emotional problems; ... Full and free disclosure to the disciplinary board or cooperative attitude toward procedures; ... [and] Character or reputation." (Record p. 642). This court finds the Hearing Panel did not act arbitrarily or capriciously or abused its discretion in its application of mitigating and aggravating factors in its decision to order suspension.

7. Finally, Petitioner states the Hearing Panel is an unconstitutionally constituted body and its decisions must be void. Additionally, Petitioner argues the Tennessee attorney disciplinary system is unconstitutionally constituted and therefore its actions should be stricken. Petitioner primarily argues there is a failure of appropriate due process in the Tennessee attorney disciplinary system. This issue has been addressed by the Tennessee Supreme Court, as cited by the Board, in *Moncier v. Bd. of Prof'l Responsibility*, 406 S.W.3d 139, 156 (Tenn.2013), stating "Tennessee's disciplinary process affords lawyers notice and an opportunity to be heard, as well as other protections, including the right to have counsel present, the opportunity to cross examine witnesses, and the right to present evidence."

Further, the combination of investigatory, enforcement, and adjudicative functions can still provide due process, as the Tennessee Supreme Court found in *Long v. Bd. of Prof'l Responsibility*, 435 S.W.3d 174 (Tenn. 2014). Petitioner cites *Gibson v. Berryhill*, 23094302, which this court finds is not applicable to the case at bar. The *Gibson* matter involved a board created and controlled by an association who intended to disqualify half of the practitioners of the state who happened to also be in competition with the members of the association. Here, no such conflict or bias exists between the Petitioner and the Hearing Panel. This court finds the process and the Panel constitutional.

8. 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.

9. Petitioner failed to demonstrate the Hearing Panel's conclusions were not supported by substantial and material evidence or their decision was arbitrary and capricious. Petitioner's suspension 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.

10. This Court AFFIRMS the decision of the Hearing Panel and assesses costs to Petitioner.

IT IS SO ORDERED, this the 25 day of February, 2015.


HONORABLE DON R. ASH

CERTIFICATE OF SERVICE

I hereby certify the foregoing has been served upon the following by U.S. Mail on this the 27 day of February, 2015:

Krisann Hodges
Board of Professional Responsibility
10 Cadillac Drive, Suite 220
Brentwood, TN 37027

Connie Reguli
1646 Westgate Circle, Suite 101
Brentwood, TN 37027

 D.C.
Clerk