

IN THE SUPREME COURT OF FLORIDA

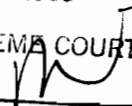
THE FLORIDA BAR, :
Complainant, :
v. :
THOMAS W. HEADLEY, :
Respondent. :

FILED

SID J. WHITE

Supreme Court
Case No. 65, 580 **MAY 8 1985**

CLERK, SUPREME COURT

By 
Chief Deputy Clerk

On Petition for Review of
the Referee's Report in a
Disciplinary Proceeding.

ANSWER BRIEF OF RESPONDENT IN SUPPORT OF REFEREE'S REPORT
AND IN OPPOSITION OF COMPLAINANT'S PETITION FOR REVIEW

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INTRODUCTION

In this brief, the Florida Bar will be referred to as either "The Florida Bar", "The Bar", or "Complainant"; Thomas W. Headley will be referred to as "The Respondent", or "Mr. Headley"; and The Florida Bar Special Committee on Alcohol Abuse will be referred to as "The Special Committee".

Abbreviations utilized in this brief are as follows:

"T" refers to the Transcript of Proceedings dated December 21, 1984;

"R.R." refers to the Report of the Referee;

"COMP. EX." refers to the Complainant's Exhibit attached to the Transcript of Proceedings dated December 21, 1984;

"R.S.M. EX. 1" refers to Respondent's Exhibit, i.e. The Florida Bar letter dated February 22, 1985, included with Respondent's Suggestion of Mootness filed with this brief.

STATEMENT OF CASE AND FACTS

On October 28, 1983, Respondent filed a Petition for Reinstatement of Membership in The Florida Bar after having been suspended from the practice of law for non-payment of dues. The Respondent proffered with his Petition for Reinstatement the dues then owed for the years 1980, 1981, 1982, and 1983. This Petition was granted and Respondent was reinstated as a member in good standing of The Florida Bar.

Thereafter, this matter was referred to a grievance committee by The Florida Bar for initiation of disciplinary proceedings surrounding the Respondent's failure to pay dues and his engaging in the practice of law while under suspension for non-payment of dues. After hearing on the matter by the grievance committee, the committee reported by recommending a private reprimand for minor misconduct.

The Bar rejected the recommendation of the committee and formally charged Respondent by way of complaint and sought hearing before a referee. Respondent admitted the allegations of the complaint and a default was entered.

On December 21, 1984, a hearing was had before a referee, the Honorable RICHARD G. PAYNE, which dealt with testimony and argument pertaining to proper disciplinary action to be recommended by the referee under the circumstances of this case. In that regard,

the referee heard testimony from Respondent, who represented himself pro se, as well as expert testimony relating to matters of mitigation.

On January 21, 1985, the referee entered his report regarding the complaint in this matter, wherein the referee made various findings and recommendations after specifically noting that there had been no instances of bad conduct by Respondent as a practicing attorney and Respondent has not been cited for contempt of court or to be found to have adversely affected the rights or neglected the interests of a client (R.R. 3). The referee inter alia recommended that the Respondent be found guilty as charged in the complaint. The referee further recommended certain disciplinary action, including:

1. The respondent should be placed on probation for a period of not less than six (6) months, nor less (sic)¹ than twelve (12) months, under the supervision and guidelines of The Florida Bar Special Committee on Alcohol Abuse, Administrative Law Judge MICHAEL E. HANRAHAN, Chairman (R.R. 4).

¹ Although the report itself uses the phrase "not less than six months nor less than twelve months:", it is obvious that this is a typographical error and the phrase should read "not less than six months nor more than twelve months".

2. Upon payment of the arrearaged Bar dues for 1984-1985, and a favorable written report from The Special Committee recommending reinstatement made to the Supreme Court, Respondent would be provisionally reinstated to practice law under the direct supervision and daily monitoring by The Special Committee.²

The referee's report further requires various reports to be furnished by The Special Committee to the Supreme Court, advising of Respondent's status as well as requiring Respondent to continue to participate in Alcoholics Anonymous and prohibiting Respondent from consuming alcoholic beverages (R.R. 5).

On March 30, 1985, The Bar filed a Petition for Review in the Supreme Court of Florida.

² It should be noted that pursuant to a Petition for Reinstatement and profer of dues owed for 1984-1985, The Florida Bar on February 22, 1985, reinstated Respondent as a member in good standing of The Bar (R.S.M. Ex. 1).

SUMMARY OF ARGUMENT

The referee's report should be adopted as the Complainant has failed to carry its burden of showing that it is erroneous, unlawful or unjustified. There is more than sufficient testimony in the record to support the finding of the referee as to a causal relationship between the Respondents' misconduct and his admitted alcoholism. This finding being supported by the evidence, it was properly considered as a mitigating factor in determining the proper disciplinary action to be recommended.

The referee's recommendations are within the scope of The Integration Rule of the Florida Bar, by providing for a period of probation with more than sufficient conditions to properly protect the public.

ARGUMENT

I. THE REPORT OF THE REFEREE SOUGHT TO BE REVIEWED IS NOT ERRONEOUS, UNLAWFUL OR UNJUSTIFIED.

In reviewing the report of the referee, the burden is upon the Complainant as the petitioning party to demonstrate that the report sub judice is erroneous, unlawful or unjustified, Art. XI Rule 11.09(3)(e), Integration Rule of The Florida Bar. Furthermore, the referee's findings of facts are presumed correct and will not be disregarded unless clearly erroneous or lacking support in evidence, The Florida Bar v. Baron, 392 So2d.1318(1981), and should not be disturbed by the reviewing Court unless there is manifest error therein, The Florida Bar v. Bennett, 246 So.2d.107 (1971).

A. The Referee's Report was not Erroneous.

Complainant seeks to establish that the recommendation of the referee was erroneous in that there was insufficient evidence to establish a causal relationship between Respondent's alcoholism and the misconduct, so as to justify consideration of alcoholism as a mitigating factor. Assuming arguendo this argument was correct, Respondent suggests that under the facts of the complaint,

even without taking into consideration the testimony in mitigation, the imposition of a period of probation as opposed to a ninety-one (91) day suspension would not be erroneous or unjustified. In that regard, the uncontradicted findings of the referee were that the Respondent in this case:

"...has made a favorable impression upon the referee at the hearing... Respondent was neat and professional in appearance as well as polite and respectful to the Court... the referee's notes that there have been no instances of bad conduct by Respondent as a practicing attorney and Respondent has not been cited in contempt of Court or to be found to have adversely affected the rights or neglected the interests of a client...."

(R.R. 2 and 3)

Based upon the testimony of the Respondent himself and the referee's observations at the time he testified, as well as the misconduct complained of and admitted to by the Respondent in this case, i.e. failure to pay Bar dues resulting in suspension and practicing while under suspension, when not linked with any further evidence of misconduct on the part of the Respondent, does not justify a ninety one (91) day suspension. Furthermore, it should be noted that at the time of his hearing, Respondent had paid his delinquent Bar dues.

However, there was ample competent, believable and uncontradicted testimony presented before the referee by both the

Respondent, as well as Professor RAYMOND P. O'KEEFE, a recovered alcoholic, upon which the referee could base his recommendation and find a causal relationship between the Respondent's alcoholism and the misconduct complained about.

Professor RAYMOND P. O'KEEFE testified inter alia that he is a member of Alcoholics Anonymous and has been a member since he took his last drink on November 4, 1965. In 1979, the New York State Bar Association invited him to form a committee to study, educate and rehabilitate lawyers who suffer from the disease of alcoholism... and he became the first chairman of the New York State Bar Association Committee on Lawyer Alcoholism (R.38-39). In 1981 he was invited to appear before the Board of Governors of The Florida Bar at which time he reported to them on the progress of lawyer alcoholism committees in other states; that he was an adjunct member of the faculty of the New York Medical Committee which is associated with Cornell University where he lectured on the subject of alcoholism (T. 40); that he has made a specialty of alcoholic lawyers and their problems since 1978; has been accepted as an expert on the subject of lawyer alcoholism (and was accepted by the referee in the case sub judice); has testified before the Supreme Court of the State of New York; has given lectures on the subject before bar associations in at least eight (8) states; has been associated with two hospitals in New York City and their alcoholism programs, served as advisor and consultant to numerous

programs; and currently serves as the Vice-Chairman of the American Bar Association Committee on Alcoholism and Drug Law Reform (T. 40 and 41).

Professor O'KEEFE in his testimony specifically advised the referee in detail as to his knowledge of the Respondent, which was first-hand and gained through personal observation by Professor O'KEEFE since he first met the Respondent in August, 1984 (T. 42).

Professor O'KEEFE in detail advised the Court of the basis for his personal knowledge of the Respondent and most particularly the Respondent's alcoholism and acts which resulted in these disciplinary proceedings. Contrary to Complainant's suggestion that there was insufficient evidence to establish a causal relationship to Respondent's alcoholism and the misconduct complained of, Professor O'KEEFE gave substantial testimony (in response many times to questions posed by the referee) as to the causal relationship between the Respondent's alcoholism and the misconduct (T. 48-54). In fact, not only did Professor O'KEEFE present an explanation as to the causal connection, but the problem of failure to pay dues among alcoholic lawyers was so common that the California Bar Association in developing twenty (20) questions specifically suited to determining whether a lawyer suffers from alcoholism includes as question number four (4)...

"HAVE YOU FAILED TO PAY YOUR BAR DUES?"

(T. 53)

Therefore, a reading of this record clearly shows substantial testimony present wherein the referee could find a causal connection and Complainants have not met their burden of overturning any factual finding by the referee in this regard.

B. The Referee's Report was not Unlawful.

Article XI, Rule 11.10, Integration Rule of The Florida Bar, provides inter alia the following:

"The judgment entered, finding members of the Florida Bar guilty of misconduct, shall include one or more of the following disciplinary measures:

1. Probation. The respondent may be placed upon probation for a stated period of time of not less than six months nor more than three years and for an indefinite period determined by conditions stated in the order. The judgment shall state the conditions of the probation which may include the following: supervision of all or part of the Respondent's work by a member of the Florida Bar; the making of reports to a designated agency; the satisfactory completion of a course of study or a paper on legal ethics approved by the Supreme Court....."

The referee's recommendations in the case sub judice are authorized and envisioned by the above Integration Rule, and in fact, seek to follow the various provisions set forth in the rule which suggest that the Court can require certain conditions of probation, including the conditions set forth by the referee in the case sub judice. See, The Florida Bar v. Harry T. Pryor, 350 So.2d. 83 (1977), wherein the Court imposed a period of probation with conditions similar to the ones recommended here,

in the case of an attorney who appeared in court while under the influence of alcohol and misrepresented to the public his status as a member in good standing of The Florida Bar while under suspension for nonpayment of dues. Albeit a longer period of probation was ordered by this Court in the Pryor case (supra), it should be noted that unlike the circumstances in Respondent's case, Pryor's alleged misconduct was far more egregious. There can be no doubt that this Court can impose a period of probation with conditions such as the ones set forth in the referee's report. The term "provisional reinstatement" obviously refers to the status Respondent would have while serving his period of probation. The problems envisioned by The Bar with the use of the term simply do not exist.

C. The Recommendation by the Referee is not Unjustified.

The Respondent suggests that the referee's recommendation is both fair, justified and provides safeguards to protect the public. The majority of the cases cited by Complainant are distinguishable in that they all deal with disciplinary actions regarding attorneys whose conduct was more egregious than the case sub judice. Many of the cases cited by The Bar (unlike the present case) deal with misconduct wherein specific clients were injured as a result of the attorney's misconduct, or criminal acts were committed by the attorney. In the case sub

judice, Mr. HEADLEY, appeared before the hearing examiner on December 21, 1984, and voluntarily admitted his alcoholism. He testified without contradiction and said testimony was corroborated by Professor O'KEEFE, that he has been and is now willing to cooperate in seeking alcoholism rehabilitation. In fact, the testimony before the referee established that Mr. HEADLEY has been actively involved as a member of Alcoholic Anonymous since August 1984.

In The Florida Bar v. Larkin, 420 So. 2d. 1080(1982) this Court stated:

"In those cases where alcoholism is the underlying cause of professional misconduct and the individual attorney is willing to cooperate in seeking alcoholism rehabilitation, we should take these circumstances into account in determining the appropriate discipline....."

Florida Bar v. Larkin, supra, at 1081. It is true that in the Larkin case, this Court recommended that Larkin be suspended from practice of law for ninety one (91) days; however, the Larkin case is factually distinguishable from the case sub judice as to the misconduct complained about.... Larkin was found guilty in three(3) instances of conduct resulting in injury to a client. Furthermore, in Larkin, the referee made references to his observations of Larkin at the hearing wherein he noted that Larkin's physical appearance was such that he concluded that Larkin suffered from such a condition before he admitted it and his appearance clearly demonstrated that his ability and faculties were impaired as a result of long abuse of alcohol. It is

evident from reading the Larkin opinion that not only was the conduct complained of the type which would cause one concern for the safety of the public, but that the condition of Larkin at the time of the hearing caused the referee concern since his mannerisms and demeanor clearly demonstrated that his ability and faculties were impaired due to alcoholism.

This is to be distinguished from Mr. HEADLEY'S case, who presented a completely opposite picture; has been actively seeking help and rehabilitation since August 1984; testified on direct and cross-examination coherently; and according to the referee's report in findings of fact, left him with a favorable impression as to his current physical and mental condition.

The conditions made a part of the recommended probation provide more than adequate protection to the public, i.e.:

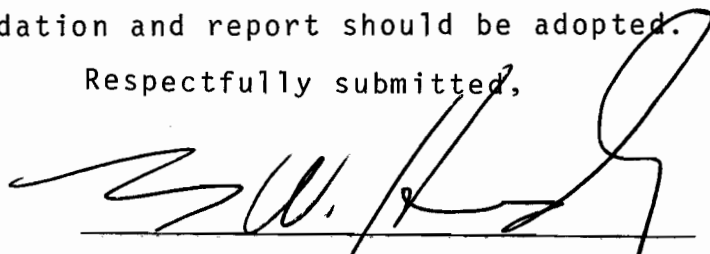
1. Probation under the supervision and guidance of the Florida Bar Special Committee on Alcohol Abuse;
2. Daily monitoring by the Special Committee;
3. Termination of probation upon report to this Court by the Special Committee that Respondent's progress or rehabilitation has become unsatisfactory;
4. Monthly reports to this Court by the Special Committee of the Respondent's progress;
5. Respondent's continued participation in Alcoholics Anonymous, and
6. No consumption of any alcoholic beverages by the Respondent.

CONCLUSION

Based upon the record in this case and the uncontradicted testimony placed before the referee at the time of hearing, there was substantial evidence upon which the referee could base his recommendation. Furthermore, the discipline recommended due to the misconduct of the Respondent in this matter under the circumstances in this case, was not unjustified or unlawful, and the Complainant has not met its burden in showing that the report was erroneous, unlawful or unjustified.

The referee's recommendation and report should be adopted.

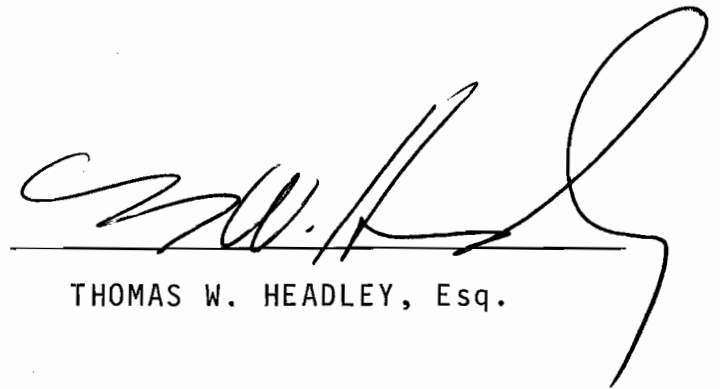
Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. W. Headley', written over a horizontal line.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the Answer Brief of Respondent was mailed to Sid White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Fl., 32301 and that a true and correct copy was mailed to Ms. Patricia Etkins Bar Counsel, The Florida Bar Suite 211, Rivergate Plaza, 444 Brickell Ave., Miami, Fl. 33131; Mr. John F. Harkness, Jr. Executive Director, The Florida Bar, Tallahassee, Fl., 32301-8226; Mr. John T. Berry Staff Counsel, The Florida Bar Tallahassee, Fl., 32301-8226; this 6th day of May 1985.



THOMAS W. HEADLEY, Esq.