IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR)

Complainant,)

v.)

THOMAS W. HEADLEY,)

Respondent.)

Supreme Court
Case No. 65,580

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

REPLY BRIEF OF COMPLAINANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ARGUMENT

THE REFEREE'S RECOMMENDED DISCIPLINE IS UNJUSTIFIED CONSIDERING THE AGGRAVATING FACTORS AND EVIDENCE OF UNFITNESS TO PRACTICE LAW

In considering discipline, this Court is not bound by the Referee's recommendations as to discipline. The Florida Bar v. Weaver, 356 So.2d 797, 799 (Fla. 1978); accord, The Florida Bar v. Mueller, 351 So.2nd 960, 966 (Fla. 1977).

Respondent argues that the discipline recommended by The Florida Bar, to wit: suspension for three months and a day, with proof of rehabilitation, is not justified because there is no evidence of any additional misconduct on the part of Respondent and Respondent had paid his delinquent Bar dues by the date of the final hearing.

The Florida Bar maintains that practicing law while under suspension for nonpayment of dues is misconduct and should result in discipline even where no additional misconduct is alleged. Further, this Court has held that belated payment of Bar dues and subsequent reinstatement does not cure the problem of a respondent's having practiced law while not in good standing. The Florida Bar v. Bratton, 413 So.2d 754, 755 (Fla. 1982).

> We do not agree that reinstatement functions retroactively so as to excuse the misconduct of practicing law while under suspension for non-payment of dues. To so hold would undermine the purpose of the proscription against practicing law while in arrears on dues.

Id. at 755.

Moreover, Respondent does not cite any case law to support his position that probation as the sole disciplinary sanction has been ordered by this Court for similar misconduct. Even in The Florida Bar v. Prior, 350 So.2d 83 (1977), which is cited by Respondent as support for a probationary term, a public reprimand in conjunction with probation was ordered.

Further, Respondent does not cite any case wherein a clearly unfit attorney has been permitted to resume the practice of law without first demonstrating proof of rehabilitation through formal reinstatement proceedings. In his attempt to distinguish the instant case from The Florida Bar v. Larkin, 420 So.2d 1080 (Fla. 1982), Respondent argues, without reference to the record, that in the instant case the Referee was left with "a favorable impression as to [Respondent's] current physical and mental condition". (Answer Brief at 11-12.) Although this statement implies that Respondent established his subsequent rehabilitation before the Referee, such assertion is contrary to the record in this case. As discussed in The Florida Bar's Main Brief, Respondent admitted and the Referee has acknowledged that Respondent is currently unfit to represent clients due to his alcoholism. (R.R. at 2-3.)

Accordingly, where, as in the case sub judice, there is undisputed evidence that a respondent is currently unfit to practice law, proof of rehabilitation pursuant to formal reinstatement proceedings is fully warranted. Such position is consistent with Larkin and all cases cited by The Florida Bar

in its Main Brief wherein reinstatement proceedings were required where subsequent proof of rehabilitation was not established before the Referee. Further, in all instances in which proof of rehabilitation has been required, formal reinstatement proceedings have been the procedure by which rehabilitation is evaluated. Respondent has cited no instance in which the authority to determine whether an attorney is fit to resume the practice of law has been delegated to any entity other than a Court-appointed referee.

Finally, Respondent argues that the cases cited by The Florida Bar involve conduct more egregious than the instant case. However, in so arguing Respondent overlooks the evidence of Respondent's current unfitness to practice law, together with the aggravating factors (i.e., practicing law in willful disregard of his Bar membership status for a period of three years) which the Bar maintains fully justifies the imposition of the terms of discipline recommended by the Bar. Moreover, Respondent overlooks the Referee's acknowledgement in his Report that the discipline recommended by The Florida Bar is not "unduly harsh". (R.R. at 3.) Therefore, even assuming, arguendo, that the ambiguities in the Referee's report can be explained and the "provisional reinstatement" status recommended by the Referee can be reconciled with the Integration Rule, a term of probation, alone, is unjustified in this case.

CONCLUSION

In conclusion, The Florida Bar reiterates its request that this Court reject the Referee's recommendation pertaining to

discipline and adopt the Bar's recommendation that Respondent be suspended from the practice of law for three months and a day, show proof of rehabilitation through formal reinstatement proceedings and pay costs. Such sanction is not unduly harsh, protects the public from a clearly unfit attorney while encouraging rehabilitation, and would be an effective deterrent to other attorneys who may be tempted to willfully disregard their obligation to ensure that they do not practice law while not a member in good standing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Reply Brief of Complainant 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 Thomas W. Headley at 10592 N.W. 7th Terrace, Miami, FL 33172 this 16th day of May, 1985.

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