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IN THE SUPREME COURT OF FLORIDA SEP 3 1985

By _____ Deputy Clerk

The Florida Bar
Re: WILLIAM E. WHITLOCK III
Petition for Reinstatement

Case No. 68,246

PETITIONER'S REPLY BRIEF

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STATEMENT OF THE CASE

Petitioner accepts without question the Bar's amendment to Petitioner's original statement of the case.

STATEMENT OF FACTS

Petitioner disagrees with the Bar's statement in the first paragraph on page vii of its Statement of Facts that Mr. Whitlock's conditional plea agreement on his second disciplinary action included his execution of a promissory note to the Kykendalls. In fact, the promissory note in question was executed two years prior to the consent judgment and Respondent acknowledged the existence of the note in the consent judgment.

ARGUMENT

I. THE REFEREE'S FINDING THAT PETITIONER IS FINANCIALLY IRRESPONSIBLE IS CLEARLY ERRONEOUS OR LACKING IN EVIDENTIARY SUPPORT.

The Referee concluded that Petitioner failed to present evidence of unimpeachable character because of "financial irresponsibility." This court's scope of review over that conclusion is broader than its review over the findings of fact. Petition of Inglis, 471 So. 2d 38 (Fla. 1985) at page 41. Petitioner challenges the Referee's conclusion by pointing out to this court that the findings of fact on which he based that conclusion are erroneous. The following findings by the Referee are either clearly erroneous or have no evidentiary support in the record.

1. In paragraph four of the Referee's Findings of Fact he states that Petitioner "has made no attempt to even contact [his] creditors" and that "no payments towards restitution have been tendered to Mr. Donald Kykendall." In fact, Petitioner tendered a $3,000 payment to Mr. Kykendall coupled with an offer to make payments for five years on an amortization schedule based on a fifteen year repayment plan. At the end of the five years, the amount due would balloon and total payment would be made. Petitioner's tender was rejected.

2. In paragraph four of his Findings of Fact, the Referee improperly found that a judgment was entered against Petitioner as a result of his being held in contempt for failure to make $8,000 in support payments. There is no evidence to support this conclusion. In fact, no such judgment was entered and Petitioner was not found in contempt for failure to make $8,000 in support payments. The Referee's conclusion in this regard is an assumption that he made. It is not based on evidence presented to the Court.

3. The Referee stated in paragraph four of his report that "it appears...that if the Petitioner had any real desire to show financial responsibility..." he would have secured a job using his real estate license or his security license to earn money to pay off the judgments. In fact, Petitioner did use his real estate license to secure employment in the Jacksonville area, but lost his job when the endeavor failed. Furthermore, he obtained some commissions from the sale of real estate last year. The Referee's

finding that Petitioner failed to utilize his licenses to earn money is clearly erroneous.

The Referee's aforementioned findings, which formed a material basis of his report, are clearly erroneous and should be overturned.

In addition to the previously mentioned erroneous findings, the Referee based his conclusion that Petitioner was financially irresponsible on factors that should not be held against Petitioner. They include Petitioner's failure to reimburse The Florida Bar's client security fund for $1,602.73 paid to Daniel McCullen (sic) in 1981. In fact, the evidence is unrebutted that Petitioner first learned of that payment shortly before final hearing. The Florida Bar, for reasons unknown, failed to notify Petitioner of that payment. Petitioner's failure to retire a debt, which he was first notified about two months prior to final hearing, should not be held against him.

The Referee also states "it appears" to him that Petitioner "could have obtained" employment utilizing his real estate license and his security license. In fact, there was no evidence before the Referee whatsoever indicating the availability of employment in the Lakeland area in those fields. Petitioner presented evidence that he has worked hard in gainful employment during his suspension. For it "to appear" to the Referee that he could have obtained employment in other fields, there should be at least some evidence before the Court that such a conclusion is warranted. A

Referee should not be basing his findings of fact upon appearances and assumptions not predicated upon any evidence whatsoever.

The Referee's conclusion that Petitioner should have obtained employment in other fields is also flawed in that there is no evidence before him indicating Petitioner could have earned more money in a different occupation.

The Referee's conclusion that Petitioner was financially irresponsible is not warranted when the record is reviewed.

Despite the fact that The Florida Bar did not recommend against reinstatement at final hearing, it attempts to support the Referee's finding in its answer brief.

Although The Florida Bar admits that Petitioner offered a payment plan to Mr. Kykendall, it argues that the Referee's findings that no payments had been tendered to Mr. Kykendall is supported by the record. The Bar then states that Petitioner has "failed to make even a token payment" on the Kykendall judgment.

Mr. Kykendall refused Petitioner's offer of a $3,000 payment!

How can the Florida Bar argue that Petitioner has not even made a token payment on the Kykendall judgment when it was Kykendall who rejected Petitioner's offer of a $3,000 payment? Petitioner tried to retire 10% of the Kykendall debt in one stroke and to set up a payment plan that would pay off the entire judgment in 5 years and Kykendall rejected it. Petitioner did the best he could to pay off that debt. Kykendall, not Petitioner, is the

reason for no payments being made.

The Bar argues that the Referee properly found that a "judgment" was entered against Petitioner because he had $8,000 in arrearages in child support payments. There was absolutely nothing in the record to support the Referee's finding that any such judgment was entered! This is an unwarranted assumption by the Referee.

The amount of the arrearages is in dispute and Petitioner was able to purge himself of contempt by payment of $400.00. Furthermore, payments on arrearages was suspended by the trial judge for a 1 year period.

On page five of its answer brief, the Bar lists numerous debts that Petitioner did not disclose in his Petition for Reinstatement. Although the Bar does not so state, Petitioner assumes that they are arguing that it is a negative factor. Petitioner acknowledges the $32,000 owed to Patrick Tittle should have been listed on his Petition. However, Petitioner's failure to list the other debts mentioned by Bar counsel should not be held against Petitioner. The first of these debts is the $8,000 owed in past due child support. First, the amount is not $8,000. The figure is in dispute. Secondly, it is not reduced to judgment.

The Bar also argues that Petitioner's failure to list the $1,602.73 CSF claim shows a lack of character. However, Petitioner did not even know about the debt when he filed his petition. Why didn't he know about it? Because the Bar never told him the claim

had even been filed, let alone paid.

Petitioner did not list the allegedly $38,000 owed to Mr. McCain because no demand for payment has ever been made and because Petitioner does not owe him $38,000.

Finally, the Florida Bar argues that Mr. Whitlock lacks character for failing to list the $700.98 assessed against him in his most recent disciplinary case. When Petitioner's Petition for Reinstatement was filed on January 30, 1986, the costs assessed in the second case had not been tabulated. In fact, this Court's order approving Respondent's second discliplinary order was not entered until March 20, 1986. Costs were not due until 30 days after that date, i.e., April 19, 1986, only one month prior to final hearing.

Finally, on page seven of its brief, the Bar intimates that because Petitioner's wife owns the lawn care business for which Petitioner works that he should be able to pay off his debts. Once again, that is an assumption that is completely unsupported by the evidence.

The company for which Petitioner works, Lawn Man, Inc., is owned jointly by Petitioner's wife and by her brother. Her share of the business cost her $20,000 and she has paid but $4,500 toward that debt. It is a modest business, with assets consisting of several trucks, garden tools and lawn mowers, and a warehouse. What evidence exists that "indicates" that there are assets available to Petitioner to use to pay off his debts? None. Would Peti-

tioner and his wife be living in a $425.00 a month apartment, owning no real estate, with his wife acting as their bookkeeper and Petitioner working labor if they had an alternative? Of course not.

Both the Referee and the Florida Bar suggest, without any factual support that there are assets in existence that Petitioner could draw upon to pay his debts. If there is no evidence of those assets, such suggestions are unwarranted.

The evidence shows that Petitioner has worked hard as a laborer earning a modest salary. Petitioner should not be discriminated against because he could not obtain a white collar job. It is very easy to argue that there is other work available that could pay better. It is an all together more difficult task to actually secure such a job.

II. PETITIONER HAS MET THE BURDEN OF PROVING HIS FITNESS TO RESUME THE PRACTICE OF LAW.

Absent Petitioner's failure to retire his debts, there is absolutely nothing to indicate that Petitioner has not proved rehabilitation. The testimony of his witnesses, all professionals who know him well, shows to an absolute certainty that this man deserves to be reinstated to the practice of law. Every single one of Petitioner's business associates found him to be a man of integrity and financial responsibility. They also testified to his fulfillment of all of the criteria required for reinstatement in

The Florida Bar v. Dawson, 131 So. 2d 472 (Fla. 1961).

The only basis for the Referee's recommendation that Petitioner not be reinstated is the Referee's conclusion that Petitioner is financially irresponsible due to his failure to pay his debts.

As agrued in Petitioner's initial brief, Petitioner's failure to retire those debts should not be held against him in the light of his inability to make a better living. Petitioner once again asks this court to consider the case of Petition of Ragano, 403 So. 2d 401 (Fla. 1981) wherein this court admitted Mr. Ragano despite outstanding financial obligations. As was true with Mr. Ragano, Petitioner has:

> No ability to generate income in any endeavor other than the practice of law and currently lacks the financial ability to satisfy such obligations.

In arguing the Petitioner has not proved rehabilitation, the Bar refers to Petition of Inglis, supra. In fact, Petitioner has proved up all six elements listed in Inglis. He has presented proof through his impressive array of witnesses that he: (1) strictly complied with his disciplinary orders; (2) possessed good moral character; (3) possessed good professional ability; (4) lacked malice towards the Bar; (5) sincerely regretted his past conduct and would not repeat it in the future; and (6) complied with the conditions imposed in the orders.

Inglis, in fact, stands for the proposition that

Petitioner should be reinstated. In Inglis, this court rejected the Referee's recommendation that Petitioner be denied reinstatement. The Referee had concluded that certain of Petitioner's business dealings indicated a lack of character, a conclusion rejected by this court. The court also rejected the Referee's conclusion that criminal misconduct that had occurred 15 years prior to the Petition for Reinstatement should not be held against the Petitioner in that case.

The court's opinion in Inglis stands for the proposition that a Referee's conclusions of law are subject to broad review by the court. Petitioner, in the case at bar, argues the same thing and asks the court to reverse the Referee's unwarranted conclusion that Petitioner lacks integrity because he lacked the financial ability to pay off his debts while suspended. Petitioner has handled his financial affairs during his suspension in an honorable manner. He has worked hard as a laborer. His failure to obtain a better paying job and to make more money should not be the basis for a denial of reinstatement. As was true with Mr. Ragano, Petitioner knows no way to make a decent living other than by working as a lawyer.

Petitioner has done the best he could with his finances while suspended. Rather than penalizing him for working as a laborer, he should be congratulated, as Dr. Barranco suggested, for picking himself up after being suspended and working hard.

CONCLUSION

Petitioner asks this court to reject the Referee's findings and conclusions of law and to reinstate him to membership in good standing in The Florida Bar immediately.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief has been mailed to Jan Wichrowski, Esquire, Bar Counsel, 605 E. Robinson Street, Suite 610, Orlando, FL 32801, on this 8th day of September, 1986.

JOHN A. WEISS