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IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

CASE NO. 72,023

IN RE: PETITION OF

The Florida Bar Case
No. 88-50,837 (FRE 17C)

RONALD E. KAY FOR
REINSTATEMENT.

ANSWER BRIEF OF
THE PETITIONER RONALD E. KAY

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PREFACE

In this Brief, The Florida Bar will be referred to as "Appellant". Ronald E. Kay will be rerferred to as "Appellee".

Abbreviations used in this Brief are as follows:

"T" refers to transcripts of the proceedings which were before the Referee, The Honorable J. Leonard Fleet on October 10, 11 and 24, 1988, to be followed by page number.

STATEMENT OF THE CASE

The Appellee agrees with Appellant°s statement of the case.

Appellee would, however, point out that L. Dennison Reed is not a psychologist/psychiatrist but only a psychologist.

STATEMENT OF THE FACTS

On February 28, 1985 Petitioner entered into an agreement with The Florida Bar to resign pending disciplinary proceedings. The disciplinary proceedings were initiated by The Florida Bar after Appellee°s felony confictions for delivery of methaqualune and possession of cocaine, Appellee had been suspended since January 22, 1982.

On February 28, 1988 Appellee filed his Petition for Reinstatement to membership in The Florida Bar.

It is Appellee°s position which was supported by the trial testimony of seven (7) other witnesses that since the entry of this Court°s Order on February 28, 1985 that he has rehabilitated himself and is entitled to be reinstated.

The Appellant and Appellee were both in agreement that the issue of rehabilitation was the only issue to be determined by the Referee. In determining the issue of rehabilitation the parties agreed that there were six (6) criteria as set forth in this Court°s opinion in, In re Timson, 301 So.2d 448 (FLA. 1974), these six (6) elements are:

1. Strict compliance with the specific conditions of the disciplinary order.

2. Evidence of unimpeachable character and moral standing in the community.

3. Clear evidence of a good reputation for profeesional ability.

4. Evidence of a lack of malice and ill feeling by the Petitioner toward those who by duty were compelled to bring about the disciplinary proceeding.

5. Personal assurances supported by corroborating evidence revealing a sense of repentance, as well as a desire and intention of the Petitioner to conduct himself in an exemplary fashion in the future.

6. In cases involving misappropriation of funds, restitution is important.

Appellant did not contest elements 1, 3, 4 and 6 before the Referee, but only element 2 and 5. (T324-326).

In order to prove elements 2 and 5 Appellee called the following individuals:

A. Rabbi Sheldon Harr; T 15 through 21

B. Pastor James Rorie; T 238 through 247

C. Phillip Fagelson; T 69 through 76

D. Harold Lippman; T 61 through 68

E. Jonn F. LaSala; T 52 through 58

F. Joel Miller T 25 through 36

G. Howard Zeidwig; T 37 through 49

All of these character witnesses testified that they have known Mr. Kay for a significant number of years. Each of these witnesses testified that since the time of Mr. Kay°s agreement to resign his character in the community had been unimpeachable and that he enjoyed a reputation for having excellent moral character in the community.

Rabbi Harr and Pastor Rorie were perhaps best able to demonstrate to the Referee Mr. Kay°s commitment to rehabilitating himself and to serving his community since the time of his arrest in 1981. It is obvious that Mr. Kay°s rehabilitation as far as these two gentlemen are concerned was exhibited by deed and not merely by talk.

The Appellant did not produce once single witness to impeach Mr. Kay°s reputation on the issue of character or moral standing as of the time of Appellee°s resignation through the time of the reinstatement proceedings.

The Appellant called but three witnesses, Dr. L. Dennison Reed, Dr. William Ryan and the Honorable Stephen H. Booher.

Neither of the two psychologists had any facts to testify to. They merely offered opinions regarding the Appellee°s mental makeup. These opinions were based on a total of five (5) to six (6) hours of examinations by the psychologist. The Appellee was initially sent to the psychologist because of the element of drug abuse that existed in the chargs that led to Appellee°s suspension. Each and every of the psychiatrist and psychologist who tested Appellee for the existence of drug or alcohol abuse reported negative findings.

The opinion testimony of the Appellant°s two psychologist could not and did not touch on the issue of reputation and moral character.

The only other witness called by The Florida Bar was the Honorable Stephen H. Booher. Judge Booher offered no testimony as to Appellee°s current character or moral standing in the community but to the contrary testified that he had no contact with Petitioner in the past six and one-half (6 1/2) years.

The remaining element which Appellant contended Appellee fell short of proving was "56. Personal Assurances supported by corroborating evidence revealing a sense of repentance and intention of Petitioner to conduct himself in an exemplary fashion in the future."

Petitioner and each and every character witness called by him assured the Referee of Appellee°s feelings of guilt, shame, remorse and repentence. (T338-339).

Appellee in his direct testimony assured the Referee that he would take any action which was necessary to avoid becoming an embarrassment to The Florida Bar in the future.

After hearing the testimony of all the witnesses and having an opportunity to judge the credibility of the witnesses and determining the appropriate weight to be given to the witnesses° testimony the Referee issued his Report recommending Petitioner°s reinstatement to membership in The Florida Bar.

SUMMARY OF THE ARGUMENT

I. The Referee°s Report finding that Petitioner has demonstrated, by clear and convincing evidence that he has been rehabilitated and that he is presently fit to be reinstated to membership in The Florida Bar is supported by substantial competent evidence and should be approved by this Court.

The Petitioner adduced substantial competent evidence through his own testimony and the testimony of seen respected members of his community that he had in fact, rehabilitated himself since the time of his suspension and was entitled to reinstatement.

Basd on the factual evidence, as opposed to opinion testimony presented the Referee made a factual determination that petitioner had proved rehabilitation by clear and convincing evidence.

In, The Florida Bar, Petition of Rubin, 323 So.2d 257 (FLA. 1975), this Court in affirming the Referee°s recommendation against reinstatement stated at 259:

> "The Referee found that Petitioner had not met his burden of showing rehabilitation, and the record supports the Referee°s findings."

The Court added a footnote to this assertion which stated "9...fact finding in disciplinary matters should not be overturned unless wholly lacking in evidentiary support." (Emphasis added.)

In seeking review of a Referee°s Report "the burden shall be upon the party seeking review to demonstrate that a Report of a Referee sought to be reviewed is erroneous unlawful, or unjustified." Rule 3-7.9(j); 3-7.6(c)(5).

The Referee°s finding that Petitioner had proved his rehabilitation by the clear and convincing weight of the evidence is supported by substantial competent evidence and should be approved by this Court.

II. The Referee was correct in precluding The Florida Bar from introducing into evidence Petitioner°s June 6, 1983 Final Judgment of Dissolution of Marriage.

The Florida Bar has cited the case Petition of Wolf, 257 So.2d 547 (FLA. 1972) for the proposition that misconduct whether or not it resulted in discipline as being relevant information.

This is not the holding of Wolf.

The Referee in this case found that the Final Judgment of Dissolution was not part of any disciplinary action brought against Petitioner and therefore determined same not to be relevant (T 312-314).

ARGUMENT

I. The Referee°s Report finding that Petitioner has demonstrated, by clear and convincing evidence that he has been rehabilitated and that he is presently fit to be reinstated to membership in The Florida Bar is supported by substantial competent evidence and should be approved by this Court.

It is clear that Appellant, in seeking review of the Referee°s findings of fact and recommendations has the burden of showing to this Court that the Referee°s Report is erroneous, unlawful or unjustified. Rule 3-7.9(j); 3-7.6(c)(5).

In order to carry this burden the Appellant must show that the Referee°s findings of fact are wholly lacking in evidentiary support.

To Appellant°s credit, they do not even attempt to suggest to this Court that there was not substantial competent evidence which allowed the Referee to reach his conclusions, indeed Appellant could not realistically take this position.

The Referee on three separate days heard testifmony of both lay witnesses and expert witnesses.

Without exception the testimony of all of the lay witnesses unequivocably supported Appellee°s position that he had been rehabilitated and was currently fit to resume the practice of law.

The testimony of the expert witnesses was split. Some believed that Appellee should be readmitted, that he had no significant problem which would effect his ability to function, some believed he had psychological problems which should be monitored. Only one psychologist believed Appellee had problems of such a nature that he should not be readmitted.

The finder of fact weighed this testimony in total and detemrined, fadtually, that Appellee had carried his burden of proof and had established rehabilitation and entitlement to reinstatement.

It is obvious that the Referee carefully considered the expert testimony in this case (T 320-321). It is also obvious that the Referee chose to accept some of this testimony and to disregard portions of the testimony. This is clearly exhibited in the probationary conditions the Referee has recommended be imposed on Appellee.

The mere fact that the Referee wishes Appellee to be monitored is not a basis for the denial of his reinstatement. The Florida Bar v. Willis. 459 So.2d 1026 (FLA. 1984) and The Florida Bar v. Stewart, 396 So.2d 170 (FLA. 1981).

II. The Referee was correct in precluding The Florida Bar from introducing into evidence Peitioner°s June 6, 1983 Final Judgment of Dissolution of Marriage.

The Appellant sought to introduce into evidence a copy of Appellee°s June 6, 1983 Final Judgment of Dissolution fo Marriage. The Appellee objected on the basis of relevance and the Referee sustained the objection on the basis that the Final Judgment of Dissolution of Marriage had nothing to do with the reasons Appellee had been arrested and finally disciplined for. (T 309-314).

The Appellant has cited the cases of Petition of Wolf, 257 So.2d 547 (FLA. 1972) and In Re: Alfieri, 529 So.2d 1116 (FLA. 1988) for the propostion that "misconduct, whether or not it resulted in discipline is certainly relevant...in a reinstatement proceeding".

That is not the holding in either case.

The Court in Wolf stated:

> "Petitioner first asserts that the Referee improperly considered Petitioner°s past disciplinary record, including the nature of the offense that led to his disbarment. This assertion is without merit, for the Referee may properly consider the prior disciplinary record of one seeking to be reinstated to The Florida Bar, including the number, similarity and gravity of his offense."

It is therefore clear that the Court was concerned with conduct which resulted in the Petitioner°s Bar Discipline and not some other misconduct which may have had no bearing on Petitioner°s fitness to practice law.

The case of Alfieri is similar in that the misconduct which the Court was interested in was Petitioner°s failure to report to the New York Bar the fact that he was disbarred in Florida as the result of his criminal conviction.

The Referee correctly determined that the Final Judgment of Dissolution of Marriage had no relevance to the Reinstatement Petition and therefore correctly sustained Appellee°s objection to its introduction.

Assuming arguendo that the document should have been allowed into evidence Appellee would argue that its exclusion was harmless error.

It is obvious that the matters raised in the Final Judgment of Dissolution of Marriage were addressed by Appellee and his witnesses.

CONCLUSION

Based upon the foregoing, and upon Appellant°s complete failure to meet its burden in requesting review of the Referee°s Report herein Appellee respectfully request this Honorable Court to approve the Referee°s Report.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Answer Brief of Ronald E. Kay was mailed to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Bldg, Tallahasee, FL 32301 and a true and correct copy of the foregoing was furnished by mail to JACQUELYN PLASNER NEEDELMAN, The Florida Bar, 444 Brickell Ave, Suite 211, Miami, FL 33131 this 8th day of September 1989.

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