

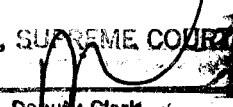
IN THE SUPREME COURT OF FLORIDA

017
FILED

SIO J. WHITE

AUG 14 1989

CLERK, SUPREME COURT

By: 
Deputy Clerk

THE FLORIDA BAR,

Complainant,

vs. ■

Supreme Court Case No.: 72,424

LEO B. WEST,

Respondent.

RESPONDENT LEO WEST'S ANSWER BRIEF

JAMES M. STARK, ESQ.

Counsel **for** Respondent /

Leo B. West

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SYMBOLS AND REFERENCES

In this Brief, The Florida Bar, will be referred to as "TFB". Leo B. West will be referred to as "Respondent". "T.1" will refer to the transcript of the final hearing held October 14, 1988. "T.2" will refer to the transcript of the final hearing held before the Referee on January 30, 1989.

STATEMENT OF CASE

On or about June 19, 1985, Respondent was arrested in Miami, Dade County, Florida and charged with among other offenses, 1) Possession of Cocaine, and 2) Possession or Delivery without Consideration of Marijuana in an amount not in excess of twenty (20) grams. On August 20, 1987, the Respondent was placed on three years probation and adjudication of guilt was withheld. As special condition of his probation, the Respondent was to successfully complete a drug treatment program and make a payment of Five Thousand (\$5,000.00) Dollars to Spectrum House. (See Appendix Exhibit "A").

Respondent notified "TFB" of the aforementioned facts by letter dated August 24, 1987. (See Appendix Exhibit "B"). A Notice of Determination or Judgment of Guilt was not filed by "TFB" until May 10, 1988. (See Appendix Exhibit "C"). Thereafter, this Honorable Court entered an order suspending Respondent from the practice of law effective thirty (30) days from September 2, 1988. The order of suspension further referred Respondent's previously filed Petition to Modify or Terminate Suspension to a referee for consideration and ordered said referee to hold a hearing, review such evidence and argument as deemed appropriate, and issue a report making a recommendation to the Supreme Court on the question of whether the three year suspension provided for by Rule 3-7.2 of the Rule Regulating the Florida Bar should be terminated or modified. (See Appendix Exhibit "D").

The Honorable Brian P. Kay, of Broward County, was appointed

referee. The matter was heard on October 14, 1988. The Referee announced his findings and recommendations on January 30, 1989. Judge Kay recommended that Respondent's Petition for Modification or Termination be granted. (T.2-9). The Referee further recommended reinstatement after the Respondent completed the disciplinary measures of the modified suspension as outlined in his report (T.2-12). The Referee stated that he considered the hearing held on October 14, 1988 as a reinstatement hearing. (T.2-11). "TFB" interposed no specific objections to this pronouncement. (T.2-12).

The Referee's report, the record of the proceedings with exhibits, and a statement of costs, was received by this Honorable Court on March 20, 1989. (Appendix Exhibit "E"). "TFB"'s Petition for Review was filed on June 26, 1989 (Appendix Exhibit "F"). Respondent filed a Motion to Strike and/or Dismiss Petition for Review due to the tardiness of filing of service. (Appendix Exhibit "G").

STATEMENT OF FACTS

Pursuant to this Honorable Court's order of suspension and appointment of Referee for Recommendations as to Respondent's Petition to Terminate or Modify Suspension, a hearing was held on October 14, 1988. The Respondent's presented numerous witnesses in support of his position that he had rehabilitated himself and therefore his suspension should be terminated.

At the aforementioned hearing, the Referee announced that he was going to hold a hearing in accordance with the order of Chief Justice Ehrlich which was dated September 2, 1988. (T.1-9). He would therefore make a recommendation as to whether the Respondent's suspension should be modified or terminated. (T.1-9). He reconfirmed this purpose by stating that he needed to understand all underlying facts which gave rise to Respondent's suspension in order to make a decision as to whether he was going to mitigate it. (T.1-16). "TFB" recognized the Referee's function and conceded that he should determine it based on the pleadings. (T.1-136). "TFB" further acknowledged that the Referee's directive was to follow the reinstatement rule. (T.1-137).

On the 30th day of January, 1989, the Referee announced his Findings and Recommendations. He recommended that Respondent's Motion to Modify or Terminate Suspension should be granted. (T.2-9). He also stated that he was treating the hearing held on October 14, 1988 as a reinstatement hearing, (T.2-111), and recommended

reinstatement after the termination of the Respondent's modified suspension. (T.2-12).

SUMMARY OF ARGUMENT

The Referee's recommendation is consistent with, and in conformity to, the order of the Supreme Court, which appointed him.

"TFB" has waived any objections to the proceedings below being treated as a reinstatement hearing.

ARGUMENT

I. THE REFEREE'S RECOMMENDATION IS WITHIN THE SCOPE OF THE ORDER APPOINTING HIM.

A referee's findings and recommendations are presumed to be correct, and will not be reversed unless it is showed that there is no basis in law or fact when considering the record as a whole. The Florida Bar v. Merrell G. Vannier, 498 So.2d 896 (Fla. 1986). While "TFB" is correct in stating that this Honorable Court is not bound to accept the referee's recommendation of discipline, they fail to acknowledge that the hearing below was not a true disciplinary proceeding. Trial counsel for the Bar acknowledged this in his closing remarks to the Court. (T.1-136). The Bar never filed a Complaint seeking sanctions against the Respondent, Rules Regulating Florida Bar, Chapter 3-7.3. The order of this Honorable Court commanded the Referee to hold a hearing regarding the Respondent's Petition to Modify or Terminate Suspension. (Appendix Exhibit "D"). This is precisely what the Referee did.

"TFB" cannot now complain that the Referee did not have the authority to recommend automatic reinstatement in that no reinstatement hearing was held on the grounds that the proceedings for same were not formally followed. They never requested a continuance. They never filed a Motion for Clarification of the proceedings to be held. A careful examination of the Petition for Modification or Termination of Suspension will disclose that Respondent was requesting, although inartfully drawn, reinstatement.

II . "TFB" HAS WAIVED ANY OBJECTION TO THE RECOMMENDATIONS OF THE REFEREE THAT THE RESPONDENT BE REINSTATED AT THE TERMINATION OF HIS SUSPENSION OR MODIFIED.

It is axiomatic that a party seeking to reverse a ruling of a proceeding below, must preserve any objections thereto by appropriate means. Hubbard v. State, 411 So.2d 1312, (Fla. 1st DCA 1981)(App.Dism.) 424 So.2d 761 (Fla. 1982). This rule of law is designed to allow the trial court to consider its ruling in light of the objections. Spurlock v. State, 420 So.2d 875 (Fla. 1982).

In the proceedings below "TFB" never gave the Referee the opportunity to rule on any objection they may have to the Referee recommending Respondent's reinstatement on the termination of his suspension as modified. In point of fact, counsel for the Bar implicitly agreed to the Referee's determination that he was considering the hearing held on October 14, 1988 as a reinstatement hearing.

The colloquy held on January 30, 1989, between the Referee and counsel for the Respondent is clear:

Mr. Stark: "Judge, you're considering this as a reinstatement hearing also, and your recommendation, as I understand it, is going to be reinstatement at the termination of the 18 month probation?"

The Court: "That's correct. Any questions by the Bar?"

Mr. Thaler: "No".

Therefore, the Bar cannot now complain that the Referee erred in holding a reinstatement hearing

CONCLUSION

Based upon the foregoing citations, the authority, and record on appeal, this Honorable Court shall accept the recommendations of this Referee.

Respectfully submitted,

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By: 

JAMES M. STARK, ESQ.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that the original and seven copies of the Respondent's Answer Brief was sent to Sid J. White, Clerk of the Supreme Court, Supreme Court Building, Tallahassee, Florida; Warren Jay Stamm, Counsel for The Florida Bar, 211 Rivergate Plaza, 444 Brickell Avenue, Miami, Florida 33131, John T. Berry, Staff Counsel, The Florida Bar, Tallahassee, Florida 32399-2300; and John F. Harkness, Jr., Executive Director, The Florida Bar, Tallahassee, Florida, 32399-2300; on this _____ day of August, 1989.

By: 

JAMES M. STARK, ESQ.
Of Counsel