

IN THE SUPREME COURT OF FLORIDA

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THE FLORIDA BAR,
Complainant,

Supreme Court Case
No. 86,337

v.

ANA HERNANDEZ-YANKS
Respondent.

FILED
SID J. YANKS
AUG 16 1986
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Chief Deputy Clerk

**RESPONDENT, ANA HERNANDEZ-YANKS' ANSWER BRIEF
ON PETITION FOR REVIEW**

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS	I
TABLE OF AUTHORITIES	ii
SYMBOLS AND REFERENCES	iii
STATEMENT OF THE FACTS AND CASE	1
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. THE REFEREE CORRECTLY FOUND THAT PETITIONER HAD PROVEN BY CLEAR AND CONVINCING EVIDENCE THAT SHE IS OF GOOD MORAL CHARACTER	
II. THE REFEREE CORRECTLY CONCLUDED THAT PETITIONER PROVED BY CLEAR AND CONVINCING EVIDENCE THAT SHE IS COMPETENT TO PRACTICE LAW	
III. THE REFEREE DID NOT ERR IN ALLOWING PRESUSPENSION EVIDENCE FOR PURPOSES OF COMPARING PRIOR AND CURRENT CONDUCT	
CONCLUSION	12
CERTIFICATE OF SERVICE	13

TABLE OF AUTHORITIES

	<u>PAGE</u>
<u>Florida Board of Bar Examiners re P. T.R.,</u> 662 So.2d 334 (Fla. 1995)	13
<u>The Florida Bar re Burton,</u> 218 So.2d 748 (Fla. 1969)	13
<u>The Florida Bar re Inglis,</u> 471 So.2d 38 (Fla. 1985)	8
<u>The Florida Bar re Jahn,</u> 559 So.2d 1089 (Fla. 1990)	10, 11
<u>The Florida Bar re Janssen,</u> 643 So.2d 1065 (Fla. 1994)	8
<u>The Florida Bar re Lopez,</u> 545 So.2d 835 (Fla. 1989)	9
<u>The Florida Bar re Rubin,</u> 323 So.2d 257 (Fla. 1975)	12
<u>The Florida Bar re Rue,</u> 663 So.2d 1321 (Fla. 1995).....	10

SYMBOLS AND REFERENCES

For the purpose of this Answer Brief, Respondent/Appellee, Ana Hernandez-Yanks will be referred to as "Petitioner". The Florida Bar will be referred to as "Bar". References to the Report of the Referee will be denoted as RR and page number. References to the transcript of the final hearing will be denoted as T and page number.

STATEMENT OF THE FACTS AND CASE

On April 29, 1993, Petitioner, Ana Hernandez-Yanks, was suspended for a period of one (1) year pursuant to a Consent Judgment. The Report of Referee accepting consent judgment imposed as disciplinary measures (a) one year suspension with proof of rehabilitation (b) payment of costs to the Florida Bar © restitution in Circuit Court Dade County Case No. 88-49277-16 and (d) restitution of any forthcoming Client Security Fund. (R.R.2).

Petitioner is thirty three years old, married and the mother of two children ages seven and six. Petitioner was admitted to the Florida Bar in 1986, and entered the private practice as a sole practitioner. (R.R.1).

In 1987, when Petitioner was 24 years old, she married. The following year she moved her office into the same office space which she shared with her husband who was a licensed mortgage broker. Thereafter, she became involved with some real estate matters involving her husband's mortgage broker business. (R.R. 2). All of the complaints which led to Petitioner's suspension occurred during 1988 and 1989, and involved matters of her husband's business.

In early 1990, Petitioner moved her offices and continued to practice in the area of bankruptcy law until her suspension in April of 1993.

Petitioner was suspended for a period of one (1) year

beginning April 29, 1993. However, since she was unable to pay the costs judgment of the Florida Bar until August 1995, she did not apply for readmission until September 1995 (R.R. 2).

Petitioner has paid restitution to the proper parties in Case No. 88-49277 (16), in the Circuit Court of Dade County, Florida. No claims have been made to the Client Security Fund involving or against Petitioner. (R.R. 3).

In September 1993, Petitioner became employed by the law firm of Dubbin, Berkman, Bloom & Karan ("Dubbin") in Miami, Florida as a paralegal. During her employment with the firm of Dubbin, Petitioner also worked for Lenard H. Gorman, Esquire, who was of counsel to the firm, as a legal secretary. (R.R. 3).

Since October 1994, through the present time, Petitioner has worked as a paralegal/secretary for attorneys Leonard H. Gorman and Andrew M. Parish, who share office space in Coral Gables, Florida. (R.R. 3).

On August 24, 1995, Petitioner filed her Petition for Reinstatement. On September 7, 1995, the Honorable Joseph P. Farina, appointed the Honorable Murray Goldman as referee. On February 28, 1996, a hearing was held on the Petition for Reinstatement.

Petitioner presented the testimony of four practicing attorneys who testified among other things, as to the Petitioner's good moral character, personal integrity and her competency to practice law.

Petitioner testified that she has remorse for her wrongdoing,

that she had learned her lesson, and was sorry for what she had done. She has no ill will feelings towards any of the complainants or The Florida Bar. (T 61-62). She is anxious to practice law again, and has an honest desire to comply with any and all conditions imposed as a condition of reinstatement. (T-161). Petitioner further testified she does not intend to have a trust account. She has agreed not to open a trust account unless notice is first given to the Bar, file quarterly reports with the Florida Bar notifying them that either she does not maintain a trust account or strictly comply with all trust accounting procedures, and provide the Florida Bar with quarterly trust account records. Additionally, Petitioner agreed to attend the Florida Bar sponsored seminar known as Professional Practice and Responsibility Enhancement Program within one year from the date she is readmitted, and provide proof to the Florida Bar that she undertook and attended such course. Finally, Petitioner does not plan or contemplate to practice in the area of real estate law.

The Florida Bar presented the testimony of attorney Holly Moody who testified that she does not believe petitioner has good integrity. (T-117). Her testimony is based solely on her one case with Petitioner in 1988, in the matter that led to the suspension. (T-126). Moody had no knowledge of Petitioner's work or reputation since her suspension.

The Florida Bar also presented the testimony of attorney Jim Coad who testified regarding the legal documents and charges on the real estate closing statement which was the subject of the

suspension. (R.R. 4). The witness testified that he had no personal knowledge of the Petitioner either before or after the suspension.

On March 11, 1996, the referee issued Referee's Report of Findings of Facts and Recommendations, recommending that Petitioner be reinstated with the conditions that Petitioner complete thirty (30) hours of C.L.E. credit in real estate (real property) law and procedure before being permitted to handle any real estate transactions; attend the Florida Bar sponsored seminar referred to as the Professional Practice and Responsibility Enhancement Program within one year of being readmitted; and, for a period of two (2) years provide quarterly reports to the Florida Bar of the status of any trust accounts, and abide by any further conditions imposed by the Bar.

On March 19, 1996, the Order taxing costs against Petitioner was entered, taxing cost in the amount of \$4,148.72 against Petitioner. This amount includes \$1,971.06 in investigative fees.

On May 29, 1996, the Florida Bar filed its Petition for Review.

SUMMARY OF THE ARGUMENT

The Referee correctly concluded and recommended that Petitioner be reinstated as a member in good standing as Petitioner had strictly complied with all the conditions of the order of suspension and proven by clear and convincing evidence that she is of good moral character and competent and fit to resume the practice of law. In the instant case, all of the Referee's findings

are supported by clear and convincing evidence, and the report should therefore be upheld.

Specifically, Petitioner proved by clear and convincing evidence through her witnesses that she is of good moral character, has personal integrity and is competent and fit to practice law. Petitioner presented evidence that she was competent at the time of her suspension and Petitioner testified that she has kept current in the law through her research, reading law weekly and listening to seminars on tape. Petitioner, thus proved that she is competent to practice law.

Finally, the Referee did not err in finding the testimony, as presented by Bar Counsel, of Holly Moody, was not relevant and probative. The Referee admitted the testimony of Holly Moody for the purpose of comparing prior and current conduct, but rejected same as proof that petitioner is not competent to practice law.

The Report of the Referee should be upheld since there is competent evidence to support it, and the Bar cannot meet its burden of proving that the report is erroneous, unlawful or unjustified. Accordingly, the report should be affirmed and Petitioner reinstated to membership in good standing with the conditions imposed by the Referee.

ARGUMENT

I

THE REFEREE CORRECTLY FOUND THAT PETITIONER HAD PROVEN BY CLEAR AND CONVINCING EVIDENCE THAT SHE IS OF GOOD MORAL CHARACTER

The referee found that Petitioner proved by clear and

convincing evidence that she is rehabilitated, has complied with all the conditions imposed by the suspension order, including restitution, has unimpeachable character, is competent to resume the practice of law, has no malice and/or ill feelings toward those involved in the disciplinary proceeding, expressed a sincere sense of repentance and desire to conduct practice in exemplary fashion in the future. (T-158, 160-161). In support of these findings, Petitioner presented the testimony of four practicing attorneys who have dealt with the Petitioner during the past three years. One witness, Attorney Murray Dubbin, has been an attorney for 45 years and a former member of the ethics committee, and is currently the City Attorney for Miami Beach. He testified that Petitioner is of good moral character, has personal integrity, is fit for a position of trust and confidence, and is competent to practice law. (T- 87-89). Lenard Gorman, an attorney for 19 years, and Petitioner's employer also testified that she is of good moral character and personal integrity, is fit for a position of trust and confidence and, is competent to practice law. (T-76-77).

Andrew M. Parish, an attorney for 16 years, and Petitioner's employer also testified that she is of good moral character, has personal integrity, is fit for a position of trust and confidence and, is competent to practice law. (T-93-95).

Petitioner also presented the testimony of Martha Block, Esquire, an attorney for 5 years, who knew Petitioner prior to her suspension, handled cases with Petitioner prior to her suspension, and worked with the Petitioner during her suspension. She

testified that Petitioner was of good moral character, had personal integrity, was fit for a position of trust and confidence and was competent to practice law. (T-145, 146, 147-149).

A Referee's findings of facts enjoys the same presumption of correctness as the judgment of the trier of fact in a civil proceeding and the burden is on the party seeking review to demonstrate that a report of a referee sought to be reviewed is erroneous, unlawful or unjustified. The Florida Bar vs. Inglis, 471 So.2d 38 (Fla. 1985). A Referee's findings of facts carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. The Florida Bar vs. Janssen, 643 So.2d 1065 (Fla. 1994). The referee's report herein is correct, and supported by competent substantial evidence and should be upheld.

The Bar argues that the Referee's report is erroneous, and the testimony of the witnesses that Petitioner is of good moral character should be ignored and disregarded because in a period of three years, Petitioner wrote five (5) checks, on a joint checking account that were returned by the Bank. Petitioner testified that all the checks were subsequently paid. (T-190).

In support of its contention that this evidence is clear and convincing proof that Petitioner does not have good moral character the Bar relies upon the case of The Florida Bar vs. Lopez, 545 So.2d 835 (Fla. 1989). The instant case is factually dissimilar and distinguishable from Lopez, supra. Firstly, the Petitioner in Lopez had been suspended twice and was seeking reinstatement therefrom.

The first suspension involved jury tampering, and the second suspension involved a conviction of 22 felony counts in Federal District Court. Additionally, Lopez withheld material information on his petition for reinstatement, had routinely written dishonored checks, forty-eight (48) in a period of two years, failed to file corporate income tax returns and failed to disclose an arrest for extortion. For all these reasons, this court held that Petitioner had failed to demonstrate his fitness to resume the practice of law. In discussing the bad checks, this court stated that "routinely writing bad checks, even if eventually made good, burdens the recipients and is fundamentally dishonest."

However, in the instant case, Petitioner did not routinely write bad checks, and the largest one was to her employer, the Dubbin law firm in the amount of \$365.51 for health insurance. (T-106). Dubbin testified in favor of Petitioner. This fact alone is not a sufficient basis to ignore and outweigh the overwhelming evidence of Petitioner's good moral character, and reverse the referee's findings.

This Court recently approved a referee's report and granted reinstatement in a case where the Bar opposed it although the court had some trepidation. The Florida Bar v. Rue, 663 So.2d 1321 (Fla. 1995). This Court stated "while the Bar's contention are not entirely without merit, we do not agree that they warrant overturning the referee's findings and further prolonging these proceedings, his actions are nonetheless troubling." Upon review of the record in Rue, supra., this Court found the decision of the

referee supported by competent substantial evidence and upheld it despite some apprehension.

In The Florida Bar vs. Jahn, 559 So.2d 1089 (Fla. 1990) this court stated that finding lack of good moral character is not restricted to acts reflecting moral turpitude, but includes acts of conduct which would cause a reasonable man to have substantial doubts about an individual's honesty, fairness and respect for the rights of others and for the laws of the state and nation. Clearly, the record does not support such a finding of Petitioner's moral character. The Bar has failed to meet its burden to demonstrate that the referee's conclusions and recommendations are erroneous, unlawful and unjustified. This court should uphold the recommendations of the Referee.

II

THE REFEREE CORRECTLY CONCLUDED THAT PETITIONER
PROVED BY CLEAR AND CONVINCING EVIDENCE
THAT SHE IS COMPETENT TO PRACTICE LAW

The Referee correctly concluded that Petitioner had proved by clear and convincing evidence that she is competent to practice law. In support of this condition, Petitioner presented evidence from Martha Block, an attorney who had worked with Petitioner prior to her suspension. (T-145-47, 149). Ms. Block testified that Petitioner was competent to practice law. Ms. Block also testified that she was aware that her boss, then a United States Trustee, now a bankruptcy court judge, thought highly of the Petitioner. (T-151). Additionally, Petitioner's employers, Murray Dubbin, Lenard H. Gorman and Andrew M. Parish, all testified that they thought Petitioner is competent to practice law. There is ample evidence to support the Referee's conclusion that Petitioner is competent to practice law. The Referee's findings on that issue should be accepted by this court as they are supported by competent evidence. In re Jahn, supra.

The Bar contends that Petitioner has not proven that she is competent to practice law because she has not attended any seminars on trust accounting and real estate. Petitioner testified that she does not intend to have a trust account or practice in the area of real estate. (T-161). Additionally, Petitioner has agreed to all the conditions imposed by the Referee, including that she take 30 hours of CLE credit in real estate prior to handling any real

estate matters, submit quarterly reports to the Bar regarding trust accounts, and attend within one year of readmission the Professional Practice and Enhancement Program.

The Bar also contends that the Referee should have been persuaded by Holly Moody's testimony that in her opinion Petitioner is not competent. Ms. Moody admitted that her opinion was based on the former transaction and from what she had heard with regard to another transaction. (T-118). The referee gave her testimony the weight he felt it should be given as the trier of fact.

III.

THE REFEREE DID NOT ERR IN ALLOWING PRESUSPENSION EVIDENCE FOR PURPOSES OF COMPARING PRIOR AND CURRENT CONDUCT

The Bar contends that the Referee erred in not considering evidence of Holly Moody to evaluate the Petitioner's conduct that led to the suspension. This court has repeatedly held that it is proper for the referee to consider a petitioner's past disciplinary record for the purpose of comparing prior and current conduct. The Florida Bar vs. Rubin, 323 So.2d 257 (Fla. 1975). In the instant case, the Referee allowed the evidence in, for the purpose of comparing prior and current conduct. (T-3,4). Therefore, the referee did not commit any error. The fact that the Referee did not find the evidence persuasive and controlling, does not amount to an error.

In the instant case, Petitioner met her burden of establishing good moral character, fitness to practice law and rehabilitation. She has been suspended longer than the original period of

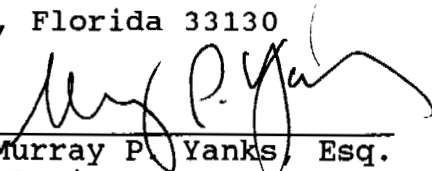
suspension, and has not engaged in any misconduct since the incidents occurred, eight years ago. "While this alone is not dispositive of whether [petitioner] should be readmitted, it is a significant factor for this Court to consider". Florida Board of Bar Examiners re: P.T.R., 662 So.2d 334 (Fla. 1995). The Bar has failed to carry its burden and show the Referee's findings are not supported by the record and that the recommendations are erroneous, unjustified and unlawful.

Finally, as this court noted in The Florida Bar vs. Burton, 218 So.2d 748 (Fla. 1969), it is important that offending members who rehabilitate themselves are given an opportunity to return to their profession. This Petitioner should have that opportunity.

CONCLUSIONS

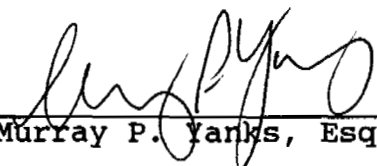
The Referee's Findings of Fact and Recommendations are correct and based on competent evidence, and the Report of the Referee should be accepted by this court. The fact that the Bar does not agree with the decision of the Referee does not render the report and recommendations erroneous, unlawful and unjustified. Since the Bar has failed to carry its burden, the Report and Recommendations should be upheld.

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By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished on this the 1st day of August, 1996 to Elena Evans, Esquire, Bar Counsel, The Florida Bar, 444 Brickell Avenue, Suite 211, Miami, Florida 33131.


Murray P. Yanks, Esquire