

FILED

SID J. WHITE

SEP 9 1998

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

FLORIDA BOARD OF BAR EXAMINERS)

RE: JOSEPH J. HIGGINS)

Case No. 93,712

CONFIDENTIAL

RESPONSE TO PETITION

The Florida Board of Bar Examiners, by and through its undersigned attorney, files this response to the Petition for Review filed on behalf of Higgins.

JURISDICTION

The Board acknowledges that the Court has jurisdiction of this matter pursuant to Article V, Section 15 of the Florida Constitution and Rule 2-30.2 of the Rules of the Supreme Court Relating to Admissions to the Bar (hereinafter referred to as "Rules").

FACTS

Based upon a review of Higgins' petition and attachments thereto, the following facts are discernible:

1. Higgins was disbarred for three years by this Court on December 18, 1986 pursuant to a consent judgment. Exhibit "C" to Petition.

2. Higgins was convicted of a crime on December 11, 1987 in the U.S. District Court of New Jersey. Exhibit "D" to Petition.

3. Higgins was disbarred by consent by order of the Supreme Court of New Jersey on April 26, 1988. Such order "permanently restrained and enjoined [Higgins] from practicing law" in that jurisdiction. Exhibit "F" to Petition.

4. Higgins recently attempted to reapply for admission to The Florida Bar. Exhibit "A" to Petition. Pursuant to Rule 2-13.1 and the Court's holding in *Florida Board of Bar Examiners re R.L.V.H.*, 587 So.2d 462 (Fla. 1991), the Board informed Higgins that he was ineligible to seek readmission in Florida while being permanently disbarred in New Jersey. Exhibit "B" to Petition.

ARGUMENT

Rule 2-13.1 of the Rules provides:

2-13.1 Disbarred or Resigned Pending Disciplinary Proceedings. A person who has been disbarred from the practice of law or has resigned pending disciplinary proceedings shall not be eligible to apply for a period of 5 years from the date of disbarment or 3 years from the date of resignation or such longer period as is set for readmission by the jurisdictional authority. Once eligibility has been established and following completion of the Board's background investigation, such person shall be required to appear for a formal hearing that is open to the public as provided by Rule 3-22.7.

Such rule was adopted by the Court in 1991. *Florida Board of Bar Examiners re Amendment to Rules of the Supreme Court Relating to Admissions to the Bar*, 578 So.2d 704, 707 (Fla. 1991).

Several months after enacting the aforementioned rule, the Court issued its opinion in the case of *Florida Board of Bar Examiners re R.L.V.H.*, 587 So.2d 462 (Fla. 1991). In that case, the Court had before it a bar applicant who had resigned from the Ohio Bar following a recommendation of permanent disbarment by that state's disciplinary board. Because of his resignation, R.L.V.H. was "no longer authorized to practice law and shall never thereafter be readmitted to the practice of law in the State of Ohio." *Id.* at 463.

In *R.L.V.H.*, the Board decided that the applicant was ineligible to seek admission in Florida due to the permanent prohibition against practicing law in Ohio. The Court affirmed the Board's decision reasoning that it "will not allow petitioner to practice law in Florida so long as he is disbarred in the state of Ohio." *Id.*

It is noteworthy that the Court's affirmation of the Board's decision in *R.L.V.H.* was not based upon the above-quoted Rule 2-13.1. Such rule was enacted after the applicant in *R.L.V.H.* had filed his application with the Board. The Court specifically noted that such rule (had it been in effect) "on its face would disqualify petitioner." *Id.* at n.1.

Instead, the Court relied upon its earlier holding in *The Florida Bar re Sanders*, 580 So.2d 594 (Fla. 1991). In that case, a disbarred New York attorney who had only been suspended in Florida sought reinstatement in Florida. The Court was influenced by the fact that Sanders had committed his misconduct in New York. In denying Sanders' request for

reinstatement, the Court held: "We should not allow the practice of law in Florida of one disbarred in his home state." *Id.* at 463.

In his petition before the Court, Higgins argues that the application of Rule 2-13.1 to his case constitutes an ex post facto application of a rule in violation of his right to due process and his contractual rights with the Court. Petition at 3, 5. Higgins' arguments are without merit for two reasons.

First, the Court can properly rule that Higgins is ineligible without any reliance upon Rule 2-13.1 as the Court did in *R.L.V.H.* Secondly, Higgins is essentially arguing that all bar admission rules were frozen in time as of the date of his disbarment back in 1986. Such a position has been expressly rejected by the Court. See *The Florida Bar v. Greenberg*, 534 So.2d 1142 (Fla. 1988), cert. denied, 490 U.S. 1080 (1989); *Florida Board of Bar Examiners re Amendments to Rules of the Supreme Court Relating to Admissions to the Bar*, 626 So.2d 156, 159 (Fla. 1993).

Higgins also argues that the language of Rule 2-13.1 is ambiguous. Petition at 5. Such argument is without merit. As the Court noted under similar facts in *R.L.V.H.*: "As now written, [Rule 2-13.1] on its face would disqualify petitioner." *R.L.V.H.*, *supra* at n.1.

Lastly, Higgins argues that New Jersey should not be able to dictate to Florida the appropriate discipline for Higgins "especially when the Florida Supreme Court found Petitioner eligible to reapply after three years." Petition at 4. This is a persuasive argument in light of a 1994 decision by this Court.

In doing research for the preparation of this response, the undersigned counsel discovered the case of *The Florida Bar re Susser*, 639 So.2d 30 (Fla. 1994). In that case, Susser (a member of the Ohio and Florida Bars) was convicted of criminal offenses in his home state of Ohio. Susser was suspended in Florida by this Court for such offenses.¹ The Ohio Supreme Court subsequently disbarred Susser because of the same criminal offenses.

In the *Susser* case, the Court addressed the issue of whether the *Sanders-R.L.V.H.* doctrine should apply. Specifically, could Susser be reinstated in Florida while still disbarred in his home state of Ohio? The Court responded to such issue in the affirmative with the following reasoning:

The instant case may be distinguished from *Sanders* in that Susser had been subjected to a final disciplinary proceeding in Florida prior to being disbarred in his home state. * * * Because the previous ruling in the case at bar was a final adjudication of discipline regarding the misconduct in question, it would be unfair now to impose discipline to a higher degree based solely on a disbarment by Susser's home state that was premised upon the same conduct. Susser complied fully with the requirements previously imposed by the referee, and the record supports his current recommendation [of reinstatement]. Therefore, we approve the referee's report and hereby reinstate...Susser to the practice of law in Florida.

Susser, *supra* at 31.

On its face, the *Susser* holding is compelling authority that Higgins should be allowed to seek readmission to

¹The Court later reduced the suspension when three of the felony convictions were overturned and one was reduced to a misdemeanor.

The Florida Bar notwithstanding his permanent disbarment in his home state of New Jersey. The Board, however, offers the following items for the Court's consideration in reaching a decision on the pending petition.

First, the facts underlying Higgins' petition are unclear based upon the slim record before the Court. For example, the ruling in the *Susser* case is based upon the fact that this Court considered the same misconduct (criminal convictions) as did the foreign jurisdiction. Yet, such fact is not established in the instant case.

On the contrary, the attachments to the pending petition establish that the Florida disbarment for three years (Exhibit "C" to the Petition) occurred in December 1986 whereas Higgins' criminal conviction did not occur until a year later in December 1987 (Exhibit "D" to the Petition). In that the underlying bar complaints from Florida and New Jersey were not included in the attachments (assuming such complaints were filed against Higgins), it is also impossible to determine if the Florida disbarment of Higgins for three years is based upon the identical misconduct underlying his permanent disbarment in New Jersey.

Furthermore, in the *Susser* case, the individual was seeking reinstatement from a disciplinary suspension imposed by this Court. Higgins, however, is seeking readmission following disbarment in both Florida and his home state of New Jersey. The Board would urge the Court to consider whether it is desirable to extend the ruling in *Susser* to the bar admissions process especially when such ruling is inconsistent

"on its face" with the language of Rule 2-13.1. *R.L.V.H.*,
supra at n.1.

The Board understands that there are two justifications for Rule 2-13.1. First, it prevents attorneys disbarred by their home state from circumventing such discipline by seeking admission in Florida prior to the expiration of such disbarment period.² Thus, Florida does not become a haven for dishonored attorneys seeking a geographical cure for professional misconduct in their home states.

The second justification concerns the integrity of Florida's judicial system. As observed by this Court: "The lawyer is an essential component of the administration of justice." *State ex rel. The Florida Bar v. Evans*, 94 So.2d 730, 733 (Fla. 1957). Furthermore, "[t]he layman must have confidence that he has employed an attorney who will protect his interests." *Florida Board of Bar Examiners re Eimers*, 358 So.2d 7, 9 (Fla. 1978). The Board submits that the public respect and confidence in Florida's judicial system are eroded by having lawyers who can practice in this state while being barred from practicing in other states for unprofessional conduct.

²It is worth noting that Florida does not require disbarred foreign attorneys to be actually readmitted in their home state. Florida recognizes that attorneys may have relocated and, therefore, have no interest in returning to their home state to practice law. Florida does require, however, that such attorneys have completed their disbarment period and be eligible for making application for readmission in their home state.

Yet, Higgins asserts that his ineligibility to reapply for admission to The Florida Bar because of his permanent disbarment in New Jersey "amounts to cruel and unusual punishment for a debt to society that has been paid with all civil rights restored to the wrongdoer." Petition at 5. The Board disagrees.

The Board submits that the issue of punishment is not a consideration when determining the eligibility of bar applicants in Florida. It is clearly reasonable for Florida to have a rule of eligibility that requires disbarred foreign lawyers to be eligible for readmission in their home state before seeking the privilege of practicing law in Florida. Higgins' argument that his permanent disbarment in New Jersey is cruel and unusual punishment is misdirected. If he wishes to assert such argument, then he should assert it before the proper forum: the Supreme Court of New Jersey.

WHEREFORE, the Board requests the entry of an order denying the relief sought herein and dismissing the petition.

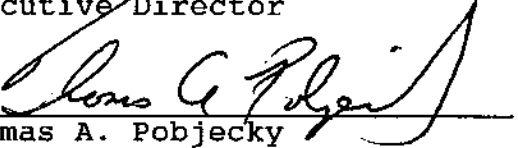
Alternatively, if the Court determines that its ruling in the *Susser* case should be extended to the bar admissions process, then the Board requests that Higgins be required to establish by record evidence that the facts of his case comport with the facts in *Susser*.

DATED this 9th day of September, 1998.

Respectfully submitted,

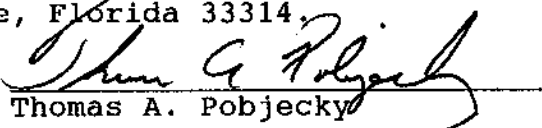
FLORIDA BOARD OF BAR EXAMINERS
RONALD A. AUSTIN, CHAIR

Kathryn E. Ressel
Executive Director

By: 
Thomas A. Pobjecky
General Counsel
Florida Board of Bar Examiners
1891 Eider Court
Tallahassee, FL 32399-1750
(850) 487-1292
Florida Bar #211941

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Petition has been served by U.S. Mail this 9th day of September, 1998 to Howard Messing, Esquire, Nova Southeastern University, Shepard Broad Law Center, 3305 College Avenue, Fort Lauderdale, Florida 33314.


Thomas A. Pobjecky