

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**LAWYER DISCIPLINARY BOARD,
Complainant**

vs.) No. 11-1279

**NORMAN L. FOLWELL, A MEMBER
OF THE WEST VIRGINIA STATE BAR,
Respondent**

FILED

June 7, 2012

released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This reciprocal lawyer disciplinary proceeding against Norman L. Folwell was brought to this Court by the Office of Disciplinary Counsel (hereinafter the “ODC”) on behalf of the Lawyer Disciplinary Board (hereinafter the “Board”). The Board’s Hearing Panel Subcommittee (hereinafter “HPS”) recommended that West Virginia should impose the same punishment upon Mr. Folwell as was imposed upon him by the State of Ohio.¹ This Court, initially, did not agree with the recommended disposition set forth by the HPS. By order entered January 12, 2012, a briefing schedule was set for the parties, and the matter was placed on the docket for oral argument. Mr. Folwell failed to file a brief in this matter; however, he did appear in person and was permitted to argue orally before this Court. Based on the Board’s brief, the parties’ arguments to this Court, and the pertinent authorities,² we now adopt the recommendations as set forth by the HPS. This case presents no new or significant questions of law; therefore, it will be disposed of through a memorandum decision as contemplated under Rule 21 of the Revised Rules of Appellate Procedure.

¹The Supreme Court of Ohio imposed a “suspension from the practice of law for a period of two years with the second year stayed on conditions.” The conditions were (1) upon reinstatement, Mr. Folwell must complete one year of probation, monitored by an attorney, appointed by relator, who is experienced in law office management and (2) commit no further misconduct.

²No record was designated for our consideration. Mr. Folwell participated in the disciplinary proceedings in the State of Ohio, but did not appear before the HPS in the West Virginia matter.

The only issue before this Court is the appropriate sanctions to impose upon Mr. Folwell's West Virginia law license for his misconduct in the practice of law in Ohio. Factually, there are no disputes. On July 20, 2011, the ODC received a letter from the Supreme Court of Ohio, along with a copy of the Ohio Supreme Court's order suspending Norman L. Folwell's license to practice law in Ohio.³ On September 15, 2011, the ODC sent Mr. Folwell a Notice of Reciprocal Disciplinary Action Pursuant to Rule 3.20 of the Rules of Lawyer Disciplinary Procedure, advising him that the ODC would request the HPS to impose the same sanctions as he had received in the State of Ohio. Further, the notice to Mr. Folwell stated that, if Mr. Folwell intended to challenge the validity of the Ohio suspension, he must request a formal hearing from the ODC and provide a copy of the record of the Ohio disciplinary proceedings within thirty days. Mr. Folwell failed to respond, either verbally or in writing.

On November 7, 2011, the ODC moved that the HPS take action in this matter without conducting a formal hearing⁴ and further requested that the HPS recommend to this Court that Mr. Folwell receive the same discipline in West Virginia as he had received in the State of Ohio. The HPS, on December 2, 2011, filed its report with this Court, asking that we impose the same sanction as the State of Ohio: suspend Mr. Folwell's license to practice law in West Virginia for a period of two years with the second year stayed provided that Mr. Folwell complies with certain conditions.⁵

As explained in the brief filed by the Board, Mr. Folwell was found guilty in Ohio of transgressions in his legal practice in seven different clients' cases, all of which resulted in the determination that he had violated multiple rules of professional conduct.⁶ The Ohio

³Although he was required to do so under Rule 3.20(b) of the West Virginia Rules of Lawyer Disciplinary Procedure, Mr. Folwell had failed to advise the ODC of his Ohio suspension within ten days. *See* note 10, *infra*.

⁴*See* note 10, *infra*.

⁵*See* note 1, *supra*.

⁶In Ohio, Mr. Folwell stipulated to the factual assertions. The parties agreed in Ohio that mitigating factors were present that included Mr. Folwell's cooperation with the disciplinary proceedings and an absence of a prior disciplinary record. Conversely, aggravating factors also were agreed upon that included a pattern of misconduct and multiple offenses. The additional aggravating factor of dishonest or selfish motive was found independently by the Ohio board, and was not stipulated to by the parties.

Supreme Court's order constitutes a final adjudication of misconduct forming grounds for discipline of a lawyer within the meaning of Rule 3.20(a) of the West Virginia Rules.⁷

Although the Board makes recommendations to this Court regarding sanctions to be imposed upon an attorney for ethical violations, we have held that “[t]his Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys’ licenses to practice law.’ Syllabus point 3, *Committee on Legal Ethics of the West Virginia State Bar v. Blair*, 174 W. Va. 494, 327 S.E.2d 671 (1984).” Syl. pt. 1, *Lawyer Disciplinary Bd. v. Scott*, 213 W. Va. 209, 579 S.E.2d 550 (2003). In this case, the facts were ascertained in the State of Ohio and are not in question before this Court. Moreover, no record was made in this State before the Board. Thus, we apply a *de novo* standard of review to the legal questions and the application of such to the facts. See Syl. pt. 3, in part, *Committee on Legal Ethics v. McCorkle*, 192 W. Va. 286, 452 S.E.2d 377 (1994) (“A *de novo* standard applies to a review of the adjudicatory record made before the [Lawyer Disciplinary Board] as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions; this Court gives respectful consideration to the [Board’s] recommendations while ultimately exercising its own independent judgment. . . .”).

On appeal to this Court, the Board notes that, under Rule 3.20(e) of the West Virginia Rules of Lawyer Disciplinary Procedure, the HPS “shall” refer reciprocal disciplinary matters to this Court with the recommendation that the same sanction be imposed as was imposed by the foreign jurisdiction unless the HPS determines that one of four exceptions⁸ set out in

⁷See note 10, *infra*. See also Syl. pt. 2, *Committee on Legal Ethics v. Battistelli*, 185 W. Va. 109, 405 S.E.2d 242 (1991) (“Article VI, Section 28-A(a) of the By-Laws of the West Virginia State Bar provides that a final adjudication of professional misconduct in another jurisdiction conclusively establishes the fact of such misconduct for purposes of reciprocal disciplinary proceedings here.”).

⁸See Syl. pt. 5, *Battistelli*, 185 W. Va. 109, 405 S.E.2d 242 (“Article VI, Section 28-A(e) of the By-Laws of the West Virginia State Bar requires imposition of the identical sanction imposed by a foreign jurisdiction in the absence of one of the enumerated exceptions contained in subsections (1) through (4). If the Committee believes one of these exceptions is applicable, it must make appropriate findings.”). The enumerated exceptions are listed as “(1) the procedure followed in the other jurisdiction violated due process; (2) there was a total infirmity of proof of misconduct; (3) imposition of the same discipline would result in a grave injustice; or (4) the misconduct warrants a substantially different type of discipline.” Syl. pt. 4, in part, *Battistelli*, *id.*

Rule 3.20(e) of the West Virginia Rules of Lawyer Disciplinary Procedure applies.⁹ In Mr. Folwell's case, the HPS recommended that this Court impose the same sanction as the State of Ohio had levied against Mr. Folwell. As previously explained, Mr. Folwell did not file a written brief; however, during oral argument before this Court, Mr. Folwell contended that this Court should impose the same sanction against his West Virginia law license as was imposed against his Ohio license to practice law.

The Board argues that, even though Mr. Folwell failed to participate in the West Virginia disciplinary proceedings and neglected to report his Ohio suspension to the ODC, the recommended sanction remains consistent with the sanction imposed in several West Virginia cases. *See, e.g., Lawyer Disciplinary Bd. v. Grafton*, 227 W. Va. 579, 712 S.E.2d 488 (2011) (attorney's law license suspended for two years upon determination that attorney failed to file appeal for client and deceived client for more than a year beyond appeal deadline). *Accord Lawyer Disciplinary Bd. v. Morgan*, 228 W. Va. 114, 717 S.E.2d 898 (2011) (per curiam); *Lawyer Disciplinary Bd. v. Simmons*, 219 W. Va. 223, 632 S.E.2d 909 (2006) (per curiam). While these cases are instructive in considering the sanction to be imposed upon Mr. Folwell for his misconduct, we first must review this Court's authority in reciprocal actions.

Reciprocal disciplinary proceedings are governed by Rule 3.20 of the West Virginia Rules of Lawyer Disciplinary Procedure.¹⁰ This provision previously has been

⁹For the text of subsection (e) of Rule 3.20 of the West Virginia Rules of Lawyer Disciplinary Procedure, see note 10, *infra*.

¹⁰Rule 3.20 of the West Virginia Rules of Lawyer Disciplinary Procedure provides:

(a) A final adjudication in another jurisdiction, whether state or federal, of misconduct constituting grounds for discipline of a lawyer or a voluntary surrender of a license to practice in connection with a disciplinary proceeding shall, for the purposes of proceedings pursuant to these rules conclusively establish such conduct. Accordingly, a Hearing Panel Subcommittee may take action without conducting a formal hearing.

(b) Any lawyer who is a member, active or inactive, of The West Virginia State Bar against whom any form of public discipline has been imposed by the authorities of another jurisdiction, whether state or federal, or who voluntarily surrenders his or her license to practice law in connection with disciplinary proceedings in another jurisdiction, whether state or federal, shall notify the Office of Disciplinary Counsel of such action in writing within ten

considered by this Court. In *Committee on Legal Ethics v. Battistelli*, 185 W. Va. 109, 405 S.E.2d 242 (1991),¹¹ reciprocal discipline was imposed on an attorney who had been fined by the federal Court of Appeals for misrepresenting the facts before that court. To this Court,

days thereof. Failure to notify the Office of Disciplinary Counsel shall constitute an aggravating factor in any subsequent disciplinary proceeding.

(c) Upon receiving notice that a lawyer who is a member, active or inactive, has been publicly disciplined or has voluntarily surrendered his or her license to practice law in another jurisdiction, whether state or federal, Disciplinary Counsel shall, following an investigation pursuant to these rules, refer the matter to a Hearing Panel Subcommittee for appropriate action.

(d) If the lawyer intends to challenge the validity of the disciplinary order entered in the foreign jurisdiction with a disciplinary proceeding, the lawyer must request a formal hearing and file with the Office of Disciplinary Counsel a full copy of the record of the disciplinary proceedings which resulted to imposition of the disciplinary order or the voluntary surrender of a license to practice law.

(e) At the conclusion of proceedings brought under this section, the Hearing Panel Subcommittee shall refer the matter to the Supreme Court of Appeals with the recommendation that the same discipline be imposed as was imposed by the foreign jurisdiction unless it is determined by the Hearing Panel Subcommittee that (1) the procedure followed in the foreign jurisdiction did not comport with the requirements of due process of law; (2) the proof upon which the foreign jurisdiction based its determination of misconduct is so infirm that the Supreme Court of Appeals cannot, consistent with its duty, accept as final the determination of the foreign jurisdiction; (3) the imposition by the Supreme Court of Appeals of the same discipline imposed in the foreign jurisdiction would result in grave injustice; or (4) the misconduct proved warrants that a substantially different type of discipline be imposed by the Supreme Court of Appeals.

¹¹For additional cases interpreting Rule 3.20 of the West Virginia Rules of Lawyer Disciplinary Procedure, see *Lawyer Disciplinary Board v. Calhoun*, 221 W. Va. 571, 655 S.E.2d 787 (2007) (per curiam), and *Lawyer Disciplinary Board v. Wasser*, 226 W. Va. 348, 700 S.E.2d 800 (2010) (per curiam), both of which imposed the same sanction as the foreign jurisdiction after determining that none of the four factors existed for imposing a different discipline.

the HPS recommended that the attorney be assessed the same fine as had been imposed by the Court of Appeals. Additionally, the HPS requested that a public reprimand be issued, and that the attorney be held responsible for paying the costs of the disciplinary proceedings. This Court found that the HPS did not make findings that the four factors in subsection (e) of Rule 3.20 of the West Virginia Rules of Lawyer Disciplinary Procedure were applicable; thus, this Court declined to increase the penalty that had been imposed by the foreign jurisdiction. The attorney received the same punishment as he had received by the Court of Appeals, and the HPS's request for additional punishment was denied.

Thereafter, in *Lawyer Disciplinary Board v. Post*, 219 W. Va. 82, 631 S.E.2d 921 (2006), this Court recognized the disbarment of Mr. Post in the State of Colorado, based on his misconduct involving nineteen different clients. This Court annulled Mr. Post's license to practice law in the State of West Virginia and imposed upon him the costs of this State's lawyer disciplinary proceedings. Even though Mr. Post objected to the reciprocal disciplinary proceedings in West Virginia based on due process grounds, he did not request a formal hearing before the HPS, nor did he file a copy of the record of the proceedings from the State of Colorado. Thus, this Court's review was necessarily limited to only those documents presented to the HPS. In *Post*, we held that "[t]he provisions of Rule 3.20 of the West Virginia Rules of Lawyer Disciplinary Procedure require the imposition of the identical sanction imposed by the foreign jurisdiction unless one of the four grounds provided for challenging the discipline imposed by a foreign jurisdiction is both asserted and established." Syl. pt. 4, *id.* Because Mr. Post failed to establish any of the four grounds, this Court found that it was "required . . . to impose the same sanction instituted against him by the foreign court." *Post*, 219 W. Va. at 87, 631 S.E.2d at 926. Thus, this Court annulled Mr. Post's law license in the State of West Virginia and, additionally, accepted the HPS's recommendation to impose upon Mr. Post the costs of the West Virginia disciplinary proceedings.

Applying these legal principles to the presently-pending case, there was no assertion by Mr. Folwell or the HPS that any of the four exceptions applied or that a different discipline should be imposed. Because of the lack of a hearing and substantive review, the HPS made no findings regarding the application of the four exceptions to imposing the same sanction. Therefore, the HPS recommended that Mr. Folwell receive the same punishment as he had received by the foreign jurisdiction. This Court's review is limited to the meager documents that were submitted to the HPS. Further, the lack of a record prevents an independent review and this Court is unable, in this case, to make its own determination regarding the presence of any of the four exceptions to imposing the same sanction as a foreign jurisdiction in a reciprocal disciplinary proceeding. Thus, we adopt the recommendations of the HPS and impose the same punishment as the State of Ohio.

Mr. Folwell is suspended from the practice of law in the State of West Virginia for a period of two years, with the second year stayed as long as certain conditions are met. As a condition of staying the second year of suspension, Mr. Folwell must complete one year of supervised practice, monitored by an attorney appointed by the ODC, who is experienced in law office management. Additionally, Mr. Folwell must not commit any further misconduct. If Mr. Folwell fails to comply with either of these conditions, the stay will be lifted, and the full two-year suspension will be served.

Recommendations Adopted.

ISSUED: June 7, 2012

CONCURRED IN BY:

**Chief Justice Menis Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh**