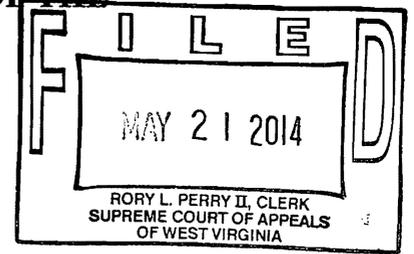


**BEFORE THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA**



LAWYER DISCIPLINARY BOARD,

Complainant,

v.

No. 13-0180

STEPHEN L. HALL,

Respondent.

BRIEF OF THE LAWYER DISCIPLINARY BOARD

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I. STATEMENT OF THE CASE

A. Procedural History

This is a disciplinary proceeding against Respondent Stephen L. Hall (hereinafter “Respondent”), arising as the result of a Statement of Charges issued against him and filed with the Supreme Court of Appeals of West Virginia on or about February 26, 2013.¹ Respondent was served with the Statement of Charges on February 27, 2013, and filed a timely response thereto on or about March 25, 2013.

On September 26, 2013, this matter proceeded to hearing held at the Office of Lawyer Disciplinary Counsel in Charleston, West Virginia. The Hearing Panel Subcommittee (hereinafter “HPS”) was comprised of Debra A. Kilgore, Esquire, Chairperson, Sean D. Francisco, Esquire, and Dr. K. Edward Grose, layperson. Renée N. Frymyer, Lawyer Disciplinary Counsel, appeared on behalf of the Office of Lawyer Disciplinary Counsel. Respondent appeared *pro se*. The HPS heard testimony from the Honorable Phyllis H. Carter, Paul Sheridan, Esquire, and Respondent. In addition, ODC Exhibits 1-15 and Respondent’s Exhibits 1-11 were admitted into evidence.

On or about March 13, 2014, the HPS issued its decision in this matter and, on or about March 26, 2014, the Report and Recommendation of the HPS (hereinafter “Report”) was filed with the Supreme Court of Appeals, with the finding that clear and convincing

¹The Investigative Panel of the Lawyer Disciplinary Board issued a written admonishment with respect to this underlying ethics complaint on December 14, 2012. By letter dated December 28, 2012, Respondent objected to the issuance of the admonishment pursuant to Rule 2.9(c) of the Rules of Lawyer Disciplinary Procedure. Thus, also pursuant to the Rule 2.9(c), the formal Statement of Charges followed.

evidence had established that Respondent violated Rule 8.2(a) and 8.4(d) of the West Virginia Rules of Professional Conduct.² On or about April 15, 2014, Respondent filed an “Objection made pursuant to Rule 3.11 of the Rules of Lawyer Disciplinary Procedure.” By Order entered April 17, 2014, this Honorable Court ordered the parties to submit written briefs of their positions and set the same for oral argument on the Rule 19 argument docket.

B. Factual Findings

1. Respondent is a lawyer practicing in and around Huntington, West Virginia. Respondent was admitted to The West Virginia State Bar on November 20, 1996. (Statement of Charges, ¶ 1; Answer to Statement of Charges, ¶ 1.) As such, Respondent is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board.
2. Tyleemah Edwards and Harry Walker Robinson each filed separate complaints of discrimination with the West Virginia Human Rights Commission (hereinafter “WVHRC”) against the Charleston Academy of Beauty Culture, Inc. (hereinafter “CABC”), Judy Hall and Cherie Bishop. (Tr. p. 19.)

² Rule 8.2. Judicial and legal officials.

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth of falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

(d) engage in conduct that is prejudicial to the administration of justice.

3. Respondent represented CABC, Judy Hall, and Cherie Bishop in the proceedings before the WVHRC.
4. Ms. Edwards and Mr. Robinson were former students of CABC. They alleged race discrimination, racially hostile environment, and segregation. Ms. Edwards also alleged reprisal and retaliation after complaining about race discrimination. Both Ms. Edwards and Mr. Robinson are African-American. (Respondent Exhibit 12.)
5. The two cases were consolidated for hearing before the WVHRC.
6. The Honorable Phyllis H. Carter (hereinafter "ALJ Carter") was serving as Acting Executive Director of the WVHRC and Chief Administrative Law Judge at the time of this disciplinary hearing before the HPS. During the proceedings at issue before the WVHRC she served as Chief Administrative Law Judge. (Tr. pp. 14-19.)
7. Ms. Edwards' and Mr. Robinson's consolidated case was initially assigned by ALJ Carter as Chief Administrative Law Judge to ALJ Elizabeth Blair. ALJ Blair later left the WVHRC and ALJ Carter decided she would take this case. (Tr. pp. 18-19.)
8. A public hearing was held upon the Edwards and Robinson complaints before ALJ Carter over the course of three plus days, starting on April 23 and ending at 4:00 a.m. April 26, 2007. (ODC Exhibit 14.)
9. ALJ Carter wrote the Final Decision, dated May 29, 2009, finding by a preponderance of the evidence that CABC, Judy Hall and Cherie Bishop had illegally discriminated against the Complainants. (Respondent Exhibit 4.)

10. ALJ Carter's decision is 109 pages with citation to the exhibits and transcript of the hearing to support the findings of fact, findings upon credibility of witnesses, and the application of law to the facts. (Respondent Exhibit 4; Tr. pp. 37-39.)
11. ALJ Carter is African-American. (Tr. p. 43.)
12. On June 29, 2009, Respondent filed a Petition of Appeal with the WVHRC on behalf of his clients, CABC, Judy Hall, and Cherie Bishop. (ODC Exhibit 2.)
13. The Petition of Appeal filed by Respondent contained the following statements:
 - a. Phyllis H. Carter failed to execute her duties as ALJ for the HRC in a fair and (sic) impartial manner by, and in direct conflict with the Code of Judicial Conduct, exhibiting clear bias and having personal knowledge of the matters appearing before her; refusing to disclose the same; and ruling against that which she personally knew to be false. (ODC Exhibit 2, Bates 4-6, numbered paragraph 6.)
 - b. The ALJ based her Decision upon a large number of misstated and judicially fabricated facts, as well as misrepresenting and lying about the history of the case and the issues involved in the case, in direct violation of the case law precedent of the Supreme Court of Appeals of the State of West Virginia. (Id., Bates 7, numbered paragraph 19.)
 - c. On May 29th, 2009, Phyllis H. Carter, the ALJ in the present cases, did unlawfully purport to exercise the function of a public official, employee and tribunal without legal authority to do so and with the intent to induce the Respondents to submit to the fraudulent authority of Phyllis H. Carter . . . Phyllis H. Carter impersonated a public official, a clear criminal violation of W.Va. Code §61-5-27a(e). Phyllis H. Carter criminally violated the law when she caused to be filed, recorded and delivered said fraudulent Decision. (Id., Bates 10, lines 3-6 and lines 13-14.)

d. The glaring fact that this presents is not merely that Phyllis Carter, (sic) flaunted her disdain for ethical obligations, but that knowing the allegations to be false, openly displayed her bias by deciding against the Respondents personally knowing the allegations to be fraudulent. It is apparent from the context of these proceedings that the explanation for Phyllis H. Carter's unethical behavior can only be that the individual Respondents are white, while Ms. Carter is black. Counsel can think of no other explanation but that Phyllis H. Carter is engaging in the most heinous of racial bigotry against the Respondents. (Id., Bates 46, first and second full paragraphs.)

e. The ALJ's Decision explicitly relied on this fraudulent incident in finding for the Complainants knowing the incident to be fraudulent. The ALJ refused to follow the Rules of Procedure even-handedly, but showed favoritism towards the AG's Office even knowing that the testimony supporting new allegations was fraudulent, and that the AG's Office had participated in perpetrating the fraud. (Id., Bates 54.)

f. In the Decision, the ALJ lied and stated that counsel for Respondent would not accept service of process. (Id., Bates 57.)

g. In an outlandish display of tyrannical inclination, ALJ Carter found that Respondents discriminated because they were unable to force other companies and trade groups to provide instruction and product knowledge at the Respondents' school . . . ALJ Carter basing her Decision upon the absence of such an outlandish forced coercion, as she obviously did, indicates not only that ALJ Carter is deluded into thinking that this is a Communist country where companies are forced to perform services for others, but is under the deluded impression that Respondents have the power and authority to compel others to do its bidding. For the foregoing reasons, Respondents recommend that ALJ Carter seek professional psychiatric help, or be required to attend a forced reeducation camp . . . oops . . . wrong country. (Id., Bates 80.)

h. The ALJ refers to the child as 'the only non-white party goer.' The child was allegedly, according to Complainant Edwards, mixed. That the ALJ ascribes racist motives to

Respondent Bishop and pointedly denies the child's white heritage speaks more of the ALJ's racism than Respondents. (sic) (Id., Bates 87, lines 4-7.)

i. ALJ Carter relies on her absolute unquestionable power as sole determinant of who is to be given the halo of credibility. Apparently this practice is routine for the HRC, the AG's Office and ALJ Carter as the ubiquitous appearance of the word credible, or variations thereof, attests. (Id., Bates 91, lines 15-18.)

j. These are plainly stupid reasons for the ALJ to ignore Ms. Davis' testimony, and more reflection upon Phyllis Carter's bias. (Id., Bates 103, lines 1-3.)

k. Corroboration is only important to ALJ Carter if it favors her predetermined outcome of the case. (Id., Bates 105, lines 3-4.)

l. Former Chief ALJ Carter states numerous lies and falsehoods in her Decision, which, while not by themselves constituting a legal error, demonstrate the pervasiveness of the ALJ's bias, disdain for the facts and lack of judicial temperament. (Id., Bates 112, lines 14-16.)

m. This appeal could go on and on concerning the seemingly perpetual lies and misrepresentations by ALJ Carter about the actual evidence in the present cases. (Id., Bates 118, lines 14-15.)

14. ALJ Carter testified she obtained her law degree from the College of William and Mary School of Law in 1975 and has been a member of the West Virginia State Bar since 1988. In addition, ALJ Carter has an Administrative Law Certificate and regularly teaches courses for administrative law judges at the National Judicial College in Reno, Nevada. These courses include courses on fair hearings, and bias and prejudice in the courtroom. (Tr. pp. 15-16.)

15. As an Administrative Law Judge, ALJ Carter has authored approximately thirty final decisions, with only one being partially reversed by the Supreme Court of Appeals. (Tr. pp. 26-27.) ALJ Carter generally receives and reviews proposed findings of fact, conclusions of law, and briefs from the parties, and reviews all of the evidence and transcript to prepare a decision. She refers to transcript pages as much as possible to support her findings. (Tr. pp. 25-26, 37-38.)
16. ALJ Carter has written decisions favoring complainants as well as respondents. (Tr. p. 28.)
17. According to ALJ Carter, the underlying case involving Respondent did not contain any novel or unusual legal issues. (Tr. p. 27.)
18. ALJ Carter testified she did not lie about, make up, or misrepresent the facts in her decision as can be seen from her reference to the transcript pages in the decision. (Tr. pp. 37-39.)
19. ALJ Carter further testified she did not have a pre-determined outcome; that she had no personal knowledge of the facts of the case; that her decision was fair; that Respondent's clients were not treated differently than anyone else; that she did not misstate the law; that she did not personally know any allegations contained in the complaints to be fraudulent; and that she is not a racial bigot, a communist, or in need of psychiatric help. (Tr. pp. 28, 39, 44, 46, 122, and 137-138.)

20. ALJ Carter found the aforementioned statements attributed to Respondent to be offensive personally and professionally, wrong, and amounted to personal attacks. (Tr. pp. 44-45.)
21. Paul Sheridan testified he has been a member of the West Virginia State Bar since 1984 and was an Assistant Attorney General in the Civil Rights Division from 1990 to 2013. (Tr. pp. 148-149.)
22. Mr. Sheridan represented the WVHRC in the underlying matter wherein Respondent's clients were adverse parties. (Tr. p.150.)
23. According to Mr. Sheridan, ALJ Carter's Final Decision did not contain any lies or fabrications, was correct, and had evidentiary basis in the record. (Tr. pp. 158-159, 167-168.)
24. Mr. Sheridan has known ALJ Carter professionally for many years and has found her to be a fair judge, even when making rulings adverse to him. (Tr. p. 160.)
25. Respondent is the financial aid officer for the CABC and does not regularly practice law. (Tr. pp. 184-185.)
26. The CABC is owned and operated by Respondent's mother, Judy Hall, whom he represented in the underlying matter. (Tr. p. 189.)
27. The underlying matter was the first and only experience Respondent had before the WVHRC and ALJ Carter. (Tr. p. 353.)
28. Respondent believed every statement he made in his Petition of Appeal to be true. (Tr. pp. 192, 249.)

29. Respondent agreed the language he used was harsh. (Tr. pp. 200, 247, 249, 257.) He also stated that he may have been “over the top in some of [his] rhetoric,” specifically when he wrote that some of ALJ Carter’s reasoning was “plainly stupid.” (Tr. pp. 248- 249.)
30. Respondent said ALJ Carter was not impartial in the underlying matter involving Respondent’s clients because of her race. (Tr. pp. 217-218.)
31. Respondent claimed ALJ Carter was racist and biased. He based that belief solely upon ALJ Carter’s rulings in the underlying matter. He conducted no other investigation or any other additional research to support this conclusion. (Tr. pp. 220-222.)
32. Respondent “was not happy with almost any of (ALJ Carter’s) rulings without a question.” (Tr. p. 243.)
33. Respondent believed his statements had an objectively reasonable factual basis; that the arguments he made in his Petition of Appeal were not unprofessional or a personal attack upon ALJ Carter; and that the statements were not false, but were all good faith arguments to advance in favor of an appeal. (Tr. pp. 248, 258.)
34. Respondent testified that hyperbole is appropriate in pleadings when trying to make a point; that he hoped calling a judicial official a racist or saying the officer based her opinion on plainly stupid reasons would be inflammatory, but nevertheless was appropriate to “express a sense of outrage;” and that calling into question ALJ

Carter's psychiatric well-being was a valid argument under the circumstances. (Tr. pp. 213-214, 238-240, 258.)

35. After the WVHRC affirmed ALJ Carter's Final Decision, and incorporated by reference the factual findings and conclusions of law set forth by ALJ Carter into a Final Order of the agency, Respondent filed an administrative appeal with the Circuit Court of Kanawha County on October 8, 2009. This administrative appeal prepared by Respondent also contained the statements set forth above. (ODC Exhibit 9, Bates 165-299.)
36. On August 8, 2011, the Honorable Judge Charles K. King, Jr., entered an "Opinion and Order Affirming the Final Administrative Order of the West Virginia Human Rights Commission," and on May 25, 2012, the Supreme Court of Appeals affirmed the Circuit Court Order. (ODC Exhibit 9, Bates 300-327; ODC Exhibit 10.)
37. Based on Respondent's statements in his Petition of Appeal to the WVHRC and to the Circuit Court of Kanawha County, as set forth above, ODC charged Respondent with violating Rules 8.2(a), and 8.4(c) and (d) of the Rules of Professional Conduct.

C. Conclusions of the Hearing Panel Subcommittee

The HPS found that the Office of Lawyer Disciplinary Counsel had proven by clear and convincing evidence that Respondent had made statements with reckless disregard as to truth or falsity concerning the integrity of a judicial officer in violation of Rule 8.2(a) of the Rules of Professional Conduct, and had engaged in conduct that is prejudicial to the administration of justice in violation of Rule 8.4(d) of the Rules of Professional Conduct.

The HPS was not convinced, however, that the statements made by Respondent rose to the level of fraud, dishonesty, deceit or misrepresentation and, therefore, recommended the dismissal of the charged violation of Rule 8.4(c) of the Rules of Professional Conduct. The HPS recommended that the Supreme Court of Appeals suspend Respondent's law license for a period of three (3) months; that Respondent be ordered to complete an additional three (3) hours of Continuing Legal Education during the 2014-2016 reporting period, specifically in ethics, over and above that already required; and that Respondent be ordered to reimburse the Lawyer Disciplinary Board the costs of the proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

II. SUMMARY OF ARGUMENT

Respondent clearly cannot meet his burden to show that the findings of fact are not supported by the reliable, probative, and substantial evidence on the record in this matter. Indeed, the evidence in the record fully supports the HPS's findings of fact and, as such, the factual findings are to be given substantial deference by this Honorable Court. The HPS also appropriately concluded that Rule 8.2(a) of the Rules of Professional Conduct applies to an Administrative Law Judge, in this case the Honorable Phyllis H. Carter, that Rule 8.2(a) applies to pleadings filed by lawyers as well as statements made publicly by lawyers, and that the Free Speech Clause of the First Amendment does not protect speech if it consists of knowingly false statements or false statements made with a reckless disregard of the truth.

After applying the proper standard of whether there is an objective, reasonable factual basis for the statements made by Respondent, the HPS applied the facts to the law and

correctly determined that the Office of Lawyer Disciplinary Counsel proved by clear and convincing evidence that Respondent had violated Rule 8.2(a) (regarding making statements about a judge with a reckless disregard for the truth) and Rule 8.4(d) (regarding engaging in conduct prejudicial to the administration of justice) of the Rules of Professional Conduct when he made numerous false and unsupported accusations attacking the integrity and qualifications of ALJ Carter that had no objectively reasonable basis. Because of his conduct, Respondent must receive a strong sanction in order to effectuate the goals of the disciplinary process. The sanctions recommended by the HPS are appropriate in this case.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 19 of the Revised Rules of Appellate Procedure, this Honorable Court's April 17, 2014 Order set this matter for oral argument on September 2, 2014.

IV. ARGUMENT

A. Standard of Proof.

The charges against an attorney must be proven by clear and convincing evidence pursuant to Rule 3.7 of the Rules of Lawyer Disciplinary Procedure. See, Syl. Pt. 1, Lawyer Disciplinary Board v. McGraw, 194 W. Va. 788, 461 S.E.2d 850 (1995). In addition, in lawyer disciplinary matters, a *de novo* standard of review applies to questions of law, questions of application of the law to the facts, and questions of appropriate sanction to be imposed. Committee on Legal Ethics v. McCorkle, 192 W. Va. 286, 452 S.E.2d 377 (1994). The Supreme Court gives respectful consideration to the Lawyer Disciplinary Board's recommendations as to questions of law and the appropriate sanction, while ultimately

exercising its own independent judgment. Id., at 290, 381. Substantial deference is to be given to the Lawyer Disciplinary Board's findings of fact unless the findings are not supported by reliable, probative, and substantial evidence on the whole record. Id.; Lawyer Disciplinary Board v. Cunningham, 195 W. Va. 27, 464 S.E.2d 181 (1995).

At the Supreme Court level, “[t]he burden is on the attorney at law to show that the factual findings are not supported by reliable, probative, and substantial evidence on the whole adjudicatory record made before the Board.” McCorkle, 192 W. Va. at 290, 452 S.E.2d at 381. The Supreme Court is the final arbiter of formal legal ethics charges and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law. Syl. Pt. 3, Committee on Legal Ethics v. Blair, 174 W.Va. 494, 327 S.E.2d 671 (1984); Syl. Pt. 7, Committee on Legal Ethics v. Karl, 192 W.Va. 23, 449 S.E.2d 277 (1994).

B. The evidence fully supports the findings of fact made by the Hearing Panel Subcommittee.

The Findings of Fact contained in the Report of the HPS, and set forth *supra*, were well documented in the record and supported by the evidence that was presented at the disciplinary hearing in this matter. Each factual finding of the HPS makes clear reference to the exhibit and/or portion of the transcript of the hearing that supported such - evidence in the record that was largely undisputed by Respondent. At the disciplinary hearing, Respondent did not present any facts, documentation, independent research, case law, or rules which supported his position that the statements he made regarding ALJ Carter - assertions that ALJ Carter falsified evidence, that her Final Decision contained “lies” and

“stupid” reasoning, and accusations that ALJ Carter violated criminal laws and was a racist - had any factual basis. Instead, Respondent simply referenced his personal opinion as supporting evidence. (Tr. pp. 226, 233.) As a result, the HPS correctly found that Respondent’s assertions were not supported by the evidence. Respondent is in no way able to demonstrate that the factual findings are not supported by reliable, probative, and substantial evidence on the whole adjudicatory record and, therefore, the factual findings of the HPS should be given substantial deference by this Honorable Court.

C. The Hearing Panel Subcommittee made the appropriate conclusions of law.

The HPS properly determined that there can be no question as to whether ALJ Carter was an “adjudicatory officer” as contemplated by Rule 8.2(a) of the Rules of Professional Conduct. The HPS stated that Administrative Law Judges are authorized by statute in proceedings pursuant to the West Virginia Human Rights Act to conduct hearings, to determine questions of law and fact, and to render a final decision. See, W.Va. Code §5-11-8(d)(3). Thus, since Administrative Law Judges adjudicate cases before the WVHRC, the HPC held that ALJ Carter was an adjudicatory officer at all relevant times herein concerning Respondent’s conduct. (Report p. 11.)

In addition, there is certainly no indication that Rule 8.2(a) is intended to be narrowly construed so as to exclude certain types of judges or limit its construction to the judicial branch only. In fact, the Comment to Rule 8.2 references the attorney general, prosecuting attorney and public defender as examples of legal officials to which the Rule contemplates. This holding is consistent with another jurisdiction, Florida, who disciplined an attorney for

violating Florida RPC 4-8.2(a), which is identical to our Rule 8.2(a), for making certain statements regarding an administrative law judge in the United States Executive Office for Immigration Review. See, The Florida Bar v. Ray, 797 So.2d 556 (Fla. 2001).

The HPS also properly rejected Respondent's argument that Rule 8.2(a) did not apply to "non-public statements particularly legal motions and appeals..." (Respondent's Proposed Findings of Fact, Conclusions of Law and Recommended Sanctions p. 4.) The HPS noted that Respondent failed to cite to any authority consistent with his position and, in fact, this Honorable Court has previously found a violation of Rule 8.2(a) for statements a lawyer made in a pleading - a motion to recuse - in Lawyer Disciplinary Board v. Turgeon, 210 W.Va. 181, 189-190, 557 S.E.2d 235, 242-243 (2000). Therefore, the HPS concluded that Rule 8.2(a) of the Rules of Professional Conduct applied to pleadings filed by lawyers as well as statements made publicly by lawyers. (Report p. 12.) This conclusion is also consistent with other jurisdictions who have disciplined attorneys for making statements in pleadings which impugned the integrity of a judge. See, e.g., The Florida Bar v. Kleinfeld, 648 So.2d 698 (Fla. 1994); In re Cobb, 838 N.E.2d 1197 (Mass. 2005); Smith v. Pace, 313 S.W.3d 124 (Mo. 2010); Board of Professional Responsibility v. Davidson, 205 P.3d 1008 (Wyo. 2009); In re McClellan, 754 N.E.2d 500 (Ind. 2001); In re Wilkins, 777 N.E.2d 714 (Ind. 2002).

Next, the HPS rejected any potential argument in this case regarding Respondent's rights pursuant to the First Amendment of the United States Constitution. Referencing this Court's holding in Committee on Legal Ethics of the West Virginia State Bar v. Douglas, 179

W.Va. 490, 370 S.E.2d 325 (1988), the HPS noted that although the First Amendment's protection of free speech extends to lawyer criticism of judges, our Court has held that this protection is not absolute:

The Free Speech Clause of the First Amendment protects a lawyer's criticism of the legal system and its judges, but this protection is not absolute. A lawyer's speech that presents a serious and imminent threat to the fairness and integrity of the judicial system is not protected. When a personal attack is made upon a judge or other court official, such speech is not protected if it consists of knowingly false statements or false statements made with a reckless disregard of the truth. Finally, statements that are outside of any community concern, and are merely designed to ridicule or exhibit contumacy toward the legal system, may not enjoy First Amendment protection.

Id. at Syl. Pt. 1. (Report p. 13.)

As for the appropriate standard to determine a violation of Rule 8.2(a) of the Rules of Professional Conduct, the HPS noted that there was an absence of precedent on the issue *sub judice* and, after looking to other jurisdictions to provide guidance, applied the standard of whether there is an objective, reasonable factual basis for the referenced statements made by Respondent considered in light of conduct of a reasonable attorney in similar circumstances. (Report p. 15.) The Lawyer Disciplinary Board asserts that this is the proper standard in this matter, as the majority of courts who have considered disciplinary action against attorneys for statements made about judges apply this objective, reasonable attorney, reasonable factual basis standard. See, e.g., United States District Court for the Eastern District of Washington v. Sandlin, 12 F.3d 961 (9th Cir. 1993) (applied an objective standard to attorney disciplinary proceedings under the State of Washington's analog of Rule 8.2(a),

requiring the court to determine “what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances,”); In re Disciplinary Proceedings Against Sommers, 811 N.W. 2d 387 (Wis. 2012) (held attorney violated SCR 20:8.2(a) with statements impugning the integrity of the court notwithstanding his avowal that he made the statements in “good faith” because the record was devoid of credible evidence to support his challenges to the trial court’s credibility); In re Cobb, 838 N.E.2d 1197 (Mass. 2005) (“What is required by the rules of professional conduct is that [an attorney] have a reasonable factual basis for making [statements critical of a judge] before he makes them.”); Mississippi Bar v. Lumumba, 912 So. 2d 871 (Miss. 2005) (attorney had no “objectively reasonable factual basis” for making statements impugning judge’s integrity and qualifications); In re Disciplinary Action Against Graham, 453 N.W.2d 313 (Minn. 1990) (proper standard in lawyer discipline cases is objective inquiry into what a reasonable lawyer, considered in light of all his or her professional functions, would do in the same or similar circumstances); In re Wilkins, 777 N.E.2d 714 (Ind. 2002) (purely subjective standard in attorney speech discipline cases is inappropriate given public interest in protecting the administration of justice); Office of Disciplinary Counsel v. Price, 732 A.2d 599 (Pa. 1999) (attorney relied upon rumors, innuendo, and his own perceptions instead of conducting reasonably diligent inquiry).

In their Report, the HPS carefully examined each of the previously excerpted thirteen (13) statements from the Petition of Appeal filed by Respondent and concluded that the evidence was clear and convincing that Respondent violated Rule 8.2(a) and Rule 8.4(d) of

Rules of Professional Conduct in reference to twelve (12) of those statements.³ (Report p. 16 *et seq.*) Specifically, the HPS found that Respondent’s statement that ALJ Carter failed to be fair and impartial; that she exhibited clear bias; that she had personal knowledge of the matters before her; and that she personally knew the matters to be false; all lacked reasonable, objective factual basis. The HPS found that Respondent’s testimony at the disciplinary hearing implying ALJ Carter “personally interjected” herself by taking over the case because of her claimed personal knowledge (Tr. pp. 278-279), lacked reasonable factual basis. The HPS found that the statements Respondent made in the Petition of Appeal that ALJ Carter lied, misrepresented, misstated, and fabricated facts about the history of the case had no reasonable factual basis. The HPS found that Respondent’s argument that the WVHRC had ceased to exist was not a reasonable, factual basis to accuse ALJ Carter of unlawful, illegal, fraudulent and criminal acts.

The HPS found that there was no objective, reasonable factual basis to accuse ALJ Carter of personally knowing the allegations regarding CABC’s practice of steering white students to white customers and black students to black customers in the underlying matter to be false because ALJ Carter had visited the CABC once previously as a customer and had apparently received services from a white student. Likewise, the HPS found Respondent’s conclusions that ALJ Carter was unethical and that her finding that CABC had engaged in

³ The HPS found that the ninth passage as charged by ODC (paragraph i, p. 6 *supra*) which states, “ALJ Carter relies on her absolute unquestionable power as sole determinant of who is to be given the halo of credibility. Apparently this practice is routine for the HRC, the AG’s Office and ALJ Carter as the ubiquitous appearance of the word credible, or variations thereof, attests,” to not be false or made in reckless disregard of the truth and to not attack the integrity or qualifications of ALJ Carter or the integrity of the judicial system. (Report p. 30.)

steering customers based upon race could only be explained because “the individual Respondents are white, while Ms. Carter is black,” and that ALJ Carter had engaged “in the most heinous of racial bigotry,” lacked any objective, reasonable factual basis. Respondent asserted that ALJ Carter exhibited racism in referring to a child referenced in testimony in the WVHRC matter as “non-white.” The HPS examined the surrounding testimony presented at the WVHRC and found that ALJ’s finding was a fair and reasonable one and that Respondent had no objective, reasonably based basis to make the conclusion that ALJ Carter was racist as a result.

The HPS determined that ALJ Carter’s finding that a majority of trade shows that were offered at the CABC focused on Caucasian hair (Respondent Exhibit 4, p. 22) was reasonably based upon the testimony of the witnesses as referenced in her findings. As a result of this and her other findings, ALJ Carter directed as part of the relief ordered that CABC “undergo training related to race discrimination and the requirements of the West Virginia Human Rights Act...” and that Judy Hall, Cherie Bishop and CABC employees “attend comprehensive anti-discrimination training.” (Respondent Exhibit 4, pp. 106-107.) The HPS determined that Respondent’s conclusion that in making such findings and ordering such relief ALJ Carter, in “an outlandish display of tyrannical inclination,” was “deluded into thinking that this is a Communist country,” and that ALJ should “seek professional psychiatric help,” or “attend a forced reeducation camp,” lacked objective, reasonable, factual basis and went beyond the conduct of a reasonable attorney.

Respondent repeatedly stated that ALJ Carter lied about the history of the WVHRC

case. The HPS found that there was simply no evidence of this and as such, there was no objective, reasonable basis for Respondent's statements. In fact, the HPS noted that when Respondent was asked at the disciplinary hearing to provide a basis for his statement that ALJ Carter had knowingly and intentionally misstated facts in her Decision, he back-tracked and stated that ALJ Carter had simply made a "mischaracterization," in her procedural history. (Tr. pp. 310-311.) The HPS noted that a "mischaracterization" is far different than a "lie," and pointed out that Respondent's simple disagreement with ALJ Carter's findings and conclusions does not make them lies or falsehoods. (Report pp. 34-35.)

The Report of the HPS went on to conclude that another allegation made by Respondent in the Petition of Appeal, in which Respondent referred to ALJ Carter making a knowingly false finding regarding an incident relating to students smoking in the basement of the CABC, was without an objective, reasonable factual basis and reasonably based upon the facts before her in the WVHRC proceedings. The HPS found that there was no evidence that ALJ Carter misstated the testimony of any witness from the WVHRC hearing or that her inferences were not reasonable in any respect, and for Respondent to conclude that ALJ's credibility determinations were made because of an implied impermissible bias was not reasonably or objectively based upon the facts. The HPS likewise found that the evidence was clear and convincing that Respondent's statement that ALJ Carter dismissed certain testimony because of a "predetermined outcome," to have zero objective, reasonable factual basis in the record.

In sum, the HPS determined that Respondent's Petition of Appeal was replete with

accusations that had no objectively reasonable basis. The HPS also found that the evidence was clear and convincing that of the previously excerpted thirteen (13) statements from the Petition of Appeal filed by Respondent, portions or all of twelve (12) of the statements were made by him in reckless disregard of the truth and clearly impugned the integrity of ALJ Carter. All of the findings and conclusions made by the HPS were correct and fully supported by the record. There is simply no other conclusion to reach in this matter. The transcript of the WWHRC hearing, ALJ Carter's written Decision, and her hearing testimony clearly indicated that she was patient, respectful, and courteous, that she conducted a thorough hearing, and that she gave Respondent every opportunity to fully and fairly argue the case.

The evidence in this case met and exceeded the clear and convincing standard as required by the Rules of Lawyer Disciplinary Procedure. Respondent's conduct fell short of Rule 8.2(a) because the aforementioned statements made by Respondent in legal pleadings were unsubstantiated, were made with a reckless disregard as to their truth or falsity, and impugned the integrity of a presiding judicial officer. Respondent's conduct also fell short of Rule 8.4(d) because his statements threatened the integrity and fairness of the judicial system, were knowingly false or made with reckless disregard of the truth, and/or were merely designed to ridicule or exhibit contumacy toward the legal system. Moreover, it is clear in looking at the record that a reasonable lawyer, considered in light of all his or her professional functions, would not have made statements and arguments made by Respondent in his Petition of Appeal in the same or similar circumstances.

D. Analysis of Sanction under Rule 3.16 of the Rules of Lawyer Disciplinary Procedure.

The Rules of Professional Conduct state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Syllabus Pt. 3, in part, Committee on Legal Ethics v. Tatterson, 173 W.Va. 613, 319 S.E.2d 381 (1984). As a result of Respondent's clear violations of Rule 8.2(a) and Rule 8.4(d) of the Rules of Professional Conduct, the HPS recommended that Respondent be sanctioned for his conduct.

Rule 3.16 of the Rules of Lawyer Disciplinary Procedure provides that when imposing a sanction after a finding of lawyer misconduct, the Court shall consider: (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors. See also, Syl. Point 4, Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d. 722 (1998). A review of the extensive record in this matter indicates that Respondent has transgressed all four factors set forth in Rule 3.16 and Jordan.

1. Respondent violated duties owed to his clients, to the public, to the legal system and to the profession.

In providing legal representation, it is Respondent's job to present the best case for his client within the Rules of Professional Conduct and to lawfully pursue his client's objectives. The vigorous pursuit of this duty by Respondent is generally not considered a violation of the Rules of Professional Conduct. Moreover, it is expected that an attorney may

be dissatisfied with adverse rulings in a court proceeding. However, Respondent's conduct in the underlying matter cannot be justified in any respect. The litany of insults and speculative accusations of judicial misconduct toward ALJ Carter contained in Respondent's Petition of Appeal far exceeded the bounds of the Rules. Respondent made statements about ALJ Carter's integrity with a reckless disregard as to their truth or falsity; statements that a reasonable attorney, considered in light of all his professional functions, would not have made under the circumstances. It is without question that this conduct violated the duties Respondent owed to his clients, the public, the legal system and profession.

Respondent's comments were not only inappropriate, but unnecessary. Respondent termed some of his arguments as "grandiose hyperbole." (Tr. p. 308.) However, in advancing and compounding his hyperbolic arguments, Respondent failed to effectively argue his clients' position. At the disciplinary hearing, Attorney Paul Sheridan testified that in terms of debate and argument, using language such as, "racist," "biased," "liar," "bigot," "sexist," is not good advocacy and reflects a reckless practice of the profession. (Tr. pp. 179-181.) Respondent even acknowledged that he could have argued his position by using less inflammatory language, but instead he chose to essentially say that "ALJ Carter is a lying, criminal, racist, tyrannical, crazy person." (Tr. p. 351.) This is not a proper argument, nor an argument that a reasonable attorney would find to have even the slightest chance of success in the appellate process. The utter factual basis for the conclusions in Respondent's Petition of Appeal and reckless language he employed clearly violates the duty he owed to his clients.

Although a lawyer's primary responsibility is to his client, a lawyer is also an officer of the Court and thus, has an independent duty to the legal system which serves both the lawyer and the client. The Preamble to the Rules of Professional Conduct states, "A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." Moreover, this Court has made it clear that lawyers are officers of the court and must operate within the bounds of the law and act in a manner to maintain the integrity of the Bar. See, Lawyer Disciplinary Board v. Stanton, 225 W.Va. 671, 678, 695 S.E.2d 901, 908 (2010). Officers of the court are obligated to uphold the integrity of the court and, at a minimum, this requires them to refrain from conduct of the type at issue here. Respondent's conduct reflects poorly on the entire legal profession, and is a clear violation of the duties he has as a lawyer.

Moreover, regulating the speech of attorneys is appropriate in order to preserve the public confidence and credibility of the judiciary. "An attorney who makes critical statements regarding judges and legal officers with reckless disregard as to their truth or falsity . . . exhibits a lack of judgment that conflicts with his or her position as 'an officer of the legal system and a public citizen having special responsibility for the quality of justice.'" In re Disciplinary Action Against Graham, 453 N.W.2d 313 (Minn. 1990), citing Minn. R. Prof. Conduct, Preamble. Respondent's conduct patently promotes disrespect for the legal system and calls into question his capacity for sound judgment. "A system that permits an attorney without objective basis to challenge the integrity and thereby, the authority of a judge presiding over a case elevates brazen and irresponsible conduct above

competence and diligence, hallmarks of professional conduct.” In re Cobb, 838 N.E.2d 1197, 1214 (Mass. 2005).

Judges are not immune from review, or even criticism, and nor should they be. It is recognized by other jurisdictions that prohibiting false or reckless accusations of judicial misconduct is not “to shield judges from unpleasant or offensive criticism, but to preserve the public confidence in the fairness and impartiality of our system of justice.” Standing Committee on Discipline v. Yagman, 55 F.3d 1430, 1437 (9th Cir. 1995); See also, Kentucky Bar Ass’n v. Waller, 929 S.W.2d 181, 183 (Ky. 1996) (disrespectful language directed at judge is not sanctioned because “the judge is of such delicate sensibilities as to be unable to withstand the comment, but rather that such language promotes disrespect for the law and for the judicial system.”). The statements in this case in which Respondent accused ALJ Carter of lies, fabricating facts, personally knowing allegations to be false, criminal acts, being a racial bigot, making findings because of her race, and being a tyrannical communist in need of psychiatric help, etc., are not proscribed because they are personal attacks upon ALJ Carter. It is because they are made by a lawyer, one who is believed by the public to have unique insight of the workings of the court and the legal system. By falsely attacking ALJ Carter’s fairness and impartiality, Respondent has improperly called into question the fairness and impartiality of the whole judicial system, and, as a result, failed the duties he has to society as a whole.

2. Respondent acted intentionally and knowingly.

Respondent clearly acted intentionally and knowingly. The statements in

Respondent's Petition of Appeal were made in writing after significant deliberation. Respondent proceeded to recycle the same arguments in subsequent pleadings. Respondent has not expressed regret or remorse for any of the statements he made. Instead, Respondent resurrected the same arguments he lost in the WVHRC case during the disciplinary process, remained firm in his position that his contentions regarding ALJ Carter were justified, and appeared indifferent to the consequences.

3. Respondent caused potential and real injury.

Reckless statements made by a lawyer about the integrity of a presiding judicial officer can undermine the integrity and public confidence in the administration of justice. Attorney Paul Sheridan credibly testified that the risk of the rhetoric that Respondent employed is that it "diminishes the authority with which the tribunal's perceived." (Tr. p. 164.) When an officer of the court engages in offensive conduct toward judges personally for their judicial acts, this does nothing but weaken and erode the public's confidence in a fair and impartial judicial system.

Respondent also caused an intangible injury to ALJ Carter. The statements contained in Respondent's Petition of Appeal amounted to personal attacks upon her and impugned the integrity of the judiciary. ALJ Carter testified that she was embarrassed and offended by the statements contained in Respondent's Petition of Appeal and the statements made her question her reputation within the legal community. (Tr. pp. 32, 44-45.) In addition, as a result of her death on January 18, 2014, ALJ Carter never received the closure she deserved in this matter.

4. Both aggravating and mitigating factors are present.

There are aggravating factors present in this case. Aggravating factors are considerations enumerated under Rule 3.16 of the Rules of Lawyer Disciplinary Procedure for the Court to examine when considering the imposition of sanctions. Elaborating on this Rule, the Scott Court held “that aggravating factors in a lawyer disciplinary proceeding ‘are any considerations, or factors that may justify an increase in the degree of discipline to be imposed.’” Lawyer Disciplinary Board v. Scott, 213 W.Va. 216, 579 S.E. 2d 550 (2003), quoting *ABA Model Standards for Imposing Lawyer Sanctions*, 9.21 (1992). The HPS found the following aggravating facts:

- a. Respondent’s repetition of the same comments in the Petition of Appeal to the WVHRC and then to the Circuit Court of Kanawha County, as well as continuing to make the same baseless accusations in the disciplinary hearing, show Respondent’s lack of understanding of the effect of his reckless disregard for the truth upon the integrity of the judicial system.
- b. Respondent’s accusation that ALJ Carter was racist and that she made biased findings based on race with no basis in evidence.
- c. Despite being of the opinion that the personal effect of Respondent’s words upon ALJ Carter was not determinative of a violation of the Rules of Professional Conduct, the HPS found Respondent’s open callousness to this effect troubling. The HPS noted that at the disciplinary hearing, ALJ Carter was visibly upset and cried when describing the personal effect of

Respondent's false accusations. In response, Respondent called ALJ's tears "crocodile tears." (Tr. pp. 289-290.) When Respondent was asked about the affect of his words upon ALJ Carter, he asserted that ALJ's Carter's were not "honest;" that her tears were not real; and he did "[n]ot in the least," believe his words hurt her. (Tr. p. 355.)

There are also mitigating factors in this case. Mitigating factors are considerations enumerated under Rule 3.16 of the Rules of Lawyer Disciplinary Procedure for the Court to examine when considering the imposition of sanctions. Elaborating on this Rule, the Scott court held "that mitigating factors in a lawyer disciplinary proceedings 'are any considerations, or factors that may justify a decrease in the degree of discipline to be imposed.'" Id. The HPS found that the following mitigating factors were present in this case: absence of a prior disciplinary record, cooperative attitude toward proceedings, and inexperience in the practice of law.

E. Recommended Sanction.

3.15 of the Rules of Lawyer Disciplinary Procedure provides that the following sanctions may be imposed in a disciplinary proceeding: (1) probation; (2) restitution; (3) limitation on the nature or extent of future practice; (4) supervised practice; (5) community service; (6) admonishment; (7) reprimand; (8) suspension; or (9) annulment.

Sanctions are not imposed only to punish the attorney, but also are designed to reassure the public's confidence in the integrity of the legal profession and to deter other lawyers from similar conduct. Committee on Legal Ethics v. White, 189 W.Va. 135, 428

S.E.2d 556 (1993); Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987); Committee on Legal Ethics v. Roark, 181 W.Va. 260, 382 S.E.2d 313 (1989); Lawyer Disciplinary Board v. Friend, 200 W.Va. 368, 489 S.E.2d 750 (1997); Lawyer Disciplinary Board v. Keenan, 208 W.Va. 645, 542 S.E.2d 466 (2000).

In addition, a principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. Daily Gazette v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984); Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344, 518 S.E.2d 101 (1999). Discipline also serves as both instruction on the standards for ethical conduct and as a deterrent against similar misconduct to other attorneys. In Syllabus Point 3 of Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987), the Court stated:

In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession.

As a condition of the license granted by this Court to practice law, a lawyer must conduct himself in a manner compatible with the Rules of Professional Conduct - Rules that are vested in sound public policy. A license to practice law is a revocable privilege and when such privilege is abused, the privilege should be revoked or restricted. Respondent's conduct clearly demonstrates an appalling lack of judgment, discretion, and concern for his own personal integrity, and calls into question his fitness as a member of the Bar. In order to

effectuate the goals of the disciplinary process of protecting the public, protecting the integrity of the disciplinary system, protecting the administration of justice, and deterring other attorneys from engaging in similar misconduct, lawyers who engage in the type of conduct exhibited by Respondent must be removed from the practice of law for a period of time. For the public to have confidence in the integrity of our disciplinary and legal systems, Respondent must receive a strong sanction.

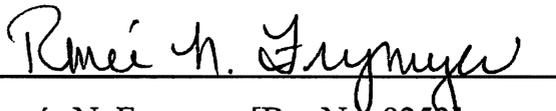
In reaching its recommendation as to sanctions, the Hearing Panel Subcommittee properly considered the evidence, the facts, the aggravating factors and mitigating factors, and properly applied the applicable law to such. For the reasons set forth above, the Hearing Panel Subcommittee determined the following sanctions to be appropriate:

1. That Respondent be suspended for three (3) months for his conduct in this matter;
2. That Respondent be ordered to complete an additional three (3) hours of Continuing Legal Education during the 2014-2016 reporting period, specifically in the area of ethics, over and above that already required; and
3. That Respondent be ordered to reimburse the Lawyer Disciplinary Board the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

V. CONCLUSION

Accordingly, for the reasons set forth above, the Office of Disciplinary Counsel requests that this Honorable Court adopt the Report and Recommendation of the Hearing Panel Subcommittee.

Respectfully submitted,
The Lawyer Disciplinary Board
By Counsel

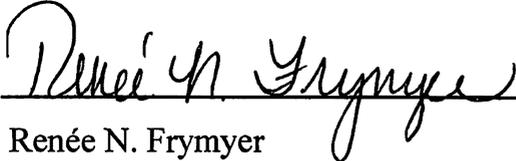


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CERTIFICATE OF SERVICE

This is to certify that I, Renée N. Frymyer, Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 21st day of May, 2014, served a true copy of the foregoing “**Brief of the Lawyer Disciplinary Board**” upon Respondent Stephen L. Hall, by mailing the same via United States Mail, both certified and regular, with sufficient postage, to the following address:

Stephen L. Hall, Esquire
3215 Bradley Road
Huntington, West Virginia 25704



Renée N. Frymyer