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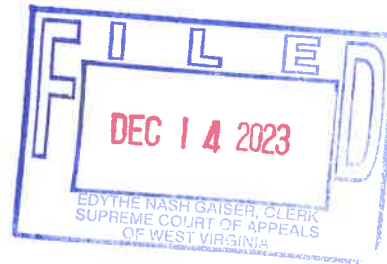
**IN THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA**

LAWYER DISCIPLINARY BOARD,
Petitioner,

vs.

PATRICK DOHENY, ESQUIRE

Respondent.



No. 18-0363

REPLY BRIEF OF THE LAWYER DISCIPLINARY BOARD

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I. REPLY TO RESPONDENT’S BRIEF and CROSS ASSIGNMENT OF ERROR

This matter is before this Honorable Court pursuant to the “Recommended Decision of the Hearing Panel Subcommittee of the West Virginia Lawyer Disciplinary Board Findings of Fact, Conclusions of Law and Recommended Decision” filed on July 25, 2023. After careful consideration of the entire record, the Hearing Panel Subcommittee (hereinafter “HPS”) determined that Respondent had not requested a formal hearing within the timeframe of Rule 3.20(d) and that pursuant to Rule 3.20(e), the same discipline could not be imposed because West Virginia does not issue private discipline; thus, a different type of discipline would be recommended. Accordingly, the HPS issued the following recommendation that Respondent be admonished. On August 21, 2023, the Office of Lawyer Disciplinary Counsel filed its consent to the HPS’s recommendation. Respondent filed his objection to the HPS’s recommended decision on August 22, 2023.

In regard to Respondent’s Cross Assignment of Error, Respondent argues that in issuing its July 25, 2023 “Recommended Decision of the Hearing Panel Subcommittee of the West Virginia Lawyer Disciplinary Board Findings of Fact, Conclusions of Law and Recommended Decision,” the HPS failed to adhere to its prior recommendation from the October 4, 2021 “Recommended Decision of the Hearing Panel Subcommittee of the West Virginia Lawyer Disciplinary Board Findings of Fact, Conclusions of Law and Recommended Decision.” Furthermore, Respondent argues that the HPS erred by not recommending that this Honorable Court rescind and withdraw its decision in Lawyer Disciplinary Board v. Patrick Doheny, 247 W.Va. 53, 875 S.E.2d 191 (2022) (Doheny I); dismiss the reciprocal proceedings, and notify any and all applicable Case Reporters that Doheny I was improvidently published.

II. ARGUMENT

A. EXCLUSIVE AUTHORITY TO DEFINE, REGULATE AND CONTROL THE PRACTICE OF LAW IN WEST VIRGINIA RESTS WITH THE SUPREME COURT OF APPEALS

This Honorable Court issued an opinion on June 10, 2022, wherein the Supreme Court found that the HPS and the Court have the authority to impose reciprocal discipline regardless of whether the underlying discipline imposed is private or public and remanded the matter to the HPS to proceed with the reciprocal disciplinary process set forth. Lawyer Disciplinary Board v. Doheny, 247 W.Va. 53, 62, 875 S.E.2d 191, 200 (2022). The Supreme Court stated that

Pursuant to Rule 3.20(a) of the Rules of LDP “[a] final adjudication in another jurisdiction ... of misconduct constituting grounds for disciplinary of a lawyer ... conclusively establish[es] such conduct” for any proceedings under “these rules.” Rule 3.20(a) does not simply authorize reciprocal discipline under the restrictions of the remaining subsections of Rule 3.20, but instead authorizes such discipline under the broader term of “these rules.” As more fully set forth below, “these rules,” namely the Rules of LDP, provide the HPS and this Court broad authority to impose discipline on attorneys licensed to practice in West Virginia. [Respondent’s] Private Reprimand is a final adjudication in another jurisdiction of misconduct constituting grounds for discipline, and pursuant to Rule 3.20(a) of the Rules of LDP, that final adjudication conclusively establishes such conduct.”

Id., 247 W.Va. at 60, 875 S.E.2d at 198.

Rule 3.20(e) provides that at the conclusion of proceedings brought under Rule 3.20 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 law; (2) the proof upon which the foreign jurisdiction based its determination of misconduct is so inform 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 by imposed by the Supreme Court of Appeals.

The Order of the Disciplinary Board of the Supreme Court of Pennsylvania wherein Respondent was issued a private reprimand conclusively establishes the misconduct for the purposes of this reciprocal disciplinary proceeding. Lawyer Disciplinary Board v. Doheny, 247 W.Va. 53, 60, 875 S.E.2d 191, 198 (2022). See also, Lawyer Disciplinary Board v. Post, 219 W.Va. 82, 631 S.E.2d 921 (2006). After careful review of the record, the HPS found that Respondent neither requested a formal hearing nor provided a full copy of the record of the disciplinary proceedings which had resulted in the imposition of the disciplinary order pursuant to Rule 3.20(d) of the Rules of Lawyer Disciplinary Procedure. Furthermore, Respondent failed to establish any of the four exceptions of Rule 3.20(e) of the West Virginia Rules of Lawyer Disciplinary Procedure. The HPS properly found that the same discipline as was issued in Pennsylvania could not be recommended in this matter because West Virginia does not impose private discipline against attorneys and no mechanism exists in the Rules of Lawyer Disciplinary Procedure which would permit the disposition of Respondent's West Virginia disciplinary proceedings to remain private. Thus, the HPS did not err in recommending an admonishment, the least serious of formal discipline in West Virginia.

Respondent cites with approval the language from a concurring opinion of the HPS that "the ODC is able to seek and obtain (capriciously, arbitrarily, and without even a hearing in Rule 3.20 proceeding) 'aggravated discipline more severe than that issued in a foreign jurisdiction, it appears that respondent attorneys will not even be afforded the minimum due process of a

‘mitigation’ hearing (no such hearing is even contemplated by the text of Rule 3.20).” [Respondent’s Brief at p. 10] It is noted, however, that Rule 3.20 does not confer a right to a “mitigation hearing.” Rule 3.20(d) provides that “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”

On April 24, 2018, the Office of Lawyer Disciplinary Counsel (hereinafter “ODC”) filed a “Notice of Reciprocal Disciplinary Action Pursuant to Rule 3.20 of the Rules of Lawyer Disciplinary Procedure”. Paragraph 9 of that Notice advised Respondent that Disciplinary Counsel will request that the Hearing Panel Subcommittee impose a similar, but not the same sanction as the Disciplinary Board of the Supreme Court of Pennsylvania because West Virginia Rules of Lawyer Disciplinary Procedure do not provide for a private reprimand as a permissible sanction. In Paragraph 10 of that notice, in accordance with Rule 3.20(d) of the Rules of Lawyer Disciplinary Procedure, ODC advised Respondent of his right to challenge the validity of his Pennsylvania discipline, advised of his right to request a formal hearing and provide a complete copy of the record to the ODC within thirty (30) days. The HPS found that Respondent neither requested a formal hearing nor provided a full copy of the record of the disciplinary proceedings which resulted to the imposition of the disciplinary order pursuant to Rule 3.20(d) of the Rules of Lawyer Disciplinary Procedure. Furthermore, at the February 22, 2023 telephonic conference, Respondent acknowledged that he did not request a formal hearing within the perimeters of Rule 3.20(d) of the Rules of Lawyer Disciplinary Procedure. [Trans. p. 5]

Respondent has not asserted and no argument has been presented that the procedures followed in Pennsylvania did not comport with requirements of due process of law. No evidence was presented demonstrating that the proof upon which Respondent’s disciplinary action was

based was so infirm as to taint the final disposition of the case. Respondent stated at the February 23, 2023 telephonic conference, that the imposition of the same discipline would result in a grave injustice but he presented no evidence that a grave injustice would result from the imposition of reciprocal discipline in this matter. Moreover, the reciprocal discipline notice filed by ODC on April 24, 2018, advised that a different discipline from the foreign jurisdiction would be sought.

Respondent also asks this Court to “reconsider, vacate and rescind Doheny I on the basis that it constitutes a wholesale abandonment of the law.” [Respondent’s Brief at p. 12] Respondent’s request for reconsideration is clearly untimely. Rule 25 of the Rules of Appellate Procedure provides, in pertinent part, that “[a] petition for rehearing may be filed within thirty days of release of any memorandum decision or opinion of the Intermediate Court or the Supreme Court that passes upon the merits of an action, unless the time for filing is shortened by or enlarged by order.” Respondent did not file a petition for rehearing and he did not appeal this Court’s decision in Doheny.

B. FINAL DISPOSITIONS OF ATTORNEY DISCIPLINE PROCEEDINGS ARE PUBLIC.

Respondent argues that ODC “misappropriated” documents from his Pennsylvania disciplinary matter. ODC did not misappropriate the documents as they were provided by Respondent to ODC. The Supreme Court has previously rejected Respondent’s arguments to seal the records in this matter, noting that the Court had refused similar requests to seal the records on two prior occasions, and that Respondent had “provided no authority or justification to warrant a different decision at this stage of the proceedings to warrant a different decision with regard to his motion to seal the record in this matter.” Doheny, 247 W.Va. at 62, 875 S.E.2d at 200.

C. RECIPROCAL DISCIPLINE IS WELL ESTABLISHED IN ATTORNEY DISCIPLINE PROCEEDINGS.

Respondent argues it was “the factual existence of Respondent’s DUI-related criminal convictions in Pennsylvania, and not any purported document from Pennsylvania’s disciplinary authorities, that conclusively establishes the purely technical fact of professional misconduct on the part of Respondent....” [Respondent’s Brief at p. 21]. Therefore, Respondent argues that the only way for ODC to properly proceed in a disciplinary proceeding against him was through a “convictions-based proceeding pursuant to W.Va. R.L.D.P. 3.19.” [Id.] This assertion is based upon Respondent’s request for this Court to reconsider its decision in Doheny I which was decided contrary to Respondent’s desired outcome.

Under the circumstances of this case, i.e., Respondent was and is located in Pennsylvania, Respondent was criminally convicted in Pennsylvania and Respondent himself provided notice to ODC that attorney disciplinary proceedings had been initiated against him in Pennsylvania. ODC monitored the status of the Pennsylvania proceedings and waited for the Pennsylvania disciplinary proceedings to conclude with a final adjudication. The disciplinary order from Respondent’s Pennsylvania matter is “a final adjudication” of misconduct constituting grounds for discipline of a lawyer establishing the jurisdiction of the HPS to “take action” in this matter pursuant to the provision of Rule 3.20(a) of the Rules of Lawyer Disciplinary Procedure. Rule 3.20(a) states that

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 law 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.

If ODC had not been advised of the outcome of his Pennsylvania disciplinary matter by Respondent and had ODC pursued the matter pursuant to Rule 3.19 of the Rules of Lawyer Disciplinary Procedure, then Respondent would have been in the position of defending himself in parallel disciplinary proceedings in two jurisdictions based upon the same Pennsylvania criminal conviction. Respondent could have possibly been in an untenable position of having to notify Pennsylvania disciplinary authorities of West Virginia discipline based upon on the same Pennsylvania criminal conviction for which had he already been disciplined in Pennsylvania.

Reciprocal discipline is well established in attorney discipline and is used to prevent a lawyer admitted to practice in more than one jurisdiction from avoiding the effect of discipline by practicing in another jurisdiction, to prevent the re-litigation of misconduct that already has been established in another jurisdiction, and to protect the public from lawyers who commit such misconduct. See Disciplinary Counsel v. Lapine, 128 Ohio St.3d 87, 942 N.E.2d 328 (2010). See also, People v. Bode (Colo.O.P.D.J.2005), 119 P3d 1098, 1100 (the purpose of reciprocal discipline is “to enhance public confidence in the profession by preventing lawyers admitted to practice in more than one jurisdiction from avoiding the effect of discipline by simply practicing in another jurisdiction”).

III. CONCLUSION

Accordingly, the Office of Lawyer Disciplinary Counsel respectfully requests that this Honorable Court find that the Hearing Panel Subcommittee considered the record and adopt the Hearing Panel Subcommittee’s recommendation that admonishment is the appropriate sanction in this reciprocal disciplinary proceeding for the reasons stated herein.

Respectfully submitted,

The Lawyer Disciplinary Board
By Counsel



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CERTIFICATE OF SERVICE

This is to certify that I, Andrea J. Hinerman, Senior Lawyer Disciplinary Counsel for the Office of Lawyer Disciplinary Counsel, have this day, the 14th day of December, 2023, served a true copy of the foregoing **"REPLY BRIEF OF THE OFFICE OF LAWYER DISCIPLINARY COUNSEL"** upon Respondent Patrick Doheny by mailing the same via United States Mail with sufficient postage, to the following address:

Patrick Doheny, Esquire
Post Office Box 23354
Pittsburgh, Pennsylvania 15222



Andrea J. Hinerman