

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

LAWYER DISCIPLINARY BOARD,

Petitioner,

v.

No. 18-0869

DANIEL R. GRINDO

Respondent.

RESPONDENT'S BRIEF

By Counsel,

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STATEMENT OF THE CASE

A. Procedural History:

Respondent agrees with the procedural history as set forth in the Petitioner's Brief and refers to the same herein.

B. FINDINGS OF FACT:

Respondent acknowledges jurisdiction and agrees with the Petitioner's Statement regarding the same.

At the time of the investigation into this matter by PDS, the Respondent's office consisted of two attorneys and between four and five staff members, some of which were part-time. All members of the firm tracked the time/work that they performed on PDS cases and the same was entered into the online voucher submission system. As a result, there could be as many as seven individuals working on PDS cases on any particular day. Also, during the time period in question, the Respondent's office was handling approximately the same case load as the Nicholas County Public Defender Office with a similar complement of attorneys and staff.

Respondent acknowledges that Mr. Eddy did contact him by letter regarding submitted vouchers in February of 2015 and that counsel immediately contacted Mr.

Eddy to discuss the same. Thereafter, a meeting was scheduled between Respondent and Mr. Eddy, along with his staff, at the PDS office. The purpose of that meeting was to discuss the allegations that PDS had raised regarding billing practices. In that meeting, the tenor promptly changed from an accusation of intentional wrongdoing to a discussion of proper procedure and the utilization of the online submission system that had been relatively recently implemented. Respondent also asserts that the conversations had during that meeting continued thereafter as the two offices worked together, not only to sort out the mistakes in Respondent's practices, but also in ironing out the use of the online versus paper voucher submission procedures, state-wide.

Petitioner is correct that Mr. Eddy did testify and stated to Respondent that it was clear that the incorrect billing method was the result of a mistake and not of any intent to defraud the PDS system. Petitioner and Respondent also agree that all work submitted in the subject vouchers was performed and that the charges for the same were reasonable, but were simply improperly coded when submitted.

Respondent agrees that he and Mr. Eddy came to an agreement on the amount of overpayment and the reimbursement was made in the amount of \$40,425.90. Respondent also agrees that there was an additional amount of \$1,927.86 that reflected duplicative charges for various expenses that Mr. Eddy acknowledged were clerical mistakes discovered over numerous vouchers submitted years apart and that he did not assert that they were fraudulent in any way.

SUMMARY OF ARGUMENT

The incorrect billing procedures used by the Respondent were the result of an unfortunate mistake and not the result of any fraudulent plan or scheme. Upon being notified of the mistake, Respondent immediately implemented procedural changes to correct the same and reimbursed the PDS for funds incorrectly paid to him. Respondent has corrected the mistake and no further issue has occurred and none is expected by PDS. As a result, the issue raised in the Complaint has been fully addressed and there is no need for further sanction.

STATEMENT REGARDING ORAL ARGUMENT

This matter is already scheduled for Oral Argument.

ARGUMENT

A. RULE 3.16 ANALYSIS

Respondent agrees that the controlling Factors found in Rule 3.16 of the Rules of Lawyer Disciplinary Procedure are: 1. whether the lawyer has violated a duty owed to a

client, to the public, 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. Syl. Pt. 4, Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d 722 (1998)

1. Violation of Duty

In this matter, the Petitioner is not alleging that the Respondent failed in any duty owed to the clients. As has been admitted by the Petitioner, the Respondent performed all of the work submitted and that the same was reasonable and appropriate. Respondent is accused of violating his duty to the public and the profession by incorrectly billing the work performed. Respondent acknowledges that the billing was submitted incorrectly, and that the same was promptly corrected upon the same being brought to his attention. If a violation of duty did occur, it was corrected.

2. Respondent Acted Intentionally and Knowingly.

In the Petitioner's brief, they argue that the Panel found that the Respondent acted knowingly. However that statement, taken out of context, ignores the complete findings of the Panel and the clear testimony of the witness. The Panel found that while the

Respondent did intentionally submit incorrect vouchers, that it was not with the intent to defraud, and that the submissions were accurate as to the work performed. In fact, Mr. Eddy acknowledged that the Respondent's vouchers were "perfect" except that the time was coded incorrectly. The overwhelming evidence in this case is that the Respondent believed he was submitting vouchers correctly for a considerable number of years. Respondent immediately confronted Mr. Eddy when the accusation was made and after sitting down to discuss the correct procedure, both sides were satisfied that the issue had been resolved. There is no evidence that Respondent intentionally defrauded the PDS.

The Petitioner also raises an argument about discussion regarding the Defendant's "business model," being of some concern. The comments regarding "business models" was made by one of Respondent's staff members during the initial meeting with Mr. Eddy and his staff when the nature of Respondent's practice was being discussed. Mr. Eddy testified that it was an odd way to describe a legal practice, but it had nothing to do with the method of coding PDS work. Respondent emphatically asserts, and the evidence supports, that he had no plan or scheme to incorrectly bill the work performed regardless of the inferences made by the Petitioner.

3. The Amount of Real Injury

The Petitioner argues that the Respondent's mistake resulted in significant injury through speculation and conjecture. There is no question that Respondent reimbursed

PDS in the agreed upon amount for the overpayment. Respondent is one of thousands of panel attorneys that takes court-appointed cases throughout the State. Respondent cannot speculate as to the inner-workings of the legislature, however Respondent would note that the rate set for panel attorneys was set decades before Respondent began his practice.

4. Mitigating Factors

Respondent acknowledges his prior disciplinary actions. In the instant case the Respondent would also note, first and foremost, that all work billed was actually performed and that PDS found it to be appropriate and reasonable. At no time has Mr. Eddy or PDS asserted that Respondent was in any way padding his bills, submitting claims for work not actually performed or in any way intentionally attempting to defraud the system. Additionally, Mr. Eddy acknowledged that, upon being advised of the mistake, the Respondent immediately corrected his billing procedure and that there has been no concerns ever since. In this case, Respondent accepted Mr. Eddy's statement that he believed that the Respondent made a mistake and was not intentionally trying to defraud the PDS. That meeting led to additional conversations between the two offices that resulted in clarifications in voucher submission procedure that was implemented state-wide. Respondent is remorseful about the situation in this case. Respondent is upset that he was unwittingly making the same billing mistake for the length of time in question and further wishes that it had been brought to his attention sooner. Respondent

cannot emphasize enough that he was absolutely not trying to defraud PDS and was trying to provide quality representation to indigent individuals, which is something he takes pride in.

B. SANCTION

Petitioner raises a number of cases that Respondent argues are distinguishable from the instant case. In the 2019 Hassan case and the 2017 Cooke case, the lawyers were suspended for intentionally submitting overstated bills that he knew were for time not actually performed. In those cases, the lawyers utilized block billing which resulted in 20 hours and 24 hours on different days. Lawyer Disciplinary Board v. Cooke, 239 W.Va. 40, 799 S.E.2d 117 (2017), Lawyer Disciplinary Bd. v. Hasson, 241 W.Va. 298, 824 S.E.2d 224(2019). In both of those cases, the lawyer submitted bills for more time than was available during the period in question, knowing that they did not actually work that time. In the instant case, the Petitioner seeks to raise a similar argument, however, as it was explained and accepted by Mr. Eddy, the Respondent had two attorneys and several staff members working on cases at any time. In reviewing the days with higher than expected time, those days, by and large, fell on days where both attorneys were in court for Motion Days in different counties while staff was continuing to work on other cases. There is no question that the time was coded and submitted incorrectly, but Respondent, his associate and staff, were all performing the work as submitted on the voucher.

As was discussed above, the record clearly supports the fact that Respondent did not submit the incorrect vouchers with an intent to defraud the PDS system. Respondent is clearly guilty of a mistaken billing practice that was immediately corrected and no further issues have arisen in the subsequent years. As was also testified, Respondent, prior to receiving notice of the billing mistakes, was already transitioning his practice away from PDS work so as to devote more time to other cases. This had progressed to the point where Respondent had reduced the number of counties where he accepted appointed cases from five to one, being Webster County. Respondent also testified as to the efforts made to be removed from the panel list, even prior to the investigation. Counsel was finally able to be released from that panel list in Webster, prior to the institution of this complaint.

In its brief, the Petitioner primarily seeks a significant suspension of Respondent's license along with a prohibition from performing any Public Defender Services work. Interestingly enough, Public Defender Services did not agree with that position. Mr. Eddy testified that he wanted Respondent to continue doing the work and that he had no concerns about future billing problems. He testified that the billing issue was a mistake, and whether the mistake should have happened or not, the mistake was now corrected.

As stated by the Petitioner, sanctions are imposed not 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. In the instant case, the Respondent has already suffered significant financial hardship in paying back the

overpayment. As Respondent was selling the vouchers to a factoring company, he also had to fulfill his contractual obligations with that company, which he did. Respondent has now been off the Panel for a number of years and only appears in older cases with a non-permanent disposition, such as probation violations, etc. Further, Respondent helped Public Defender Services in improving and clarifying its voucher system. Respondent asserts that at one point there was even a brief discussion about the possibility of Respondent becoming affiliated with Public Defender Services.

This is a case about an unfortunate mistake that has been corrected and the system made better as a result. Whether there is formal disciplinary action or not, Respondent has suffered significantly financially. Respondent has now come through that process and has rebuilt his practice where he serves an underserved rural community. Respondent is proud of the service that he provides to his community both through his professional services as well as his involvement in various community organizations. Respondent argues that the billing mistake that resulted in these proceedings does not rise to the level of suspension, as the mistake has been corrected and there is no more that needs to be accomplished with Respondent and his practice.

CONCLUSION

Respondent argues that although he should have known that the vouchers were being submitted incorrectly, all witnesses agree that in reality, he did not, and that he was

not attempting to defraud the PDS in any way. To the contrary, upon being notified of the mistake, he immediately opened a line of discussion with PDS and worked together to correct his mistake as well as to improve the PDS system as a whole. Respondent has suffered significant financial hardship as a result of making reimbursement to PDS and has fully corrected the circumstances that led to the billing error.

Respondent argues that the circumstances in this case are not willful violations of the Rules of Professional Conduct but was simply a mistake regarding voucher process. Respondent and his staff performed the work in question and Respondent worked very hard to provide quality representation to those whose cases he was entrusted with. Because the mistake in question was not willful and has been corrected, Respondent requests that the sanctions requested by the Petitioner be denied and that a lesser sanction that does not include suspension be imposed.

By Counsel,



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