

IN THE SUPREME COURT OF OHIO

In re: :
: :
DON S. McAULIFFE :
Attorney Reg. No. (0014629) :
Don S. McAuliffe :
: :
Respondent, :
: :
vs. :
: :
DISCIPLINARY COUNSEL :
250 Civic Center Drive :
Suite 325 :
Columbus, Ohio 43215-7411 :
: :
Relator. :

Case No. 08-1200

FILED
JUL 15 2008
CLERK OF COURT
SUPREME COURT OF OHIO

OBJECTIONS TO THE FINDINGS OF FACT
AND RECOMMENDATION OF THE BOARD

The Board of Commissioners, in a seven page report, adopted the Findings of Fact, Conclusions of Law and Recommendation of the Panel and accordingly recommend that Respondent, Don S. McAuliffe, be permanently disbarred from the practice of law. (Recommendation at ¶7).

On June 27, 2008, Chief Justice Moyer signed an Order to Show Cause, stating that objections need to be filed within 20 days from the date of the Order.

Objection No. One:

Respondent Don S. McAuliffe specifically objects to ¶21 of the Board's report. In that paragraph it states, "The Supreme Court has held that it is not necessary that the Board delay a decision on permanent disbarment pending final determination of post-conviction

relief pursuant to a writ of habeas corpus. 'It is theoretically possible for Respondent to repeatedly file habeas corpus petitions. There must be some finality to our disciplinary process.' Bar Association of Greater Cleveland v. Steele (1981), 65 Ohio St. 2d 1." (Report at ¶21).

At the hearing conducted on April 10, 2008, before the three judge panel, McAuliffe requested a stay of the proceedings until the conclusion of his post-conviction motion filed pursuant to the Federal Code: 28 U.S.C. §2255.

The reason for the request, was because since the Steele decision, the Federal law has changed. The law now states that the movant McAuliffe has a statutory period of one year to file his Section 2255 petition. If he does not, he is jurisdictionally denied. McAuliffe filed the 75 page petition with the Court through a motion to supplement the record, and that is a part of the proceedings in this case.

It is important to note that under 28 U.S.C. §2255(h) a second or successive motion must be certified by the Court of Appeals.

It has today become almost theoretically impossible for anyone to prevail on a second or successive federal petition. The reason frankly is because of finality.

Thus, when Respondent McAuliffe requested the stay, he noted the Steele decision.

This Court thus has the authority to distinguish their situations, where the respondent has filed a 2255 motion in the

Federal Court, has done so within the one year period, and is waiting for a final decision by the Federal District Court.

The 2255 motion has significant information that normally cannot be included in the direct appeal process. This is the reason why Respondent McAuliffe has filed his 2255 motion, and again has included in the record of the current proceeding.

It is thus respectfully requested that the Board erred when it refused to stay these proceedings.

Objection No. Two:

Respondent McAuliffe specifically objects to ¶20.

Respondent McAuliffe had specifically requested at the hearing, and also in a document filed March 31, 2008, that the Board "certify" the following two questions to the Ohio Supreme Court:

"Does the board have any authority to recommend indefinite suspension when an elected Ohio judge is found guilty and sentenced pursuant to a felony conviction?

Closely associated with the above would obviously be whether the relator-disciplinary counsel, has any authority, considering mitigating circumstances, to negotiate sanctions less than disbarment?"

In response to the above, the report recommended that, "The Board has no authority to certify questions regarding sanctions to the Supreme Court. The Board is required to make recommendations for sanctions against any justice, judge, or attorney found guilty of misconduct in accordance with Gov. Bar R. V(6)(B)." (Report at ¶20).

Respondent McAuliffe specifically objects to this, because under the status of the law as it exists now, respondent as an elected Ohio judge has virtually no defense if he or she pursues the merits of the felony conviction.

At the hearing, Respondent McAuliffe specifically requested an indefinite suspension.

The common law enunciated from the Ohio Supreme Court regarding Ohio elected judges is instrumental to the outcome of this pending matter.

The reason is the Ohio Supreme Court, through its decisions regarding elected Ohio judges, has singled them out as a special class, and/or category, and has ordered their disbarment, with no consideration of mitigating factors.

The seminal case is Disciplinary Counsel v. Gallagher (1998), 82 Ohio St.3d 51.

Gallagher was an elected judge from the Court of Common Pleas of Cuyahoga County. He was convicted of a federal offense, i.e. distributing cocaine, and was sentenced to twelve months in prison and fined \$20,000.00.

He was subject to the same violations as McAuliffe is in the pending matter.

It is important to note that in Gallagher, the then panel recommended a indefinite suspension, and the board ultimately adopted the findings and conclusions of the panel and similarly recommended that Gallagher be suspended indefinitely, at page 51.

The Ohio Supreme Court summarily overruled the panel and the board. The central reason why the Ohio Supreme Court ordered permanent disbarment is "because respondent held judicial office at the time of his arrest. Judges are subject to the highest standard of ethical conduct. Mahoning Cty. Bar Assn. v. Franko (1958), 168 Ohio St. 17, 23, 5 O.O.2d 282, 285-286, 151 N.E.2d 17, 23; See, also, In re Complaint Against Harper (1996), 77 Ohio St.3d 211, 673 N.E.2d 1253."

In Gallagher's case he offered mitigation in relevance to his addiction to cocaine. The Supreme Court responded to this by stating, "Mitigating factors have little relevance, however, when judges engage in illegal conduct involving moral turpitude.

In In the Matter of Hughes (Ind. 1994), 640 N.E.2d 1065, the Indiana Supreme Court disbarred a municipal judge following felony convictions. The court refused to allow mitigating factors to prevent disbarment because the judicial system suffers institutional harm when a judge commits serious ethical violations." [Emphasis supplied], Gallagher at page 53.

The opinion then concludes by stressing, "Mitigating factors relevant to this individual attorney pale when he is viewed in his institutional role as a judge. We, therefore, find that respondent deserves the full measure of our disciplinary authority.", at page 53.

There are other cases dealing with elected Ohio judges from the Ohio Supreme Court that parallel the Gallagher ruling. The

importance here is that because the Ohio Supreme Court has singled out Ohio elected officials as a specific class to be sanctioned automatically, there is, under the present state of the law, no justifiable reason to present even compelling mitigating evidence.

The board has promulgated rules and regulations governing the procedure on complaints and hearings.

Under Section 10, the Guidelines for Imposing Lawyer Sanctions, it states that each disciplinary case involves unique facts and circumstances. In striving for fair disciplinary standards, consideration will be given to specific professional misconduct and to the existence of aggravating or mitigating factors. (Board Rules; Section 10(A)).

It then lists detailed factors regarding aggravation, and detailed factors regarding mitigation.

These guidelines on their face appear to present a fair criteria in presenting one's case before the panel, and ultimately the board.

However, with the decisions of the Ohio Supreme Court, it is respectfully asserted that this board has no alternative but to follow the law as the Gallagher decision and the other accompanying decisions have ordered.

Obviously, McAuliffe cannot contest the fact that he is convicted of a felony, and he cannot contest the fact that he is charged with misconduct in the instant complaint.

It is further noted that even counsel representing the relator

is foreclosed from offering any type of negotiations with respect to the recommendation of an indefinite suspension. In the Gallagher decision, this indeed occurred, and the panel and board were summarily overruled by the Ohio Supreme Court.

Cases which have followed closely the Gallagher ruling dealing with Ohio elected judges include Office of Disciplinary Counsel v. Mosely (1994), 69 Ohio St.3d 401. Mosely was an elected municipal court judge, was convicted of a felony, and disbarred. The Steele case cited earlier resulted in permanent disbarment.

In sharp contrast, an elected Ohio judge who was convicted of a misdemeanor enjoys a different standard. In Disciplinary Counsel v. Connor (2004), 105 Ohio St. 3d 100, Connor, an admitted alcoholic, was convicted of multiple drunken driving charges. He admitted his misconduct.

As a result, Connor was suspended from the practice of law in Ohio for six months, and the suspension was stayed on condition that he comply with terms dealing with his recovery process.

The end result of all of this is that it is respectfully asserted that under the Ohio Supreme Court rulings, this panel, the relator, and McAuliffe are left with no choice.

As a result of the above, Respondent McAuliffe requested that the questions noted above be certified to This Court so that a proper resolution can be determined.

In conclusion, Respondent McAuliffe specifically objects to the recommendation that he be permanently disbarred, and requests

as a result of the above, that This Court order indefinite suspension, or in the alternative, remanded back to the original panel so that a further hearing can be conducted according to the objections noted above.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies the foregoing was served upon Lori Brown, First Assistant Disciplinary Counsel, 250 Civic Center Drive, Suite 325, Columbus, Ohio 43215-7411 this 15th day of July, 2008.



DAVID J. GRAEFF (0020647)