ORIGINAL

The Supreme Court of Ohio

BEFORE THE BOARD OF COMMISSIONERS

ON CHARACTER AND FITNESS OF

THE SUPREME COURT OF OHIO

10-0372

In re: Application of
Adam Michael Binaut

Case No. 436

FINDINGS OF FACT AND RECOMMENDATION OF THE BOARD OF COMMISSIONERS ON CHARACTER AND FITNESS OF THE SUPREME COURT OF OHIO

Pursuant to its *sua sponte* investigatory authority under Gov. Bar R. I, Sec. 10(B)(2)(e), the Board of Commissioners on Character and Fitness considered this matter based on a referral from the Board of Bar Examiners.

A duly appointed panel of three Commissioners on Character and Fitness was impaneled for the purpose of hearing testimony and receiving evidence in this matter. The panel filed its report with the board on February 2, 2010.

Pursuant to Gov. Bar R. I, Sec. 12(D), the board considered this matter on February 5, 2010. The board adopts the findings of fact and the panel's recommendation that the applicant be disapproved as set forth in the attached panel report, but amends the recommendation of the panel to provide that the applicant be permitted to reapply for admission in July 2010. The applicant shall reapply by filing a Supplemental Character Questionnaire, which shall be sent for review by the board.

Therefore, the Board of Commissioners on Character and Fitness recommends that the applicant be disapproved and that he be permitted to reapply for admission in July 2010 by filing a Supplemental Character Questionnaire. The board further recommends that, upon reapplication, the applicant undergo review by the board; and that upon a recommendation of approval by the board, he be admitted to the practice of law in Ohio.

FILED
FEB 26 2010
CLERK OF COURT
SUPREME COURT OF OHIO

TC Hicks

TODD HICKS, Chair, Board of Commissioners on Character and Fitness for the Supreme Court of Ohio

THE BOARD OF COMMISSIONERS ON
CHARACTER AND FITNESS OF THE SUPREME COURT OF OHIO

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BOARD OF COMMISSIONERS
ON CHARACTER AND FITNESS

THE APPLICATION OF
ADAM MICHAEL BINAUT

CASE NO. 436

PANEL REPORT AND RECOMMENDATION

Introduction

The applicant, Adam Michael Binaut, is before the Board of Commissioners on Character and Fitness pursuant to a referral by the Board of Bar Examiners as a result of his having violated the examination rules for the July 2009 bar examination. The panel held a hearing on January 21, 2010, at which the applicant was represented by George Jonson and the Bar Association was represented by Hanna Haddad.

Statement of Facts

Mr. Binaut was one of almost seven hundred applicants who took the July 2009 bar examination using a computer to prepare his answers. Each laptop user was given a set of instructions from SoftTest™, the software for the test. These instructions included two of especial pertinence to this case. First, the instructions told applicants that "typing or writing after time is called will be considered a breach of examination rules." Second, the instructions warned applicants that "returning to a question set or an MPT item to review or make changes after time has been called for that question set or item will be considered a breach of examination rules." See Exhibit 1. Reinforcement of the prohibition against returning to a question set was given at the beginning of each exam session orally. Additionally, laptop users were given a notice that stated:

> **Important Note:** When time is called at the end of each question set, you must stop typing and follow the instructions given by the exam administrator. Once time has been called for a questions set, you are **not permitted** to return to that set. **Your return to a question set will be tracked by ExamSoft and will be considered a breach of exam rules.** Should you accidentally return to a question for which time has been called, you should immediately return to the proper question set.

See Exhibits 2, 3, 4 (emphasis in originals). Despite these clear, repetitive and emphasized instructions that Mr. Binaut readily acknowledged he had received and understood, Mr. Binaut violated these instructions on the afternoon of the first day of the examination by returning to his answer to MPT 1 after the time for MPT 1 had and ended during the time allotted for MPT 2. Mr. Binaut readily conceded that the MPT 1 problem had been collected by the exam proctors and that the only problem he had before him was the MPT 2.

In light of his understanding and awareness of the instructions, Mr. Binaut's actions seem inexplicable and his attempted explanation for his actions are equally inexplicable. Upon being advised by letter from the Admissions Office of his violation of the examination rules, Mr. Binaut sent a responsive letter. Admittedly, the letter is not a very clearly worded or well thought out response. See Exhibit 10. For this reason, it is worth quoting Mr. Binaut's words themselves:

> My returning to MPT1 during the allotted time period was not of the intent to violate procedure. I finished MPT 2 early and did edit for punctuation and misspellings, but did not alter anything substantively. My state of mind was one of belief that this action was permissible during the allotted time – not one of malfeasance. . . . My unintentional mistake was an honest one.

It appears from this letter that Mr. Binaut is attempting to say that he thought he could return to a previous MPT item so long as his changes were non-substantive, albeit he refers to editing the MPT 2, not the MPT 1 which makes the explanation confusing. During the hearing, Mr. Binaut

stated that nothing stated in the instructions led him to believe he could return to a prohibited earlier item to make non-substantive changes. Moreover, Mr. Binaut's changes were in fact substantive. See Exhibit 8. At the hearing, Mr. Binaut's explanation was frankly equally hard to pin down with any precision. On one hand, he indicated that he went back because he was not focusing on the instructions and was thus not consciously disregarding the rules. While acknowledging that the written instructions were present on the table as he typed his response and went back to the earlier MPT, he said he just did not have it in mind when he did it. His counsel explained his conduct as analogous to a driver sitting at a red light that is marked with a "no right turn on red" sign, but who is thinking about something else and consciously makes a turn, albeit inadvertently because the driver's mind is on other things.

The analogy may be apt and certainly the panel cannot put itself into the mind of the applicant as he did what he did. However, the panel still has real doubts about the justification for the action taken. First, the applicant was not doing the quotidian task of driving a car; he was taking an examination to be licensed as a member of the legal profession. Second, drivers are routinely faced with lights where a right turn is permitted so their mindless act is one of losing focus on the circumstances at the particular light. In the circumstances of the bar examination, the instructions are not a solitary sign; the instructions are given in the master set of instructions for laptop users (Exhibit 4), orally before each session of the examination; and in special written instructions handed out to each laptop user before each exam session (Exhibits 5 and 6). The special instructions were on the table as applicant responded to MPT 2. Finally, applicants are taking one of the most important examinations they have probably faced up to that point in their careers. It is beyond doubt that each applicant is nervous, apprehensive, and usually diligent in wanting to do things correctly. In light of all these circumstances, Mr. Binaut

has not provided a very clear or logical explanation for why he violated the examination rules. To some extent, his explanation is based upon the premise that he is an honorable person and thus his actions had to be innocent.

To his credit, Mr. Binaut passed the bar even though the Board of Bar Examiners disqualified his response to MPT 1. He also otherwise has no issues that raise serious concerns under the criteria set forth in Rule I. Finally, the panel has been advised that the applicant has been accepted by the Air Force Judge Advocate General branch and has the opportunity to enter that program this Spring. Nonetheless, the panel concludes that his actions and lack of a coherent explanation for them do raise issues about his character and fitness that warrant some additional time passing to ensure that there are not further issues of this nature.

Recommendation

For the reasons set forth above, the panel recommends that the applicant not be approved for admission at this time. The panel further recommends that he be not be permitted to be admitted until April 30, 2010. The Rules for the Government of the Bar defines the litmus test as being a "record of conduct [that] justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them. . . ." Rule I, Section 11(D)(3). The panel does not believe that the applicant has shown by clear and convincing evidence that he meets this test. His testimony was not clear and direct, albeit the panel is not finding that he lied or was dishonest. He was both taking responsibility for his actions and trying to characterize them in a way that relieved him of responsibility. Assuming that there are various levels of culpability in the actions of the applicants who violated the exam rules, Mr. Binaut's actions seem to be culpable and to warrant additional time before admission is granted.

Suzanne K. Richards, Panel Chair

G. Scott McBride, Panel Member

John C. Fairweather, Panel Member