

ORIGINAL

IN THE SUPREME COURT OF OHIO

10-0693

In Re: : CASE NO. CV09-039

Complaint against :

RITA JOHNSON :
Attorney Reg. Nos. 0065959

Respondent. :

CLEVELAND METROPOLITAN BAR :
ASSOCIATION,

Relator. :

**RELATOR CLEVELAND METROPOLITAN BAR ASSOCIATION'S BRIEF IN
OPPOSITION TO RESPONDENT'S OBJECTIONS TO FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDATION OF THE BOARD OF
COMMISSIONERS ON GRIEVANCES AND DISCIPLINE**

Timothy A. Marcovy (0006518)
Thomas P. Marotta (0024884)
WILLACY, LOPRESTI & MARCOVY
700 Western Reserve Building
1468 West Ninth Street
Cleveland, Ohio 44113
P: (216) 241-7740
F: (216) 241-6031
Email: tam@wlmlaw.com
tpm@wlmlaw.com

RECEIVED
JUN 09 2010
CLERK OF COURT
SUPREME COURT OF OHIO

*Attorneys for Relator, Cleveland Metropolitan
Bar Association*

Rita Johnson (006595)
3546 Washington Blvd.
University Heights, Ohio 44118
P. (216) 214-2895
Email: ritajohn@sprint.blackberry.net

FILED
JUN 09 2010
CLERK OF COURT
SUPREME COURT OF OHIO

Respondent, *Pro Se*

TABLE OF CONTENTS

	Page(s)
INTRODUCTION.....	1
LAW AND ARGUMENT	2
A. The Panel Properly Declined to Consider Respondent’s Claim of “Stress” in Mitigation	2
B. The Cases Relied Upon by the Panel in Determining the Sanction were Appropriate Under the Facts of this Case	5
C. Respondent’s Withdrawal for the Practice of Law is Not a Mitigating Factor	6
D. CONCLUSION	6
CERTIFICATE OF SERVICE	8

TABLE OF AUTHORITIES

CASES

1. *Columbus Bar Assn. v. Dice*, 120 Ohio St.3d 455, 2008-Ohio-6787
2. *Columbus Bar Assn. v. DiAlbert*, 120 Ohio St.3d 37, 2008-Ohio-5218

BRIEF IN OPPOSITION

I. Introduction.

As set forth in the Board of Commissioners on Grievances and Discipline's Findings of Fact, Conclusions of Law and Recommendation, this matter arises from grievances filed by two former clients of the Respondent, Arthur Pullum and Alida Walker. Following the filing of the Complaint and Answer, Respondent and Relator entered into Stipulations of Fact in which Respondent has admitted that the conduct described in the Stipulations constitutes the following ethical violations:

As to the Arthur Pullum Matter, Respondent admitted to the following violations:

1. Violation of Disciplinary Rule 6-101(A)(3) of the Code of Professional Responsibility, ("A lawyer shall not...[N]eglect a legal matter entrusted to him").
2. Violation of Rule 3.4(c) of the Ohio Rules of Professional Conduct ("A lawyer shall not ...knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on a good faith assertion that no valid obligation exists...").
3. Violation of Rule 1.3 of the Ohio Rules of Professional Conduct ("A lawyer shall act with reasonable diligence and promptness in representing a client").
4. Rule 1.16(c) of the Ohio Rules of Professional Conduct ("If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission").

As to the Alida Walker matter, the Respondent admitted a second violation of Rule 1.3 (neglect of a legal matter). In addition, she admitted a violation of Rule 1.16 (d) ("As part of the termination of representation, a lawyer shall take steps, to the extent reasonable practicable, to protect a client's interest").

Following a hearing on this matter on January 15, 2010 before a panel of the

Board, the Board adopted the Findings of Fact and Conclusion of s of Law; however, it rejected the sanction proposed by Relator of a one-year suspension with the full year stayed, and recommended a one-year suspension with six months stayed, subject to the condition that the Respondent enter into an OLAP contract for three years. Respondent now objects to the recommended sanction.

II. Law and Argument

A. The Panel Properly Declined to Consider Respondent's Claim of "Stress" in Mitigation.

Respondent argues, in her Brief in Support of her Objections, that the sanction recommended by the Board was inappropriate because the Board, "did not accept Respondent's testimony that she was dealing with a great amount of stress," over various personal matters because she did not submit reports of psychological professionals to support this claim. She argues that she was not claiming that she suffered from a clinical diagnosis of depression and so should not be required to submit such reports or affidavits in support of mitigation.

However, "stress," without more, does not constitute a mitigating factor under Section 10 of the Rules and Regulations Governing Procedures on Complaints and Hearings before the Board of Commissioners on Grievances and Discipline ("BCGD Proc. Reg."). Rather, the only mitigating factor relating to the Respondent's mental state is Section 10(B)(2)(g), relating to a claim of mental disability, which does require a professional medical opinion:

(g) chemical dependency or mental disability when there has been all of the following:

- (i) A diagnosis of a chemical dependency or mental disability by a qualified health care professional or alcohol/substance abuse counselor;
- (ii) A determination that the chemical dependency or mental disability contributed to cause the misconduct;
- (iii) In the event of chemical dependency, a certification of successful completion of an approved treatment program or in the event of mental disability, a sustained period of successful treatment;
- (iv) A prognosis from a qualified health care professional or alcohol/substance abuse counselor that the attorney will be able to return to competent, ethical professional practice under specified conditions.
- (h) other interim rehabilitation.

Further, although she now asserts she is not claiming a mental disability, and so need not provide expert evidence, she states in her testimony at hearing that she is seeing a therapist and taking medication for her stress:

Q. And you indicated you're seeing a therapist?

A. Yes.

Q. And how often do you see the therapist?

Q. It varies from twice a month. At one point, I think I was actually going -- Every week

I was in a group of hers that -- I went every week. But it varies from twice a month to once a month.

Q. Is this person a psychologist or psychiatrist?

A. The medication is given to me by my internist, so that would make her a psychologist, correct?

Q. Okay.

A. Because a psychiatrist is a doctor, M.D. doctor, right?

Q. Correct.

A. So she's a doctor -- therapy doctor, not M.D. doctor.

(Tr. 90,91)

Thus, if she is asserting a mental disability such as depression as a mitigating factor, she has not met the requirements of the Rule. If Respondent is not claiming a mental disability, the panel need not have considered her “stress” as a mitigating factor under the Rule. As Respondent concedes, her testimony presents, “an issue of credibility,” and it was within the Board’s discretion to determine that issue against her. In any event, although the panel refused to accept this testimony in mitigation, it stated expressly that it would take her claims of stress under consideration in determining the proper sanction (Findings of Fact and Conclusions of Law, p. 8).

Respondent also argues that the panel’s recommendation that she be required to enter an OLAP contract to manage her stress is inconsistent with its rejection of her testimony. However, as noted, the panel did consider her stress management issues in assessing her sanction, and it was within its discretion to require an OLAP program as a condition of reinstatement.

In sum, the panel was not obligated to consider her testimony of “stress” a mitigating factor. Moreover, there is more than ample evidence to support the recommended sanction. Specifically, the panel found that Respondent’s prior disciplinary offense constituted an aggravating factor. BCGD Proc. Reg. Sec. 10(B)(1)(a). The sanction recommended by the panel is thus appropriate and should be adopted.

B. The Cases relied upon by the Panel in determining the Sanction were
Appropriate under the Facts of this Case

Respondent second objection is that the cases relied upon by the panel in assessing her sanction were distinguishable from her conduct is likewise without merit. The first of these cases, *Columbus Bar Assn. v. Dice*, 120 Ohio St. 3d 455, 2008-Ohio-6787, involves conduct similar to that stipulated to by the Respondent in the instant matter. The basis of the objection is that, despite the similar conduct, Ms. Johnson cooperated in the investigation. She also offers, apparently in mitigation, what she characterizes as culpable conduct by her clients, the victims of her conduct. The slight difference, however, does not warrant a different result, especially considering the existence of an aggravating factor in her case not present in the *Dice* case, i.e., her prior disciplinary offense and resultant reprimand. Further, the panel properly held that, although she was not charged with failing to notify her clients of her lack of malpractice insurance, it could be considered as an additional aggravating factor which did not exist in *Dice*. Also, in *Dice* there was the additional mitigating factor of proof of a mental disability, which, as discussed, is not present in this case. Finally, the panel did not fail to consider Respondent's cooperation as a mitigating factor (Findings of Fact, Conclusion of Law and Recommendation, p.8).

Respondent also objects to the panel's reliance upon *Columbus Bar Assn. v. DiAlbert*, 120 Ohio St. 3d 37, 2008-Ohio-5218, in which a similar sanction was imposed, because in that case the Respondent had served a previous six-month suspension. However, in *DiAlbert*, there was expert evidence as to Respondent's depression and its causal relationship to his misconduct. Thus, the Court saw fit to reduce the recommended

sanction to one similar to that recommended by the board's recommendation here.

Rule 10(A)(2) of BCGD Proc. Reg. states that, the factors to be considered in mitigation, "shall not control the Board's discretion, but may be considered in favor of recommending a less severe sanction." Here, given the aggravating factors and the lack of any evidence of mental disability as a mitigating factor, it cannot be said that the recommended sanction was inappropriate.

C. Respondent's Withdrawal for the Practice of Law is Not a Mitigating Factor.

Finally, Respondent objects on the grounds that the panel failed to consider her voluntary withdrawal from the practice of law as a mitigating factor. She testified that, in about November of 2007, she closed her practice to take a job as the Clerk of Courts/Court Administrator for Garfield Heights, Ohio. Indeed, it was her leaving practice for this job that led to at least one of the violations in the Walker matter (Tr. 58-60).

However, a Respondent's voluntary leaving the practice of law is not one of the factors to be considered under BCGD Proc. Reg. 10. Under the facts of this case, it cannot be said that the panel erred in not finding that this fact outweighed the aggravating factors that it found. The sanction should therefore be adopted.

D. Conclusion.

Based upon the stipulated facts setting forth Respondent's multiple offenses, Relator submits that the Court should adopt the board's finding of misconduct as well as the

recommended sanction of a one-year suspension, with six months stayed upon the condition that she enter into an OLAP contract.

Respectfully submitted,



Timothy A. Marcovy (0006518)
Thomas P. Marotta (0024884)
WILLACY, LOPRESTI & MARCOVY
700 Western Reserve Building
1468 West Ninth Street
Cleveland, Ohio 44113
P: (216) 241-7740
F: (216) 241-6031

*Attorneys for Relator,
Cleveland Metropolitan Bar
Association*

Certificate of Service

On the 8th day of June, 2010, a true copy of the forgoing Brief in Opposition was sent by regular U.S. Mail to Respondent *pro se* Rita Johnson, 3546 Washington Blvd., University Heights, Ohio 44118 and to Jonathan Marshall, Esq., Secretary, Board of Commissioners on Grievances and Discipline, 65 South Front Street, 5th Floor, Columbus, Ohio 43215-3431


Thomas P. Marotta