

ORIGINAL

IN THE SUPREME COURT OF OHIO

IN RE: APPLICATION OF)
DANIEL PAUL POIGNON)
)
)
)
)
)
)
)

Case No. 2011-1423

Upon the Recommendation of the Board
of Commissioners on Character and
Fitness of the Supreme Court of Ohio
(No. 492)

**RESPONSE OF THE SPECIAL INVESTIGATOR OF THE BOARD OF
COMMISSIONERS ON CHARACTER AND FITNESS TO THE OBJECTION
AND BRIEF OF APPLICANT DANIEL PAUL POIGNON**

James E. Brazeau (0016887)
Sarah J. Corney (0086472)
ROBINSON, CURPHEY &
O'CONNELL, LLC
Ninth Floor, Four SeaGate
Toledo, Ohio 43604
Tel: (419) 249-7900
Fax: (419) 249-7911
jbrazeau@rcolaw.com

*Counsel for Applicant
Daniel Paul Poignon*

Michael Thomas (0000947)
VORYS, SATER, SEYMOUR
AND PEASE, LLP
52 East Gay Street
PO Box 1008
Columbus, Ohio 43216-1008
Tel: (614) 464-5686
Fax: (614) 719-4905
mrthomas@vorys.com

*Counsel and Special Investigator for Board of
Commissioners on Character and Fitness*

FILED
NOV 02 2011
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF JURISDICTION.....	1
STATEMENT OF APPLICANT'S OBJECTION	1
STATEMENT OF THE CASE.....	1
STATEMENT OF FACTS	3
ARGUMENT.....	6
Applicant Daniel Paul Poignon did not show by clear and convincing evidence that he should be allowed to reapply for admission to practice law in Ohio.....	6
CONCLUSION.....	13
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Cases

<i>In re Application of Barilatz</i> , 91 Ohio St.3d 396, 2001-Ohio-69	10
<i>In re Application of Corrigan</i> , 47 Ohio St.3d 32 (1989)	10
<i>In re Application of Keita</i> , 74 Ohio St.3d 46, 48, 1995-Ohio-33	11
<i>In re Application of Nerren</i> , 79 Ohio St.3d 322, 1997-Ohio-305	11
<i>In re Application of Sabino</i> , 81 Ohio St.3d 98, 1998-Ohio-579	11

STATEMENT OF JURISDICTION

The Supreme Court of Ohio determines who may practice law in the State of Ohio and in that role has the authority to consider objections to reports and recommendations of the Board of Commissioners on Character and Fitness. Ohio Gov. Bar Rule I, Sec. 12(G).

STATEMENT OF APPLICANT'S OBJECTION

Applicant Daniel Paul Poignon has objected to the portion of the Report and Recommendation of the Board of Commissioners on Character and Fitness, filed August 18, 2011, recommending that he not be allowed to reapply to take the Ohio bar examination in the future. Mr. Poignon does not object to the Board's finding that he presently lacks the necessary character, fitness, and moral qualifications to practice law or to its recommendation that his current application to take the next Ohio bar examination be denied. See Applicant's Objection and Brief, filed September 28, 2011, at 1.

STATEMENT OF THE CASE

Mr. Poignon filed an application to register as a candidate for admission to the practice of law in Ohio. Two members of the Toledo Bar Association Admissions Committee interviewed him pursuant to Gov. Bar Rule I, Sec. 11(C)(3), and referred his application to a seven-member panel of the Committee. The Admissions Committee panel held a hearing on September 30, 2010, which Mr. Poignon attended. (See Admissions Committee Report on Disapproval of the Applicant, Nov. 22, 2010, at 1.) At the conclusion of the hearing, it voted unanimously to "recommend that he not be approved as to character, fitness, and moral qualifications to practice law," pursuant to Gov. Bar Rule I, Sec. 11(E)(4). (Id., at 8.) The Committee found "a significant deficiency in the honesty, trustworthiness, diligence, or reliability of the Applicant," citing the following factors:

- Conviction of a crime subject to Gov. Bar Rule I, Section 11(D)(5)
- A pattern of disregard of the laws of Ohio
- Acts involving dishonesty, fraud, deceit, or misrepresentation
- Neglect of financial responsibilities
- Disciplinary action by another professional disciplinary agency

(Admissions Committee Report, at 1, 4.)

Mr. Poignon filed an appeal with the Secretary of the Board of Commissioners on Character and Fitness pursuant to Gov. Bar Rule I, Sec. 12(A). (The Board's review was required in any event by Gov. Bar Rule I, Sec. 11(D)(5)(a), due to Mr. Poignon's criminal record of felony convictions.) The Board of Commissioners conducted a hearing on May 26, 2011, before a three-member panel. Mr. Poignon was represented by counsel, who presented testimony by three witnesses at the hearing in addition to documentary evidence; Mr. Poignon also testified on his own behalf. (See Transcript of Proceedings, 2, 3, 125-28.)

The panel of the Board of Commissioners agreed with the Admissions Committee that Mr. Poignon's record manifests a significant deficiency in the honesty, trustworthiness, diligence, and reliability required to practice law, and therefore found that he does not possess the necessary character, fitness, and moral qualifications for admission to the bar. (See Panel Report and Recommendation, July 8, 2011, at 6.) It recommended that he not be admitted at this time but that he be permitted to reapply for the July 2013 bar examination. (Id.)

The Board of Commissioners subsequently agreed that Mr. Poignon lacks the requisite character, fitness, and moral qualifications and that he should not be approved for admission. (See Board Report and Recommendation, August 18, 2011, at 5, 8.) However, the Board of Commissioners further recommended that Mr. Poignon not be permitted to reapply in the future. (Id., at 6, 8.)

Mr. Poignon filed an Objection and Brief in Support on September 28, 2011, in which he agrees that the Board of Commissioners properly denied his application for admission but objects that “a permanent bar on re-applying is not warranted.” (Supra, at 1.) The Board of Commissioners appointed a special investigator pursuant to Gov. Bar Rule I, Sec. 10(B)(2), to prepare and file the instant Response to the objection. Oral argument before this Court is scheduled for December 6, 2011.

STATEMENT OF FACTS

There is no dispute as to any fact that is relevant to the Court’s consideration of the Report and Recommendation of the Board of Commissioners. See Applicant’s Objection and Brief, supra, at 1 (“Poignon accepts as true the Board’s conclusions of fact”).

Mr. Poignon was born on October 31, 1960, and is presently 51 years old. (See Certificate of Dean, at 3.) He received a bachelor degree in pharmacy from the University of Toledo in 1984 and initially worked as a pharmacist at Saint Vincent’s Hospital in Akron before moving to South Carolina in 1990 for a pharmacist position with McLeod Regional Medical Center. (Transcript of Proceedings, supra, at 49-50.) However, in 1993 Mr. Poignon was accused of stealing drugs from McLeod, abusing drugs, and submitting a prescription in his own handwriting using the name of a doctor who denied that he had approved the prescription. (Tr. 85.) “[T]hey said... I should resign or they would report [me] to the state [pharmacy] agency.” (Tr. 85-86, 94-95.) Mr. Poignon resigned. (Id.)

Mr. Poignon then worked at the Florence Community College extended care facility in South Carolina until he returned to Ohio in 1995. He worked as a pharmacist at Galion Community Hospital “for a brief time” and then at Tiffin Mercy Hospital in Akron. (Tr. 51.) However, he failed a drug test and was terminated by Tiffin Mercy Hospital for what he calls

“performance issues,” i.e., “I was having trouble sleeping so I was taking whatever I could find at home to get – whether it was prescription or otherwise to try to sleep and that probably worsened my performance...and ultimately I was fired for it.” (Tr. 83-84.) Mr. Poignon concedes that he was “abusing drugs” during his employment at Tiffin Mercy Hospital but denies that he stole drugs from the hospital. (Tr. 93.)

Mr. Poignon was then hired as a pharmacist by Drug Corner Pharmacy in Toledo in 1997. (Tr. 51-52.) He acknowledges that he used drugs, including Vicodin and Adipex, while he worked there that he took from his employer. (Tr. 52-53, 60.) Mr. Poignon admits using Vicodin once a week between March 1997 and March 1999. (Tr. 25; Admissions Committee Report, *supra*, at 2.) However, the State Pharmacy Board “found some pill irregularities on the narcotics count” and confronted Mr. Poignon about thousands of missing pills. (Tr. 51-52.) He was found to have two Adipex “diet pills” on his person at that time for which he had no legal prescription. (Tr. 25.)

After further investigation, the State Pharmacy Board found that Mr. Poignon had stolen 1,888 doses of prescription drugs, “primarily narcotics...and stimulants,” during a 14 month period of time. (Tr. 60.) See *Poignon v. Ohio Bd. of Pharmacy*, 10th App. Dist. No. 03 AP-178, 2004-Ohio-2709, at ¶¶ 2, 13. Based on its findings, the Pharmacy Board permanently revoked Mr. Poignon’s license to practice pharmacy in 2000. (Tr. 55.) He attempted to appeal the license revocation, but the notice of appeal was filed too late and his appeal was dismissed. 2004-Ohio-2709, at ¶ 16. He reapplied for a new pharmacist license, but the Pharmacy Board refused to process his application because it had permanently revoked his license during the earlier proceedings. (*Id.*, at ¶¶ 17-18.) Mr. Poignon filed for a writ of mandamus to compel the

Pharmacy Board to allow him to reapply; the Court of Appeals denied the writ and granted summary judgment against him. (Id., at ¶9.)

Mr. Poignon was criminally charged in 1999 with theft of Ritalin and Adipex from the Drug Corner Pharmacy. (Tr. 53.) He ultimately pled “no contest” to two fourth-degree felony charges and was sentenced to serve six months in the Lucas County treatment facility, followed by five years of community control. (Tr. 53-54.) However, he was released from the facility in less than 100 days and community control was terminated after one year. (Tr. 8, 39, 54.) Mr. Poignon tested negative for drugs throughout that one-year time period. He testified that he has not used drugs after his release in 2001, but he has not been tested since then. (Tr. 19.) His convictions have been expunged.

Mr. Poignon has not held any job for a substantial period of time in over a decade. (Tr. 101-102.) He has worked at “various positions,” mostly in sales and food service, for short durations. (Tr. 56.) He worked briefly for an automobile dealer, and then for a mortgage company, but he quit those positions because he “disagreed with the ethics” of their sales practices. (Tr. 99-100.)

Mr. Poignon obtained a certificate in paralegal studies in 2006 and was employed by the Roetzel & Andress law firm in Toledo for approximately one year. (Tr. 56.) He worked as a paralegal there for a friend’s husband, Thomas Matuszak, who testified at the hearing that Mr. Poignon did a good job and “would make a fine attorney.” (Tr. 114-15.) He later worked “briefly” at a small law firm for another attorney, Joanna Baron, but was terminated after “some personality conflicts there.” (Tr. 58, 98, 102.) Mr. Poignon enrolled in the University of Toledo law school in 2007 and graduated in 2010. (Tr. 102.) He testified that his wife did not want him

to work during law school, and he has done only “odd jobs around the neighborhood” since he graduated. (Tr. 102.)

The Admissions Committee and the Board of Commissioners also considered Mr. Poignon’s financial responsibility. He filed for bankruptcy in 1997, but he has “no idea” of the amount of the debt that he discharged in that proceeding. (Tr. 74-75.) He admits that he currently owes an outstanding dental bill for approximately \$500.00 that he “will probably have to pay,” but he does not intend to do so unless the late fees are waived. (Tr. 76-77.) Other unpaid bills are also past due by more than 90 days. (Tr. 77-78.) Finally, Mr. Poignon’s current wife filed for bankruptcy, apparently to halt ongoing foreclosure proceedings against their home, but Mr. Poignon testified that he “know[s] very little about it” and the mortgage is in his wife’s name. (Tr. 80-81.)

ARGUMENT

Applicant Daniel Paul Poignon did not show by clear and convincing evidence that he should be allowed to reapply for admission to practice law in Ohio.

Mr. Poignon recognizes that he “necessarily has ... a heavy burden” in proving that he “has the requisite moral character to serve as a member of the legal profession” given his professional and criminal misconduct. (Objection and Brief in Support, *supra*, at 2.) He also agrees that the Board of Commissioners properly found that he did not carry that burden with respect to his current application to take the bar examination, and he is not contesting its recommendation that his application be disapproved. (*Id.*, at 1.) Instead, he objects only to a permanent bar on reapplying. (*Id.*, at 1.)

A. Public confidence

Mr. Poignon argues, first, that the Board's recommendation that he not be allowed to reapply in the future is "based upon an unprecedented 'public perception' argument.... Namely, the Board is concerned about how the public would regard an attorney whose pharmacy license was previously revoked." (Objection and Brief in Support, at 2-3.) However, this issue was mentioned only very briefly in the Board's eight page report, when it noted that "[t]he public has to have confidence in the integrity of the legal profession. And, it is difficult to believe that the public can have such confidence if a person can violate the strictures of one profession... but still become a member of another profession." (Report and Recommendation, at 7.)

Moreover, the Board's comment about public confidence was invited by Mr. Poignon's attorney, who stated during his opening statement at the hearing that this is a proper factor for its consideration:

[T]he Board in its review may consider how an approval of the Applicant impacts the public's perception or confidence in the legal profession....

(Tr. 9.) In fact, Gov. Bar. Rule I, Section 11(D)(5)(a), specifically provides that when an applicant has previously been convicted of a felony, "the Board shall consider...(iv) How an approval of the applicant would impact the public's perception of, or confidence in, the legal profession."

In any event, the Board's recommendation is based upon much more than public confidence and perceptions. It noted that Mr. Poignon left three pharmacy positions, for three different employers, after he stole drugs from them, abused drugs, or both, and that he abused prescription medications for nine or ten years. (Report and Recommendation, at 2-4.) It also noted Mr. Poignon's "neglect of financial affairs," his "seeming lack of knowledge" about them,

and his failure to maintain employment for any substantial period of time during the last ten years that he has not abused drugs. (Id., at 4.)

The Board was less concerned with public perceptions of Mr. Poignon's past professional and criminal misconduct than with its own perception of his present attitude toward that misconduct. For example, he admits that he was "abusing drugs" while employed at Tiffin Mercy Hospital, but he insists that he was fired for "performance issues." (Tr. 84, 93.) He admits that he was forced to resign from the pharmacy position in South Carolina for stealing and abusing drugs, but he denies stealing the drugs and implies that the prescription he submitted was authorized even though the physician denied it. (Tr. 85-86.) He admits that he stole and abused narcotics from the Corner Store Pharmacy in Toledo for two years, but he denies stealing 1,888 pills and rationalizes and excuses his conduct on the ground that drug abuse is part of a "pharmacy culture" that included "every pharmacist that worked there but one." (Tr. 72-74, 92.)

Significantly, Mr. Poignon testified that he pled no contest to the two felony drug charges, not because he stole and abused the drugs, but rather because he was threatened with six months in jail for contempt if he went to trial. (Tr. 66-67.) Similarly, he explains that his pharmacy license was revoked because his attorney did not appear and because a different attorney then failed to file a timely appeal, minimizing his admitted theft and abuse of drugs. Finally, he blames his employers for his failure to retain a job.

The Board was also concerned about Mr. Poignon's attitude toward his finances. He professes not to know how much debt he incurred before he filed for bankruptcy, and he claims that he filed because he was ordered to do so by a domestic relations court. He testified that he has not paid bills on time because he needed more information about them or because the late fees were not waived, and he knows nothing about his wife's current bankruptcy even though she

has been supporting him and their home is in foreclosure. Mr. Poignon explained that he has not been employed since 2007 because his wife didn't want him to work while he was in law school, but he has made no apparent efforts to secure any employment since he graduated in 2010.

The Board specifically recognized that "Mr. Poignon's course of conduct in stealing and abusing drugs is in the past," and it properly focused on his present attitude and behavior as the best indication of his future character, fitness, and moral qualities:

Mr. Poignon went years not taking responsibility for his actions. Rather, there was always someone or something else that he blamed. And ... even now that he finally is purporting to take responsibility, his explanations appear half-hearted and self-serving. In this regard, his application itself is replete with self-justifying explanations with respect to each job from which he was terminated [H]e also has not engaged in any conduct that truly reflects rehabilitation or that gives any indication that he understands the seriousness of his betrayal of professional standards.

(Report and Recommendation, *supra*, at 6.) Moreover, the Board noted "the perception of the members of the panel that Mr. Poignon's demeanor during his testimony caused him not to appear entirely credible." (*Id.*, at 7.) The Admissions Committee also had serious concerns about Mr. Poignon's present attitude toward his past misconduct:

[W]hile the Applicant admitted the basic facts of the events, he did not seem to accept responsibility for his actions. He blamed his use of controlled substances on the "culture of pharmacy" – though illegal, everyone else was doing it. He blamed his criminal conviction on his counsel – he was forced to plead guilty because his attorney did not correctly inform him of his trial date. He blamed his loss of his pharmaceutical license on another attorney – his appeal was not timely filed. He blames the theft of drugs on a co-worker, though the Applicant pled guilty [sic, should read "no contest"] and was convicted. He blames his bankruptcy on the domestic relations court – he was ordered to file bankruptcy. He blames his failure to hold a job both before and during law school on his employers.

(Admissions Committee Report, *supra*, at 3.) See *In re Application of Nerren*, 79 Ohio St.3d 322, 324, 1997-Ohio-305, ¶ 9 (citing an applicant's "blame of third parties for her personal failings" as one factor in the Court's decision that she be forever precluded from reapplying).

In short, public perception was only one of many factors considered by the Board. It found that Mr. Poignon's professional and criminal misconduct over a period of at least ten years, his sporadic employment, his financial history, and – most importantly – his ongoing justifications and refusal to accept responsibility for his actions, all indicate that he should not be permitted to reapply.

B. Rehabilitation

Mr. Poignon argues, second, that a permanent prohibition against reapplying is appropriate only for applicants "who have already been offered a second chance or for whom rehabilitation seems unlikely." (Objection and Brief in Support, *supra*, at 3.) There are two problems with that contention. First, this Court has never adopted an automatic "second chance" rule that would prevent it from considering the unique individual circumstances of each applicant. See *In re Application of Corrigan*, 47 Ohio St.3d 32, 37 (1989) (noting that deciding whether an applicant should be prohibited from reapplying "is not an exact science"). No such rule has been included in Ohio Gov. Bar Rule I, which provides without qualification that "[t]he Board shall recommend that the applicant not be permitted to reapply for admission to the practice of law or that the applicant be permitted to reapply only after a specified period of time." (Id., Section 12 (E).)

There is also no support for such a rule in relevant caselaw. In *In re Application of Barilatz*, 91 Ohio St.3d 396, 2001-Ohio-69, the applicant had been dishonest about collateral matters during the Board's investigation, had failed to pay child support five years earlier, and

had pled guilty to a misdemeanor weapons charge many years before that. The Court agreed with the Board that giving the applicant a second chance was not warranted and that he should not be allowed to reapply:

[A]pplicant's conduct, having occurred when he was in his forties, could not be ascribed to youth or inexperience, and ... since applicant was now almost fifty years old, any change in his actions could not be expected [Applicant] shall not be permitted to reapply for admission in the future.

91 Ohio St.3d at 397, 2001-Ohio-69, at ¶¶ 3, 5. In *In re Application of Sabino*, 81 Ohio St.3d 98, 1998-Ohio-579, this Court also permanently prohibited an applicant from reapplying, without affording him a second chance, after he “abandoned” his application for unknown reasons.

Second, Mr. Poignon objects that the Board's recommendation is improper because it does not explicitly find that “rehabilitation seems unlikely.” (Objection and Brief in Support, at 2.) This Court has permanently barred applicants from reapplying in previous cases without any specific findings that rehabilitation was unlikely. See, e.g., *In re Application of Nerren*, 79 Ohio St.3d 322, 1997-Ohio-305. In *In re Application of Keita*, 74 Ohio St.3d 46, 48, 1995-Ohio-33, ¶ 9, the Court ordered that the applicant be “forever precluded from reapplying” because he continued to rationalize his earlier criminal conduct; “we consider such enduring conduct ample justification.”

Most importantly, Mr. Poignon submitted virtually no evidence at the hearing to carry his burden of showing that he is rehabilitated. He has not tested positive for drugs for eleven years, but he has not been tested for drugs during the last ten years. He completed law school in 2010, but graduation from law school is not sufficient to establish that an applicant has achieved the requisite character, fitness, and moral qualifications to practice law. It is arguable whether Mr. Poignon's “no contest” pleas demonstrate an acceptance of responsibility for his crimes, but his

insistence that he was coerced into entering these pleas clearly does not. Mr. Poignon submitted no evidence whatsoever to show that he has learned financial responsibility, or that his history of sporadic and brief employment has changed.

There is thus ample basis for the Board's recommendation that Mr. Poignon be permanently prohibited from reapplying. More than ten years after his felony convictions, he continues to exhibit a lack of candor and a lack of responsibility for his crimes, and he continues to blame everyone but himself for his problems: he was convicted of stealing drugs because his attorney erred, he lost his pharmacy license because two more attorneys erred, and he abused drugs because he is a victim of "pharmacy culture." Mr. Poignon was a member of one profession in Ohio and he repeatedly violated the standards of that profession and the trust reposed in its members. His failure to recognize fully and to take responsibility for his breaches of his professional obligations constitutes the type of "enduring conduct" that justifies exclusion from the practice of law in Ohio.

In short, Mr. Poignon has failed to show by clear and convincing evidence that he is rehabilitated and deserves a second chance to apply for admission to the Ohio bar.

CONCLUSION

The recommendation of the Board of Commissioners that Mr. Poignon's application should not be approved and that he should not be allowed to reapply is supported by the evidence of record and by applicable legal authorities. Mr. Poignon did not carry his burden of proving by clear and convincing evidence that he possesses the requisite character, fitness, and moral qualifications to practice law in Ohio, or that he will acquire those traits in the future. Accordingly, the Board of Commissioners believes that his Objection should be overruled.

Respectfully submitted,



Michael Thomas (0000947)
VORYS, SATER, SEYMOUR
AND PEASE, LLP
52 East Gay Street
PO Box 1008
Columbus, Ohio 43216-1008
Tel: (614) 464-5686
Fax: (614) 719-4905
mrthomas@vorys.com

*Counsel and Special Investigator for
Board of Commissioners on
Character and Fitness*

CERTIFICATE OF SERVICE

A copy of the foregoing Response of the Board of Commissioners on Fitness and Character was sent by regular U.S. mail, postage prepaid, on November 2nd, 2011, to each of the following parties:

John A. Borrell, Jr.
MARSHALL & MELHORN, LLC
Eighth Floor, Four SeaGate
Toledo, Ohio 43604
*Counsel for Toledo Bar
Association Admissions Committee*

James E. Brazeau
ROBINSON, CURPHEY, & O'CONNELL, LLC
Ninth Floor, Four SeaGate
Toledo, Ohio 43604
Counsel for Applicant Daniel Paul Poignon

Daniel Paul Poignon
8517 Kacie Lane
Monclova, Ohio 43542



Michael Thomas (0000947)