Supreme Court of Ohio Clerk of Court - Filed January 30, 2015 - Case No. 2014-1555

IN THE SUPREME COURT OF OHIO

In re:	:	
Application of	:	Case No. 2014-1555
Joseph V. Libretti, Jr.	:	

ANSWER BRIEF OF AMICUS CURIAE,
CITIZENS' INSTITUTE FOR LAW AND PUBLIC POLICY
IN SUPPORT OF APPLICANT JOSEPH V. LIBRETTI, JR.

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INTRODUCTION AND STATEMENT OF FACTS

Amicus incorporates the Introduction and Statement of Facts filed by co-amicus CURE-Ohio .

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LAW AND ARGUMENT

I. THE PANEL'S CONCERNS ABOUT CANDOR AND SINCERE REGRET ARE A BASIS FOR A DELAY WITH PERMISSION TO REAPPLY, NOT A PERMANENT BAN FROM THE PRACTICE OF LAW.

As co-amicus CURE-Ohio has indicated, this Court has historically rejected Board recommendations that an applicant never be permitted to re-apply in favor of a delay, where there is evidence of an applicant's redeeming qualities. In *Application of McKinney*, the applicant had provided what the Panel, Board, and Court found to be a false reason for her employment termination, did so repeatedly, and gave multiple explanations under oath for not telling the truth initially. *See McKinney*, 134 Ohio St.3d 260, 2012-Ohio-5635, 981 N.E.2d 847, ¶ 23. The Court did not find it determinative that she made a false statement on her Application and ultimately permitted her to reapply and submit to a new investigation. *Id*. at ¶ 22. In *Application of Holzhauser* (66 Ohio St. 3d 43) the Board's recommendation of a permanent ban was set aside in favor of a two-year delay because the Court found the Applicant did not "completely lack rehabilitation potential." This is all the more true with the present Applicant, who has displayed rehabilitation and redeeming qualities, and requests additional time to demonstrate them.

Instances in which a candidate has been permanently banned from reapplication include a former pharmacist whose license had been revoked for felony drug theft, and who ten years later still blamed his supervisor, the pharmaceutical profession, and his attorney for the outcome. See *In re Poignon*, 132 Ohio St. 3d 395, 2012-Ohio-2915 (2012). Another permanently banned applicant failed to take responsibility even for admitted violent conduct (*In re Keita,* 74 Ohio St. 3d 46, 656 N.E.2d 620). The holdings in *In re Nerren, In re Cvammen*, 102 Ohio St. 3d 13, 2004-Ohio-1584, 806 N.E.2d 498, and *In re Wiseman*, 135 Ohio St. 3d 267, 2013-Ohio-763, all

involved candidates who refused to accept responsibility for their actions, indicating that this Court judges most severely not the person who engages in conduct she or he acknowledges was unwise but the person unable to admit to error, and hence to correct it.

The Applicant's acceptance of responsibility ("[T]he issue in any direct appeal wasn't whether I sold drugs. I did that. I own that. I don't deny that. I never have.") should weigh strongly in favor of his being permitted to re-apply for permission to register as a candidate for the practice of law, an opportunity this Court granted to the applicant in the seminal case of *In Re Davis* 38 Ohio St. 2d 273, 313 N.E.2d 363 (1974) and 61 Ohio St. 2d 371, 403 N.E.2d 189 (1980). Though the Court had "significant doubts" due to Davis' evasiveness while testifying, the Court remanded the Application to the Board with instructions to hold another hearing in 6 months to consider "current evidence," noting Davis' accomplishments, which included academic achievements and a prior position of considerable responsibility. *Id.* at 276, 313 N.E.2d 363. Upon rehearing the Board again disapproved Davis, but the Court held that despite some evidence which supported the Board's decision, it was impressed with his academic and professional accomplishments to approve his application. *In re Davis,* 61 Ohio St. 2d at 373-374, 405 N.E.2 at 189.

II. THE OHIO SUPREME COURT HAS ORIGINAL JURISDICTION TO DETERMINE CHARACTER AND FITNESS THAT SHOULD NOT BE LIMITED BY COLLATERAL ESTOPPEL AND WAIVER.

In Ohio the Supreme Court is the ultimate arbiter of an Applicant's character and fitness and of the conditions under which an individual may engage in the practice of law. Ohio Const. Article 4.02. Collateral estoppel, requests for deference, and claims of waiver cannot limit the Court's authority to regulate the practice of law in Ohio, which is exclusive and

absolute. See *Smith v. Kates*, 46 Ohio St.2d 263, 348 H.E.2d 320 (1976). A bar admissions proceeding is *sui generis* and unrelated to other types of criminal or civil proceedings, which have differing standards of proof and may or may not have provided a chance to fully and fairly litigate an issue, or have provided sufficient notice that a procedural misstep resulting in a default, or a concession made for strategic reasons unrelated to "what actually happened," would later be invoked in a bar admissions proceeding. The argument that Applicant has waived any objections—a discretionary doctrine in any event—cannot apply since this Court has original and not appellate jurisdiction in practice of law cases. See *In re M.D.,* 38 Ohio St.3d 149, 151, 527 N.E.2d 286 (1988); *State v. Awan,* 22 Ohio St.3d 120, syllabus, 489 N.E.2d 277 (1986).

This Court has full and exclusive jurisdiction over the practice of law in Ohio and may draw its own conclusions based on the facts before it, as well as fashion an appropriate remedy.

III. OMISSIONS FROM A BAR APPLICATION THAT ARE OPENLY RAISED AND DISCUSSED BY AN APPLICANT IN AN ADMISSIONS INTERVIEW, A PANEL HEARING, AND A SUPPLEMENT SHOULD BE CONSIDERED AS MITIGATION AND A BASIS FOR A DELAY WITH PERMISSION TO REAPPLY, NOT A PERMANENT BAN FROM THE PRACTICE OF LAW.

Applicant's discussion of his activity with the admissions committee and panel and submission of requested documentation should be considered evidence of no deliberate attempt to deceive. Amicus would note that Applicant's conduct exceeds the transparency of another recent candidate, who actually made false statements, repeatedly, and did not disclose the truth even when questioned by the Panel, but was still permitted to reapply. *See McKinney*, *Id*.

IV. NEW "FINDINGS" ALLEGED BY ONE PARTY THAT ARE NOT PRESENT IN THE PANEL REPORT ARE NOT A SUFFICIENT BASIS TO PERMANENTLY BAN AN APPLICANT FROM THE PRACTICE OF LAW

As a preliminary matter, amicus notes that numerous statements are made in the Brief to

which it responds that are not present in the underlying Panel Report.

For example, there is no finding in the Panel Report that Applicant's "Post-Conviction Accomplishments Alone Do Not Adequately Demonstrate Full Rehabilitation, Acceptance of Responsibility And Candor" and there is no finding in the Panel Report that Applicant demonstrated "A Significant Deficiency In [Libretti's] Honesty."

The Report did find Applicant characterized his activity as "stupid," "foolish," that he "expressed regret" that "his conduct had resulted in humiliation and pain," (13), that he had "serious questions that this may not be very moral," (6) that he "didn't feel good about it," (7) did "think it was wrong" (7) yet concluded that he had an "amoral view of what he had done" (13) based on his demeanor without considering the typical and documented effects on an individual's demeanor of lengthy incarceration and post-traumatic stress. Both Amici respectfully submit that it is possible the candidate's level of remorse was underestimated, but that in any case there is no reason Applicant should not be permitted to withdraw and reapply at some future date when he can better demonstrate the level of acknowledgement of his wrong.

Neither the Panel Nor the Probation Office found that Applicant violated his probation multiple times between 2008-2013. The Report mentions and Applicant admits that he should not have been associating with William Breeden in 2010.

There is no finding (or mention) in the Panel Report regarding new and very serious allegations that Applicant engaged in tax evasion, held an undisclosed ownership interest in JPL Marketing, failed to obtain a license to run a business or to remit sales tax, or was engaged in the sale of controlled substances since 1990, and these issues should be remanded for full hearing if they are to form the basis of a practice of law decision.

Amicus respectfully submits that the tenor of the filings, the continuing presentation of

more and more new allegations not addressed in the Panel Report, and the willingness to piece together data from disparate and unproven sources to paint the most unflattering possible portrait relying on such doctrines as collateral estoppel and waiver for support bears a striking resemblance to the treatment of the bar candidate Loss in the case of *In re Loss,* 518 N.E.2d 981 (Ill. 1987) discussed in its initial Amicus Brief filed with this Honorable Court.

V. NEW ALLEGATIONS AGAINST WHICH APPLICANT CANNOT DEFEND HIMSELF SHOULD NOT BE CONSIDERED AT THE FINAL BRIEFING STAGE BUT REMANDED FOR HEARING ON THE MERITS

There is simply insufficient notice or inability to defend against the following allegations raised at this late date.

There is no finding (or mention) in the Panel Report regarding new allegations that Applicant engaged in tax evasion, held a 42% undisclosed interest in JPL Marketing, failed to obtain a license to run a business or to remit sales tax, or sold a controlled substance since 1990. Applicant may be a convicted felon and hence incur the automatic suspicion of those he encounters, but he is still entitled to present evidence in his defense when serious allegations are raised and to have a fair investigation conducted.

VI. APPLICANT'S OUTSTANDING RECORD OF ACCOMPLISHMENTS AND STRONG SUPPORT FROM THE LEGAL COMMUNITY WARRANT A DELAY WITH PERMISSION TO REAPPLY, NOT A PERMANENT BAN FROM THE PRACTICE OF LAW.

Amicus refers and supports the Answer filed by Applicant within and the Answer filed by co-Amicus CURE-Ohio and Fifteen Attorneys and Law Professors in support of Applicant.

CONCLUSION

Amicus supports the relief requested by Applicant, by co-amicus CURE-Ohio, and Fifteen Attorneys and Law Professors.

CILPP is grateful for the opportunity to provide the enclosed information in consideration of the important issues raised by this case.

Dated: January 27, 2015

Respectfully submitted,

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A true copy of the foregoing has been served by electronic mail (and U.S. mail as to Admissions Committee) this 29th day of January, 2015 upon the following:

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