

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RESPONDENT E

A Member of the State Bar

[No. 88-O-11634]

Opinion on Motion for Reconsideration—Filed December 9, 1991

SUMMARY

Arguing that the review department used an erroneous standard of review and that the discipline imposed was insufficient, the examiner moved for reconsideration of the review department's decision to order a private reproof for aberrational negligence by respondent in handling a client's check. The review department held that the motion was timely, because the service of the original decision by mail had extended by five days the time to move for reconsideration.

On the merits, the review department declined to adopt an abuse of discretion standard for review of hearing judges' findings of fact, and explained that in conducting its de novo review, it had not rejected the credence given by the hearing judge to the complaining witness's testimony, but merely found that such testimony did not constitute clear and convincing evidence that respondent's contrary testimony was intentionally false.

Based on the imposition of a public reproof in a recent Supreme Court case involving more serious misconduct and less mitigation, the review department declined to impose greater discipline than a private reproof in this matter.

COUNSEL FOR PARTIES

For Office of Trials: Lawrence J. Dal Cerro

For Respondent: Daniel Drapiewski

HEADNOTES

[1] 130 Procedure—Procedure on Review
135 Procedure—Rules of Procedure

The rule extending any prescribed period of notice five days for service by mail applies to the State Bar Court's service of its decisions as well as to service of papers between parties. Thus, the time to file a motion for reconsideration of a review department decision was extended due to service of the decision by mail. (Trans. Rules Proc. of State Bar, rules 243, 455.)

- [2 a, b] **166 Independent Review of Record**
 167 Abuse of Discretion
Abuse of discretion is the standard generally applied to review of rulings on motions at the hearing level, but has never been the standard of review applied by the Supreme Court to findings of culpability. The review department must independently review the record as a whole. Great weight is given to credibility determinations based on testimony at the hearing, but none of the findings at the hearing level is binding upon the reviewing court.
- [3] **162.11 Proof—State Bar’s Burden—Clear and Convincing**
 801.90 Standards—General Issues
Findings in aggravation, like findings of culpability, must be supported by clear and convincing evidence.
- [4 a-c] **162.11 Proof—State Bar’s Burden—Clear and Convincing**
 166 Independent Review of Record
 615 Aggravation—Lack of Candor—Bar—Declined to Find
Where respondent’s client denied having had a certain conversation with respondent, and the hearing judge credited the client on that point, but the record as a whole showed that respondent lacked a motive to lie in testifying about the conversation, the evidence suggested that the client might have forgotten the conversation, and the client exaggerated in other testimony and was very bitter toward respondent, the review department, while not rejecting the credence given to the client’s testimony by the hearing judge, did find that the client’s testimony failed to constitute clear and convincing evidence of intentional misrepresentation by respondent.
- [5 a, b] **162.11 Proof—State Bar’s Burden—Clear and Convincing**
 166 Independent Review of Record
 615 Aggravation—Lack of Candor—Bar—Declined to Find
Where the hearing judge accepted as true the testimony of two State Bar witnesses, but such testimony did not contradict respondent’s own plausible version of events, the review department found that State Bar had failed to prove by clear and convincing evidence that respondent had testified falsely.
- [6 a-c] **280.00 Rule 4-100(A) [former 8-101(A)]**
 824.52 Standards—Commingling/Trust Account—Declined to Apply
 824.54 Standards—Commingling/Trust Account—Declined to Apply
Where respondent negligently committed a minor trust account violation, made voluntary restitution prior to any complaint to the State Bar, presented extensive character evidence, and was on the verge of retiring from a very respectable 40-year career, respondent was appropriately the subject of a private reproof.

ADDITIONAL ANALYSIS

[None.]

OPINION AND ORDER DENYING MOTION FOR RECONSIDERATION

PEARLMAN, P.J.:

The examiner has moved for reconsideration of the review department's decision to order a private reproof in this matter for the aberrational negligence found by the hearing judge. Respondent has opposed such motion as untimely filed and as unmeritorious. [1] We find that the motion was timely filed since rule 455 of the Transitional Rules of Procedure expressly authorizes such motions to be filed within 15 days of written notice of the filing of the review department decision and rule 243 extends any prescribed period of notice five days for service by mail. This has always been interpreted by the State Bar Court to apply to service of its decisions as well as to service of papers between parties. We would obtain the same result by interpreting the requirements of section 1013 of the Code of Civil Procedure. (See, e.g., *Citicorp North America, Inc. v. Superior Court* (1989) 213 Cal.App.3d 563.)

We therefore address the motion on its merits. The examiner raises two grounds for his request for reconsideration: the alleged use by the review department of an erroneous standard of review and the alleged insufficiency of the discipline imposed.

What the examiner in fact objects to is the review department's application of the existing standard of review established by the Supreme Court for review of hearing department findings. He instead urges, for the first time, that a new standard of review be adopted for findings of fact by full-time hearing judges—reversal for abuse of discretion only. The examiner's reliance on language from the review department opinion in *In the Matter of Heiser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 47 is misplaced. In *In the Matter of Heiser*, we reviewed the dismissal of a count and found the dismissal on the referee's own motion to have been within the hearing referee's discretion. It was apparently predicated on his determination that there was insufficient evidence to support a finding of culpability based on the unconvincing nature of the sole witness's prompted recollection. [2a] Abuse of discretion is the standard generally applied to motions granted or denied at the hearing level (see,

e.g., *Lister v. State Bar* (1990) 51 Cal.3d 1117, 1128 [upholding denial of motion to introduce additional evidence as "within the referee's discretion"]), but has never been the standard of review applied by the Supreme Court to findings of culpability. Indeed, although in the last year and a half, numerous other cases have been before the review department on review of the new full-time judges' decisions, the Office of Trial Counsel has never argued for a change in the standard of review. A motion for reconsideration before an intermediate reviewing court is not the appropriate vehicle for challenging the nature of the review function in disciplinary matters long since established by the Supreme Court and incorporated into the Rules of Procedure adopted by the Board of Governors of the State Bar.

Rule 453(a) of the Transitional Rules of Procedure contains the same operative language as its predecessor with respect to the standard on review: "In all matters before the review department, that department shall independently review the record and may adopt findings . . . at variance with the hearing department. . . . Findings of fact of the hearing department resolving issues pertaining to testimony shall be given great weight."

We place great weight on the factual determinations of the judges of the hearing department and, in fact, it is precisely because of the careful resolution of the central charges by the hearing judge below that her contrary resolution of two peripheral issues was a major focal point of the respondent's appeal. The hearing judge squarely rejected the claim, resurrected by the examiner on motion for reconsideration, that respondent intentionally failed to return client funds. She believed respondent on this crucial issue and found that he committed no intentional misconduct toward his client whatsoever. She also found that the negligent mishandling by respondent's office of the client's check intended for cost reimbursement was aberrational in the context of a 40-year career with no other evidence of accounting problems and high praise from a cross-section of credible witnesses who vouched for his honesty and integrity. In this context, we considered two findings in aggravation (findings 9 and 23) that in the course of his testimony before the hearing judge in 1990, respondent falsely testified regarding two conversations he had in 1981.

[3] Findings in aggravation, like findings of culpability, must be supported by clear and convincing evidence. (*In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, 11.) Thus, in the very recent decision of the Supreme Court in *Calvert v. State Bar* (1991) 54 Cal.3d 765, 783-784, the Supreme Court rejected two findings of a referee in aggravation as unsupported by the record and reduced the discipline recommended by the volunteer review department accordingly. The Supreme Court applied a similar analysis in its recent decision in *Lubetzky v. State Bar* (1991) 54 Cal.3d 308, reversing all of the adverse findings against an applicant for admission to the State Bar. In undertaking independent review, it scrutinized the evidence and rejected all findings of incidents indicative of bad moral character, noting that the volunteer hearing panel had not, in its decision, indicated that it had assessed the probative value of exculpatory evidence or inferences that could be drawn from the entire circumstances. For example, the absence of any apparent motive to lie about a matter on which *Lubetzky* was found by the hearing panel to have intentionally concealed information appeared to the high court to qualify an omission from the application as an "unintentional nondisclosure of a relatively unimportant matter." (*Lubetzky v. State Bar, supra*, 54 Cal.3d at p. 319.) [4a] In light of the record as a whole, we found a similar lack of motive for the findings that respondent lied about two relatively minor matters when testifying below.

Both of the conversations which respondent attested to were alleged to have followed respondent's undisputed action in refusing to pay a bill for expert witness consultation on his client's behalf that he believed was invalid and his client should not have to pay. The bill was one which, if valid, the client would clearly have been liable for under his written fee agreement with respondent. Eventually, the client received credit for the amount of the client's check against fees and other costs advanced by respondent and never had to pay the disputed expert witness bill. The client thus benefitted by the respondent's objection to the bill on his behalf. [4b] Respondent testified that in the fall of 1981 he orally communicated his refusal to pay the bill to both his client and a partner at the law firm which sent the bill. The partner was never called to testify at the hearing; the client did testify that he never had such a conversation with

respondent, but he also testified that he had a stroke in 1986 in which he temporarily lost his memory and "substantially" regained it thereafter. The hearing judge expressly found the client to have exaggerated his testimony in other respects and to be very bitter toward respondent.

[4c] In conducting its own de novo review of the record, the review department did not reject the credence given to the client's testimony by the hearing judge, but merely found that it did not constitute clear and convincing evidence that respondent intentionally misrepresented his own recollection of the nine-year-old conversation in light of the whole record. (Cf. *In the Matter of Crane & DePew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 158 [respondent's testimony regarding events six years earlier was rejected based on documentary and other evidence, but respondent was not found to have offered such testimony in bad faith or to have lacked candor].)

[5a] The other challenged finding had even less evidentiary support. Finding number 9 was expressly based on the hearing judge's view that the testimony of two witnesses produced by the State Bar contradicted respondent's testimony. In fact, we assumed their testimony to be true based on the hearing judge's assessment of their credibility, but held that their testimony did not contradict that of respondent. The hearing judge found that respondent's testimony of a luncheon meeting with the partner in question in November 1981 was corroborated by respondent's calendar. Neither of the witnesses produced by the State Bar was present during the conversation respondent allegedly had with their partner and both testified with respect to firm practices as opposed to a clear recollection of the facts of this nine-year-old billing dispute. The partner who was the logical person to affirm or deny the contents of the conversation was never called to testify. The examiner argues that the State Bar had already submitted adequate proof and was not required to present additional evidence in the form of the testimony of the other participant in the conversation. The review department has concluded otherwise. The fact that there is no written record that A ever told B and C about a conversation which neither B nor C witnessed does not by itself provide clear and convincing proof that the conversation never took place.

Here any inference that could be drawn from the testimony of the State Bar's witnesses on this point was offset by other circumstantial evidence that the law firm did not follow ordinary procedures in the handling of its billing of this matter. Had the refusal to pay the bill never been communicated to the law firm then it would have been logical for follow-up bills to have been sent and for collection procedures to have been instituted before the statute of limitations prevented collection. The fact that no further billings were sent to respondent for over three years is more consistent with a communicated objection to the bill and the law firm's subsequent reluctance to pursue this minor matter. [5b] Since respondent's version was plausible and uncontradicted, the State Bar failed to meet its burden of proof that respondent testified falsely on this issue even accepting as true all of the testimony offered by the State Bar witnesses. *Edmondson v. State Bar* (1981) 29 Cal.3d 339 and *Davidson v. State Bar* (1976) 17 Cal.3d 570 are but two illustrations of the application of the independent de novo standard of review. *Lubetzky v. State Bar, supra*, 54 Cal.3d 308 and *Calvert v. State Bar, supra*, 54 Cal.3d at pp. 783-784 provide very recent examples of the required scrutiny of factual evidence by the reviewing court.

[2b] The principle applied in all of these cases is time-honored—the record as a whole must be independently reviewed. Great weight is given to credibility determinations based on testimony at the hearing, but none of the findings at the hearing level is binding upon the reviewing court.

[6a] The examiner's secondary argument that the discipline should be greater based on the findings in this case is also unpersuasive. This case clearly presents a less serious fact situation than *Dudugjian v. State Bar* (1991) 52 Cal.3d 1092 which resulted in a public reproof imposed by the Supreme Court in the face of similar arguments by the State Bar that more severe discipline was warranted. Unlike the short otherwise blemish-free record of the two attorneys in *Dudugjian v. State Bar, supra*, 52 Cal.3d 1092, respondent had a 40-year record he could point to with pride and a wide range of character witnesses. He also put on evidence of extensive pro bono activities that was not a factor in mitigation in the *Dudugjian* case.

Dudugjian itself was consistent with the prior disposition of similar cases. Indeed, in a widely publicized case heard by the former volunteer review department in 1989, the review department issued a public reproof of a prominent trial lawyer for intentionally refusing to place over \$100,000 in trust while contending that he was entitled to such sum as additional fees negotiated in violation of statutory fee limitations. (*In the Matter of R. Browne Greene* (State Bar Ct. No. 84-O-13477), reproof effective Jan. 2, 1990 [reported in *State Bar Discipline*, Cal. Lawyer (Feb. 1990), at pp. 109-110].) In *Dudugjian v. State Bar, supra*, 52 Cal.3d 1092, the attorneys also got into a fee dispute with the client, but were found to have lied about their intention to return the money and thereafter refused to return the funds upon request.

[6b] Here, respondent was found to have negligently failed to place \$1,754 in trust while arbitrating his entitlement to fees and costs of far greater magnitude. The client, who was represented by new counsel when the 1982 mistake in handling the client's check was first brought to respondent's attention in 1985, never demanded that the \$1,754 be placed in trust after discovering that the bill for which it had been intended as reimbursement had never been paid. Instead, the client acquiesced in simply receiving credit for the amount in question in arbitration. Voluntary restitution occurred in 1986—three years before any complaint was filed with the State Bar. In *Dudugjian v. State Bar, supra*, 52 Cal.3d 1092, voluntary restitution never occurred. Restitution had to be ordered as a condition of the reproof. In *In the Matter of Greene, supra*, restitution likewise did not occur until over seven months after the appellate decision in the client's favor.

[6c] Since respondent unintentionally committed a minor violation of rule 8-101(A) of the Rules of Professional Conduct, made voluntary restitution, and is on the verge of retiring from a very respectable career, he is appropriately the subject of a private reproof. The motion for reconsideration is DENIED.

We concur:

NORIAN, J.
STOVITZ, J.