



IN RE: MICHAEL J. LIVINGSTONE

NO. BD-2011-005

S.J.C. Judgment of Reinstatement entered by Justice Duffly on January 24, 2013.¹

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¹ The complete Order of the Court is available by contacting the Clerk of the Supreme Judicial Court for Suffolk County.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO: BD-2011-005

IN RE: MICHAEL J. LIVINGSTONE

MEMORANDUM OF DECISION

The respondent seeks reinstatement to the bar of the Commonwealth following his disciplinary suspension. In January, 2011, the respondent stipulated to a disciplinary sanction of suspension from the practice of law in the Commonwealth for a period of one year.¹ At that time, the respondent was serving as the director of medical services for the Bristol County sheriff's office, following his 2008 resignation from the judiciary of the Commonwealth. In May, 2012, the respondent filed an application for automatic reinstatement pursuant to S.J.C. Rule 4:01, § 18(1)(b), accompanied by the requisite affidavit of compliance and evidence of a passing score on the multi-state professional responsibility examination. Bar counsel objected to the respondent's reinstatement, see S.J.C. Rule 4:01, § 18(1)(c), and the matter came before me "to determine if the filing of a

¹ At the hearing before me, the respondent's counsel acknowledged that the one-year term of suspension was a sanction negotiated with bar counsel, particularly, from counsel's point of view, so that the respondent would not be required to petition for formal reinstatement through proceedings under S.J.C. Rule 4:01, § 18(4), (5), and (6).

petition for reinstatement," S.J.C. Rule 4:01, § 18(4), and "a reinstatement hearing," S.J.C. Rule 4:01, § 18(5), was necessary.

Background. In August, 2011, the Bristol County sheriff's office filed an internal "notice of discipline/termination hearing" of the respondent, with a hearing scheduled for September, 2011.² Immediately prior to the date of the scheduled hearing, the respondent resigned from his position with the Bristol County sheriff's office, and the hearing did not take place.

Based on those facts in the documents relative to the Bristol County sheriff's office's internal charges which are undisputed (in the absence of a hearing, the only facts upon which bar counsel may rely), bar counsel determined that the matter did not warrant additional disciplinary proceedings by the Board of Bar Overseers (board).³ Nonetheless, in her June, 2012, response to the respondent's application for reinstatement, bar counsel provided notice of the internal proceedings in the

² The charges contained in the internal disciplinary complaint, sheriff's office documents relative to those allegations, and correspondence from the respondent concerning the circumstances of the allegations, have been filed with this court, and bar counsel's motion to impound those documents, joined by the respondent, has been allowed.

³ Bar counsel made no similar assertion concerning the disputed facts alleged in the "notice of discipline/termination hearing" complaint, but stated repeatedly during the hearing before me that she did not believe, given the available record, that she would be able to prove those facts with the sufficiency required to meet the standard of a bar discipline proceeding.

sheriff's office, and sought this court's determination whether the respondent's application for reinstatement therefore should be remanded for formal reinstatement proceedings before the board, see S.J.C. Rule 4:01, § 18(1)(c), 18(5) and (6), and, if so, whether the respondent should be required to complete a formal petition for reinstatement pursuant to S.J.C. Rule 4:01, § 18(4).

On July 23, 2012, I conducted a hearing on bar counsel's motion. At that hearing, bar counsel stated that the respondent had admitted to certain facts alleged in the sheriff's internal disciplinary complaint, but that, in any formal reinstatement proceeding, she did not believe that she would be able to prove other, disputed facts sufficient to warrant additional bar disciplinary proceedings. Thus, she no longer sought a formal reinstatement proceeding. Instead, bar counsel sought "guidance" from the court concerning whether a formal reinstatement proceeding was necessary.

Bar counsel pointed out that even the conduct underlying the sheriff's investigation to which the respondent did admit evidenced a "lack of judgment," "result-oriented blinders," and the type of thinking "that got him into trouble in the first place." While sharing the court's concerns regarding a possible reflection on the respondent's moral character, bar counsel noted also that the additional period of suspension necessarily imposed

as a result of the proceedings in opposition to automatic reinstatement might have addressed some of those concerns. Bar counsel's investigation had suggested that the respondent's admitted conduct did not reflect sufficiently on his character and fitness to require a reinstatement hearing.

The respondent's counsel conceded at the hearing before me that the respondent used "bad judgment" in the actions which he admits undertaking at the Sheriff's office. Counsel argued that certain other actions mentioned in the internal disciplinary documents were undertaken by third parties, on their own initiative (albeit at the behest of the respondent), and that the respondent's actions were "understandable." When questioned by the court, the respondent's counsel conceded also that, among other things, the respondent had been "less than candid" with his own supervisor.

The respondent's counsel argued against remanding the matter for a formal reinstatement hearing, maintaining that such a hearing would effectively add another year to the respondent's suspension because of the time required to conduct the investigation and the hearing. The respondent's counsel claimed also that, even if bar counsel were able to prove some of the disputed conduct, there was "not enough" there to result in

another year of suspension,"⁴ likely the practical result of requiring a reinstatement hearing.⁵ The respondent's counsel argued also that the respondent had already been "effectively" suspended for four years, since counsel had recommended to the respondent, after his resignation from the bench, that the respondent not practice law, and the respondent had not done so. Counsel claimed thus that remand for reinstatement proceedings would result in, effectively, a five-year suspension.

Discussion. When applying for reinstatement as the respondent would be required to do in conjunction with formal reinstatement proceedings pursuant to S.J.C. Rule 4:01, § 18(5), a suspended attorney bears the burden of showing that the attorney "has the moral qualifications, competency and learning in law required for admission to practice law in this Commonwealth, and that his or her resumption of the practice of

⁴ The respondent's counsel asserted, inter alia, that bar counsel would "have trouble establishing these [disputed] facts -- hard to establish at a hearing"; that if bar counsel, who is very experienced, did not think the facts could be established at a disciplinary hearing, she was likely correct and further investigation would serve no useful purpose; that even if "these things could be established, should it be tested through further investigation?"; that there was a "very limited area that she [bar counsel] could go in and prove -- she would not be able to prove other ancillary facts"; and that, at a reinstatement hearing, bar counsel would not be trying to prove the "things up for grabs," so that the respondent's counsel would have less to defend.

⁵ It appears that it is unlikely that testimony from a number of the participants would be available in any future disciplinary or reinstatement proceeding.

law will not be detrimental to the integrity and standing of the bar, the administration of justice, or the public interest."

S.J.C. Rule 4:01, § 18(5).

By stipulating to an agreed-upon sanction of one year, a day less than the sanction that would have required such formal reinstatement proceedings, bar counsel thereby indicated her conclusion that no such formal reinstatement proceeding was necessary to protect the public, and that a one-year period of suspension was an appropriate sanction for the respondent's misconduct. After investigation and careful consideration of the facts, admitted and disputed, in the Bristol County sheriff's office internal disciplinary proceedings, bar counsel came to the conclusion that the respondent's undisputed actions in that matter did not support initiation of disciplinary proceedings, and did not reflect sufficiently on his character and fitness so as to require a reinstatement hearing. Subsequent to the hearing before me, bar counsel now states that, "at this time," she does not object to the respondent's reinstatement.

Although "not binding on this court, the findings and recommendations of the board are entitled to great weight." Matter of Wainright, 448 Mass. 378, 384 (2007), quoting Matter of Fordham, 432 Mass. 481, 487 (1996), cert. denied, 519 U.S. 1149 (1997). The court looks to "the board's recommendation, its experience, and its expertise to . . . dispose of disciplinary

matters uniformly." Matter of Daniels, 442 Mass. 1037, 1038 (2004), citing Matter of Eisenhauer, 426 Mass. 448, 455, cert. denied, 524 U.S. 919 (1998). The "court is not bound by the recommendations of either the [b]oard or [b]ar [c]ounsel. Nevertheless, we give "substantial deference to their recommendations." Matter of Alter, 389 Mass. 153, 156 (1983). See Matter of Orfanello, 411 Mass. 551, 558 (1992).

While the respondent's conceded "bad judgment" is of some concern,⁶ in the absence of any pending disciplinary proceeding, given the extension of the respondent's suspension during the pendency of these proceedings, see Matter of Daniels, *supra*, and given bar counsel's representations at the hearing before me, I am constrained to agree that a formal reinstatement hearing would serve no useful purpose. This is, however, a close call. I do not agree with the respondent's counsel's minimization of the acknowledged events at the Bristol County sheriff's office, and, had the disputed events been established, my decision here would undoubtedly be different. Even given the admitted conduct, standing alone, I note that a sanction of a year's suspension could have been appropriate, and, in recommending an appropriate sanction, the board would have had to take into account the

⁶ I note also that, according to the representations in the impounded documents, the respondent's actions leading to the internal charges at the Bristol County sheriff's office were undertaken, at least in part, in a misguided effort to assist a third party.

aggravating factor of the respondent's prior misconduct.

Moreover, I do not accept the respondent's counsel's characterization of the respondent's professional activities since his resignation from the bench as "effectively" a four-year disciplinary suspension. Nonetheless, I note, in that regard, that the primary factor for a court's consideration in any bar discipline proceeding is "the effect upon, and perception of, the public and the bar." Matter of Alter, supra.

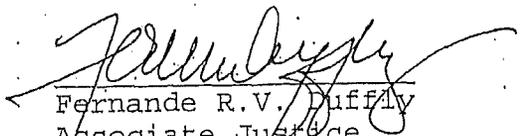
In Matter of Daniels, supra, the board, reversing the recommendation of a hearing committee, recommended against the reinstatement of an attorney who had been suspended from the practice of law for three years on the ground that the attorney's "lapse in judgment" in engaging in conduct which might be viewed as having engaged in the practice of law while suspended showed that the attorney had not established the requisite "moral qualifications to resume practice." Matter of Daniels, supra at 1037. The single justice adopted the board's recommendation, but the full court determined that the attorney should be reinstated. In deciding that reinstatement was appropriate, the court did not resolve whether the attorney had indeed engaged in the practice of law while suspended. Instead, the court observed that the additional period of the attorney's suspension, which had by then "continued in effect for two years beyond" the date on which the hearing committee initially recommended reinstatement, was longer

than any sanction which likely would have been imposed for the attorney's "misjudgment." The court noted also that bar counsel would not, at that point, have objected to the attorney's reinstatement on that ground.⁷

While the conduct at issue in Matter of Daniels, supra, was distinct from the conduct in question here, in each instance the suspended attorney's conduct could be seen, at least to some extent, as the product of the attorney's "ill-advised, if well-intentioned, acquiescence to the request of [a] good friend." Id. at 1038. Given this, and in the absence of an objection by bar counsel to the respondent's reinstatement, I conclude that a reinstatement hearing is not necessary to protect the public interest.

An order shall enter allowing the respondent's application for reinstatement to the practice of law in the Commonwealth.

By the Court,


Fernande R.V. Duffly
Associate Justice

Entered: January 24, 2013

⁷ The court considered, and rejected, other grounds on which bar counsel did object to the reinstatement.