TO BE PUBLISHED

Supreme Court of Kentucky

2018-SC-000081-KB

KENTUCKY BAR ASSOCIATION — MOVANT

V. — IN SUPREME COURT

MYRA DESHAWN CHENAULT — RESPONDENT

OPINION AND ORDER

I. BACKGROUND

Respondent, Myra Deshawn Chenault, was licensed to practice law in the Commonwealth of Kentucky on May 1, 2001. Her current bar roster address is 209 Kindel Brooke Circle, Mount Sterling, Kentucky 40353, and her Kentucky Bar Association (KBA) Member Number is 88691. In 2006, Chenault was appointed as Master Commissioner and continued in that position until October 3, 2014.

During her tenure, Chenault managed the Master Commissioner's bank accounts. Chenault's job duties included paying her own and her staff's salaries from the Master Commissioner's operating account. The Administrative Office of the Courts (AOC) conducted annual audits of the bank accounts and noticed substantial discrepancies in the audits for 2013 and 2014. Specifically, Chenault should have paid herself an annual salary of no

more than $58,000; however, in 2013, Chenault exceeded her authorized compensation by $32,663.07, and in 2014, by $27,520.83.[1]

Chenault was criminally charged with Abuse of Public Trust, a Class C felony, for making these overpayments. She entered an *Alford* plea to an amended charge, which reduced the crime from a Class C felony to a Class D. The circuit court accepted her *Alford* plea and sentenced Chenault to two years' imprisonment, diverted for three years on the conditions that she pay restitution and commit no new offenses. Chenault paid $60,000 in restitution to the AOC on June 29, 2015.

Following her *Alford* plea, Chenault was suspended from the practice of law pursuant to SCR 3.166.[2] A bar complaint, charge, and hearing before a KBA Trial Commissioner followed. At the hearing, Chenault insisted that her withdrawal of unauthorized funds was an accounting error which occurred as a result of being overwhelmed with her job duties and not being properly trained. The Board found that Chenault was genuinely remorseful for her conduct. The Board considered the fact that, since Chenault's automatic suspension from the practice of law, she has had two disciplinary complaints against her; however, the Board noted that neither of these complaints involved conduct

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[1] The excess payments accrued both in the form of payments made to herself above her approved compensation and tax payments she made on her personal behalf from the operating account.

[2] SCR 3.166 provides: "Any member of the Kentucky Bar Association who pleads guilty to a felony, including a no contest plea or a plea in which the member allows conviction but does not admit the commission of a crime, or is convicted by a judge or jury of a felony, in this State or in any other jurisdiction, shall be automatically suspended from the practice of law in this Commonwealth.

bearing upon her honesty, trustworthiness, or fitness to practice law in the future and issued private admonitions related to both those complaints. Chenault now contests whether her conduct in those cases amounted to Rules violations, but states that she went along with the private admonitions at the time in an attempt to fully cooperate with the KBA.

In the current case, the Trial Commissioner ultimately recommended Chenault be found guilty of violating SCR 3.130(8.4)(b)[3] and (c)[4] and that she be suspended for a period of four years, retroactive to the date of her automatic suspension on June 27, 2015, with the final eighteen months of her suspension probated upon conditions that she comply with the conditions of her criminal diversion and complete the KBA's Ethics and Professionalism Enhancement Program. The KBA's Board of Governors voted 13 to 4 to accept the findings and recommendations of the Trial Commissioner. Thereafter, KBA's Office of Bar Counsel filed a notice of review pursuant to SCR 3.370(7), [5] arguing to this Court that the sanction recommended by the Board was inadequate. Bar Counsel agrees with the Board that this Court should find Chenault guilty of both Rule violations, but asks that we enter a harsher sanction. In its brief, Bar Counsel argues that permanent disbarment—or, at a

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[3] SCR 3.130(8.4)(b) provides: "It is professional misconduct for a lawyer to . . . [c]ommit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects . . . ."

[4] SCR 3.130(8.4)(c) provides: "It is professional misconduct for a lawyer to . . . [e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . ."

[5] SCR 3.370(7) provides: "[w]ithin thirty days after the Board's decision is filed with the Disciplinary Clerk, Bar Counsel or the Respondent may file with the Court a Notice for the Court to review the Board's decision stating reasons for review."

minimum, a five-year suspension from the practice of law—is the appropriate sanction based upon this Court's precedent.

After reviewing Chenault's file, we see no reason to upset the recommendation of the Trial Commissioner or the findings of facts and conclusions of law of the Board.

I. ANALYSIS

Bar Counsel contends that the Trial Commissioner and Board erred in determining that Chenault should be suspended for a period of four years, with the final eighteen months of suspension to be probated. We note that findings of fact by trial commissioners and the Board are merely advisory to this Court. SCR 3.360; *Kentucky Bar Association v. Jones*, 759 S.W.2d 61, 63 (Ky. 1988). "Final decisions of guilt and punishment *can only be made by the Supreme Court*, and it is done on the basis of a *de novo* consideration of pleadings and trial review." *Kentucky Bar Association v. Jacobs*, 387 S.W.3d 332, 337 (Ky. 2012) (quoting *Jones*, 759 S.W.2d at 63-64)). While this Court is not bound by the findings or recommendation of the Board, we hold that the sanction recommended by the Board is adequate in this case.

Chenault violated SCR 3.130 (8.4)(b) and (c) through her conduct in making unauthorized withdrawals from the operating account while acting as Master Commissioner—she does not contest the violation. Our analysis will focus on the proper sanctions for Chenault's violation of these rules.

Bar Counsel contends that the Trial Commissioner's recommended sanction is contrary to Kentucky case law and the ABA standards. The ABA

standards are not binding on this Court, but we have stated that they "can at times serve as persuasive authority." *Anderson v. Kentucky Bar Ass'n*, 262 S.W.3d 636, 639 (Ky. 2008). Since the standards are merely advisory and we have sufficient case law to inform our decision, we need not examine the ABA standards.

Bar Counsel argues that three attorneys have been disbarred for misappropriating funds while serving as master commissioner and that precedent should be applied here. *King v. Kentucky Bar Ass'n*, 162 S.W.3d 462 (Ky. 2005); *Kentucky Bar Ass'n v. Layton*, 97 S.W.3d 452; (Ky. 2003) *Polk v. Kentucky Bar Ass'n*, 885 S.W.2d 691 (Ky. 1994). Bar Counsel urges our reliance on those cases in sanctioning Chenault.

First, Bar Counsel points us to *King*. As McCreary Master Commissioner, King misappropriated more than $300,000 in funds. He pleaded guilty to 132 felony counts of failure to make required disposition of property. King admitted to his professional misconduct and moved the Court to permanently disbar him. The KBA did not object to King's motion and this Court granted it.

Next, in *Layton*, this Court permanently disbarred the Jessamine and Garrard Master Commissioner after he pleaded guilty to eight felony counts of failure to make required disposition of property after having misappropriated more than $385,000 from the Master Commissioner's accounts over the course of several years. Layton denied the associated ethical violations, saying instead that he committed the felonies due to mental health issues. However, although

Layton was being treated for bi-polar disorder, he presented no evidence which would act as a defense to the ethical charges. He told the Board he never intended to practice law again, but merely asked that his disbarment be based upon his mental illness rather than intentional misconduct. The Board recommended Layton's permanent disbarment, and neither party filed a notice of review. This Court accepted the Board's recommendation.

Finally, in *Polk*, the Pulaski Master Commissioner admitted to misappropriating funds totaling $73,698.10. He was charged criminally with failure to make required disposition of property and official misconduct. Polk pleaded guilty to both charges, and, as part of his plea bargain, he agreed to resign from the practice of law. Pursuant to that plea agreement, Polk moved this Court to allow him to resign under terms of disbarment. Polk admitted his criminal conduct was in violation of our Rules. This Court granted Polk's motion. However, we note that our Rules have changed since Polk's case. At the time, we ordered that "Polk shall not file an application for reinstatement for a period of five years . . . ." *Polk*, 885 S.W.2d at 692. This is unlike the permanent disbarment Bar Counsel now seeks for Chenault—after which she could never again practice law in the Commonwealth.

We have held, "our precedent is crystal clear: we treat criminal financial misconduct by attorneys very seriously; and we have previously found that disbarment was appropriate for *numerous* attorneys who had committed criminal offenses involving dishonesty in financial matters." *Kentucky Bar Ass'n v. Rorrer,* 222 S.W.3d 223, 229 (Ky. 2007). However, we look to the specific

facts and circumstances of each case. Of the cases Bar Counsel points us to, we believe that Chenault's case is most like Polk's. Chenault had been the Master Commissioner for more than six years with no evidence of intentional misappropriation of funds prior to 2013. Furthermore, when she became aware of the amount of funds she had misappropriated, she deposited an amount sufficient to pay those funds back in her lawyer's escrow account prior to being ordered to repay the amount. She participated in the disciplinary process and, while providing mitigating circumstances, did not contest the fact that her conduct violated our ethical rules—unlike Layton. In distinguishing the other cases cited by Bar Counsel, unlike King and Polk, Chenault did not move the Court for disbarment and her *Alford* plea did not require her to do so.

We also point out that, while we take financial crimes seriously, we have not always held permanent disbarment was the appropriate sanction. For example, in *Sivasubramaniam v. Kentucky Bar Ass'n,* 487 S.W.3d 891, 893 (Ky. 2016), this Court suspended Sivasubramaniam for five years from the practice of law. There, Sivasubramaniam had violated 3.130-8.4(b) in committing the financial crime of subscribing to a false tax return (resulting in an underpayment of federal taxes of more than $4.5 million). In reaching this suspension, we noted that the attorney's violation of SCR did not arise out of his practice of law.

We also find the case of *Kentucky Bar Ass'n v. Goble,* 424 S.W.3d 423, 428 (Ky. 2014), instructional. There, in acting as a fiduciary for a business, Goble had withheld more than $16,000 in employees' pay, which he indicated

was to go into a 401(k) account for the employees. He never deposited those funds in the account. He pleaded guilty to two counts of failure to make required disposition of property and one count of theft of labor. In suspending Goble from the practice of law for five years for violating SCR 3.130 8.4(b) and (c), we pointed out:

> we have also recently imposed less severe penalties on attorneys who engaged in dishonesty involving financial matters. In *Kentucky Bar Ass'n v. Hawkins,* 260 S.W.3d 337, 338 (Ky.2008), Hawkins took several settlement checks made payable to his client and converted them to his own use. We suspended Hawkins from the practice of law for five years. In *Elliott v. Kentucky Bar Ass'n,* 341 S.W.3d 119, 120 (Ky.2011), we suspended Elliott from the practice of law for two years after he pled guilty to issuing a check for $8,124.95 when he knew there were not sufficient funds in the account. In *Kentucky Bar Ass'n v. Hammond,* 241 S.W.3d 310, 316 (Ky.2007), we suspended Hammond's license to practice law for five years when, among other things, he failed to return unearned retainer fees to four clients.

Id.

Here, prior to the current charges, Chenault had no previous discipline. While she has since had two disciplinary charges, these charges were resolved with private admonitions without Chenault incurring any further suspension from the practice of law. Furthermore, Chenault's conduct neither occurred over an extended period of time, nor impacted any clients. While we do take this misconduct seriously, we believe the Board's recommended sanction adequately resolves the matter and is in line with our precedent.

ORDER

Therefore, it is ordered:

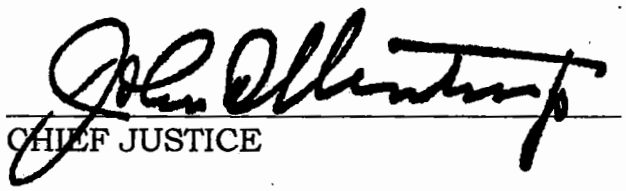
1. Respondent, Myra Deshawn Chenault, KBA Member No. 88691, is suspended from the practice of law in Kentucky for a period of four years, with the final eighteen months of said suspension probated, on conditions that she comply with her pretrial diversion in her Franklin Circuit Court criminal case related to this matter and that she attend, at her expense, the next scheduled Ethics and Professionalism Enhancement Program (EPEP) offered by the Office of Bar Counsel, separate and apart from her fulfillment of any continuing legal education requirement, within twelve months after the issuance of this Order; Chenault must pass the test given at the end of the program and will not apply for Continuing Legal Education (CLE) credit of any kind for her participation in the EPEP program; and Chenault will furnish a release and waiver to the Office of Bar Counsel to review her records of the CLE Department that might otherwise be confidential, such release to continue in effect until after she completes her remedial education.
2. The period of suspension shall be retroactive, commencing on the date of her temporary suspension, June 27, 2015, and shall continue until she has complied with the requirements of this opinion and order and is reinstated to the practice of law by Order of this Court pursuant to SCR 3.510.

3. Notwithstanding the four-year period mentioned above, Chenault shall not file an application for reinstatement if there is any outstanding claim or judgment originating from the criminal and civil charges mentioned herein.
4. If she has not already done so, pursuant to SCR 3.390, Chenault shall promptly take all reasonable steps to protect the interests of her clients, including, within ten days after the issuance of this order, notifying by letter all clients of her inability to represent them and of the necessity and urgency of promptly retaining new counsel and notifying all courts or other tribunals in which Chenault has matters pending. Chenault shall simultaneously provide a copy of all such letters to the Office of Bar Counsel.
5. If she has not already done so, pursuant to SCR 3.390, Chenault shall immediately cancel any pending advertisements; shall terminate any advertising activity for the duration of the term of suspension; and shall not allow her name to be used by a law firm in any manner until she is reinstated;
6. Pursuant to SCR 3.390, Chenault shall not, during the term of suspension, accept new clients or collect unearned fees; and
7. In accordance with SCR 3.450, Chenault is directed to pay the costs of this action in the amount of $1426.80 for which execution may issue from this Court upon finality of this Opinion and Order.

8. Bar Counsel's motion to strike Chenault's response brief in this matter is DENIED.[6]

Keller, VanMeter, Venters, Wright, JJ., concur. Hughes, J., dissents to the extent that she would not probate any portion of the four-year sentence, in which Minton, C.J. joins. Cunningham, J., not sitting.

ENTERED: June 14, 2018



CHIEF JUSTICE

[6] Bar Counsel bases its motion to strike Chenault's brief on her discussion and inclusion of Bar Counsel's response to a negotiated sanction in this matter rejected by this Court in 2016, which it asserts violates SCR 3.290(1). However, that rule applies to "communications between the parties concerning negotiations for an agreed sanction . . . ." The response Chenault discusses and includes did not amount to communications between the parties. We see no grounds to strike Chenault's brief, as the document in question was filed in and considered by this Court.