

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

MARK M. GEYER

A Member of the State Bar

Nos. 00–O–10746; 00–O–14654; 01–O–01709; 02–O–15397; 03–O–05008; 04–O–12467; 04–O–12746

Filed October 10, 2007

SUMMARY

Following respondent's admission into the Alternative Discipline Program (ADP), the State Bar opened seven new investigations against respondent involving serious misconduct allegedly occurring after respondent's acceptance into the ADP. Despite repeated orders from the court, respondent failed to cooperate or respond in any meaningful way to the State Bar regarding its investigation of the seven new matters. As a result, the State Bar filed a motion to terminate respondent from the ADP which the hearing judge denied. The State Bar requested interlocutory review of the hearing judge's order.

The review department concluded that the hearing judge abused his discretion by failing to terminate respondent from the ADP in light of uncontroverted and overwhelming evidence demonstrating respondent's repeated failure to comply with court orders and to cooperate in seven pending investigations regarding new allegations of serious misconduct. The review department reversed the hearing judge's order, granted the State Bar's motion to terminate respondent from the ADP, and remanded the matter to the hearing department for further proceedings.

COUNSEL FOR PARTIES

For State Bar: David T. Sauber

For Petitioner: Edward O. Lear

HEADNOTES

- [1] **130 Procedure on Review**
 167 Abuse of Discretion
 In reviewing a hearing judge's decision not to terminate an attorney from the Alternative Discipline Program, the review department's examination of the issue is limited to deciding whether the hearing judge committed legal error or abused his discretion.
- [2] **130 Procedure on Review**
 167 Abuse of Discretion
 To determine if an abuse of discretion occurred, the review department is required to conclude that the judge contravened the uncontradicted evidence.
- [3] **130 Procedure on Review**
 167 Abuse of Discretion
 Where a hearing judge failed to terminate respondent from participating in the Alternative Discipline Program despite uncontroverted and overwhelming evidence demonstrating the respondent's repeated failure to comply with court orders and to cooperate in seven pending investigations involving serious misconduct, the hearing judge abused his discretion.
- [4] **135.89 Specific Proceedings--Other/General**
 Where a judge questioned the State Bar at an Order to Show Cause hearing about its reasons for seeking an attorney's termination from participating in the Alternative Discipline Program, the hearing judge did not improperly shift the burden of proof to the State Bar because an order to show cause requires parties to appear at a specified time to demonstrate why the relief sought by the applicant should not be granted.

OPINION

THE COURT:*

The State Bar has requested interlocutory review of a hearing judge's order denying the State Bar's motion to terminate respondent Mark M. Geyer from the Alternative Discipline Program (ADP). In light of the uncontroverted and overwhelming evidence that Geyer continually and deliberately failed to comply with court orders and to cooperate with the State Bar during its investigation of outstanding matters, we conclude that the hearing judge abused his discretion by failing to terminate Geyer from the ADP.

I. GEYER REPEATEDLY FAILED TO COMPLY WITH THE TERMS AND CONDITIONS OF THE ADP

On November 20, 2003, Geyer signed a Contract and Waiver for Participation in the ADP (ADP contract) and was formally accepted into the program. The ADP contract is the written agreement in which the hearing judge set forth the terms and conditions of Geyer's participation in the program. (Rules Proc. of State Bar, rule 802(a).) By signing the ADP contract, Geyer acknowledged and accepted that "allegations of additional misconduct which occurred after Respondent was accepted into the [ADP]" and his failure to "comply with the [judge's] orders" could result in his termination from the program.

Following his admission into the ADP, seven new complaints were submitted against Geyer. The State Bar opened investigations on all seven matters,

each of which involved allegations of serious misconduct occurring *subsequent* to Geyer's acceptance into ADP.¹ Three of the complaints were submitted to the State Bar in 2005 (2005 matters), and four were submitted in 2006 (2006 matters). Despite repeated orders from the court and Geyer's assurance that he would comply forthwith, he failed to cooperate or respond in any meaningful way to the seven new matters under investigation.

On January 25, 2007, the State Bar filed a motion to terminate Geyer from the ADP based on his lack of cooperation with the State Bar in its investigations, and because the additional misconduct occurred after Geyer's admission into the program. The hearing judge issued an order to show cause (OSC) on March 2, 2007, regarding termination of Geyer from the ADP.² The State Bar filed a response to the OSC, attaching 11 exhibits in support of its motion to terminate. Geyer failed to file a response to the OSC or to provide any explanation for his non-compliance.

A hearing on the OSC was held on April 4, 2007. The hearing judge admitted into evidence, without objection, the 11 exhibits submitted by the State Bar that set forth the new allegations of misconduct and substantiated Geyer's failure to cooperate with the State Bar's investigations. At the hearing, the hearing judge denied the State Bar's motion to terminate, repeatedly stating that the matters under investigation were "old" and "stale" because no formal Notice of Disciplinary Charges (NDC) had been filed as to those matters. The hearing judge focused almost exclusively on the delay and failure by the State Bar to file a NDC regarding the investigation matters. Geyer offered no evidence or testimony, and the hearing judge did not pose any questions to him regarding his failure to comply with the investigations.

*Before Remke, P.J., Watai, J. and Epstein, J.

1. The cases are: 05-O-3466 [failure to prosecute a claim after payment of \$10,000 advanced fee]; 05-O-3558 [failure to prosecute a personal injury claim resulting in dismissal]; 05-O-4582 [failure to represent interests of client and to communicate after payment of \$5,000 advanced fee]; 06-O-10068 [failure to perform and abandonment of client]; 06-O-10422 [settlement of personal injury suit without authority and failure to promptly disburse funds]; 06-O-

10424 [failure to pay medical providers in personal injury suit]; and 06-O-13266 [referral from Los Angeles Superior Court for gross neglect and client abandonment resulting in default judgment].

2. Two different hearing judges oversaw Geyer's participation in the ADP. The original hearing judge left the court in late 2006 and Geyer's case was reassigned to the new judge, who issued the OSC and made the determination now on review.

The State Bar's evidence presented to the hearing judge established that beginning in November 2005, Geyer continually and deliberately failed to cooperate with the State Bar during its investigation of the outstanding matters. Between November 2005 and December 2006, Geyer failed to respond to at least 14 separate letters from the State Bar requesting information pertaining to the seven complaints filed against him. As detailed below, during this same one-year period, Geyer repeatedly failed to comply with court orders that demanded his immediate cooperation and response to the outstanding matters.

Status Conference on March 9, 2006. By this time, six new investigations had been filed against Geyer: the three 2005 matters and three of the 2006 matters.³ Geyer provided neither cooperation nor a response to the investigator regarding the 2005 matters. The three 2006 complaints were just entering the investigation stage of the State Bar process. Geyer was ordered to respond to all outstanding matters. The judge set a status conference for April 13, 2006, where he "[expected] all of these matters to be dealt with."

Status Conference on June 5, 2006:⁴ At this conference, the judge noted that as of the April 13, 2006, conference, the outstanding investigations had still not been resolved, and that Geyer had yet to respond or fully cooperate with the investigations. Geyer claimed that he had responded to the 2005 matters, but acknowledged that he had not done so on the 2006 matters. However, contrary to Geyer's claim, the State Bar had not received any information from him about the 2005 matters. Geyer was ordered to cooperate with the investigator to resolve all of the matters within 60 days and a new conference date was set.

Status Conference on August 7, 2006: By this date, the State Bar had completed its investigation of the three 2005 matters without Geyer's cooperation, and was preparing to file a formal NDC. The

three 2006 matters were still under investigation. Geyer had not provided any information or contacted the investigator regarding the 2006 matters despite being ordered to do so by the court. Geyer was again ordered to respond to these matters by August 11, 2006.

Status Conference on September 20, 2006: As of this date, Geyer had still not responded to the three 2006 cases. The fourth 2006 complaint was filed and under investigation. Geyer had not contacted the investigator, despite representations to the court in every prior status conference of his intention to do so forthwith. The State Bar asked that Geyer be placed on inactive status, arguing that "the delay in getting these investigations done" was attributable to Geyer. Further, the State Bar argued that the difficulty in resolving the matters or filing charges was because the "[i]nformation is not being provided by Mr. Geyer."

The judge admonished Geyer stating that "[as] far back as November of 2005, we've been talking about outstanding matters . . . every time we have met, I have talked with you about these matters. This has got to stop." Further, the judge told Geyer: "I'm going to take you out of practice. All right? Unless you, in thirty days, clear up all of these matters. And that's gonna [sic] be the final thing. I'm giving you notice that if they are not resolved in terms of your providing the information necessary to the investigators so that they can move forward on this in thirty days, you're not gonna [sic] be practicing law." A subsequent status conference was set for October 30, 2006.

The October 30, 2006, status conference was continued until December 4, 2006, at which time the matter was transferred to the new hearing judge. Geyer did not appear in December; however, his counsel was present. The matter was then continued two more times, first to January 2, 2007, and then to January 19, 2007. By that date, Geyer still had not

3. In addition, there were three complaints still being investigated that had been pending since the time Geyer entered the ADP. Ultimately, the parties reached a stipulation as to facts and culpability on these three matters and they were consolidated

with the original proceeding. These three matters are not part of the motion to terminate.

4. No transcript of the April 13, 2006, proceeding was admitted in evidence.

cooperated in any of the outstanding matters under investigation.

II. THE HEARING JUDGE ABUSED HIS DISCRETION

[1] Our examination of the issues presented on interlocutory review is limited to deciding whether the hearing judge committed legal error or abused his discretion. (Rules Proc. of State Bar, rule 300(k); *In the Matter of Respondent AA* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 721, 726.) The State Bar asserts that the hearing judge abused his discretion in two ways: first, by improperly shifting the burden at the OSC hearing to the State Bar to show cause as to why Geyer should be terminated; and second, by failing to terminate Geyer from the ADP given the overwhelming evidence of his failure to comply with the program requirements.

[2] To determine if an abuse of discretion occurred, “the decision of the hearing judge is reviewed not with an intention of substituting the view of this court for that of the hearing judge, but rather with the intention of ‘employ[ing] the equivalent of the substantial evidence test by accepting the trial court’s resolution of credibility and conflicting substantial evidence, and its choice of possible reasonable inferences [citations omitted].’” (*In the Matter of Murphy* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 571, 577–578.)” (*In the Matter of Terrones* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 289, 293.) “‘[I]t is generally accepted that the appropriate test of abuse of discretion is whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered. [Citations.] . . . [W]hen two or more inferences can reasonably be deduced from the facts, a reviewing court lacks power to substitute its deductions for those of the trial court. [Citations.]’ [Citation.]” (*H. D. Arnaiz v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1368.) Thus, in order to upset the determination of a lower court, we are required to conclude that the judge “‘contravened the uncontradicted evidence.’ [Citations.]” (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 527.) Such is the case here.

[3] Upon the record, we are compelled to conclude that the hearing judge abused his discretion by

failing to terminate Geyer in light of the uncontroverted and overwhelming evidence demonstrating Geyer’s repeated failure to comply with court orders and to cooperate in seven pending investigations regarding new allegations of serious misconduct.

The goal of the ADP is to protect the public, courts and legal profession while providing assistance to rehabilitate members of the State Bar from substance abuse or mental health problems. (State Bar Court, Alternative Discipline Program, Program Outline (June 2005) p. 1. (Outline); see also Bus. & Prof. Code, § 6230 et seq.) The ADP offers a respondent the opportunity to receive less severe discipline if he admits to having committed misconduct, establishes a nexus between his substance abuse or mental health issue and the misconduct, successfully completes the prescribed treatment, and performs any other duties required under his ADP contract. (Rules Proc. of State Bar, rules 802, 803.) When the participant fails to comply with the terms of the ADP contract, he may be terminated from the program and more severe discipline may be imposed. (Rules Proc. of State Bar, rules 803, 805.) Thus, the ADP provides a clear incentive of a more lenient discipline to the participant to comply with the program terms, while providing a disincentive for failure to comply in the form of more severe discipline.

We cannot, and do not, readily disregard the determinations of the hearing judge, as program judges are afforded wide discretion in the supervision of an ADP participant. (Rules Proc. of State Bar, rule 807; see also Outline at pp. 7–8.) However, the State Bar presented a documented and uncontroverted litany of Geyer’s non-compliance with court orders and of his failure to cooperate with the State Bar. Indeed, when the hearing judge finally decided to issue an OSC after more than a year of non-compliance and in response to the State Bar’s motion to terminate, Geyer failed to file any response. He was present at the OSC hearing, but offered no contradictory testimony or exhibits. Similarly, although given an opportunity, Geyer failed to file a response or offer any evidence in opposition to the State Bar’s request for interlocutory review. We find that Geyer’s repeated and prolonged failure to cooperate with the State Bar on even the most basic level, coupled with his willful disobedience of numerous

court orders, clearly demonstrates his lack of concern for compliance with his ADP contract and his lack of appreciation of the importance of these disciplinary proceedings. In order to uphold the integrity of the ADP, such a participant cannot be allowed to remain in the program with the potential reward of less severe discipline.

[4] The above analysis renders moot the State Bar's other point that the hearing judge abused his discretion by questioning the State Bar at the OSC hearing as to why Geyer should be terminated from the ADP. Nevertheless, we note that, contrary to the State Bar's assertion, the hearing judge did not "shift the burden" to the State Bar during the hearing. An order to show cause requires parties to appear at a specified time to demonstrate why the relief sought by the applicant should not be granted, and a hearing follows in the same manner as if the time were specified in a notice of motion. (*McAuliffe v. Coughlin* (1894) 105 Cal. 268, 270; *Eddy v. Temkin* (1985) 167 Cal.App.3d 1115, 1120.) While we certainly believe an inquiry directed at Geyer as to why he should not be terminated from the ADP would have been judicious, the hearing judge acted within his discretion to question the State Bar at the hearing regarding its reasons for seeking Geyer's termination.

Finally, the hearing judge's concern that the matters were "old" and "stale" are irrelevant to the substantive inquiry of the motion to terminate for

failure to cooperate with the State Bar's investigation. The issue was, and remains, Geyer's disregard for his obligation to cooperate with the State Bar and to comply with all court orders as a condition of receiving lesser discipline. The record before this court clearly indicates that

Geyer's unremitting failure to assist the State Bar in its investigations caused the delay in bringing formal charges against him. Rather than participate in the ADP by adhering to his obligations, he caused obstruction and impediment to ongoing investigations.

Although we generally defer to a hearing judge's determinations regarding a program participant, there is no uncertainty here as to the numerous obligations Geyer failed to fulfill. His continued disregard for those obligations clearly demonstrates his unwillingness to participate fully in the program and he should no longer be entitled to the benefit of participation. Thus, we find that the hearing judge "contravened the uncontradicted evidence" by failing to terminate Geyer from the ADP.

III. THE MOTION TO TERMINATE IS GRANTED

We reverse the hearing judge's order of May 8, 2007, and accordingly, the State Bar's motion to terminate Mark M. Geyer from the ADP is granted. This matter is remanded to the hearing department for further proceedings in accordance with this opinion.