

**BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA**

IN THE MATTER OF

[ANONYMOUS]

PETITION FOR REINSTATEMENT

No. 482, Disciplinary Docket
No. 2, Supreme Court

No. 25 DB 1985 - Disciplinary Board

Attorney Reg. No. []
([] County)

**REPORT AND RECOMMENDATION OF THE
DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA**

TO THE HONORABLE CHIEF JUSTICE AND
JUSTICES OF THE SUPREME COURT OF PENNSYLVANIA:

MORRIS, J., *Member of the Board.*

Pursuant to Rule 218(c)(5) of the Pennsylvania Rules of Disciplinary Enforcement, the Disciplinary Board of the Supreme Court of Pennsylvania submits its findings and recommendations to your Honorable Court with respect to the above-captioned Petition for Reinstatement.

I. HISTORY OF PROCEEDINGS

This matter is before the Disciplinary Board pursuant to a Petition for Reinstatement by [Petitioner]. On April 4, 1985, Petitioner was disbarred on consent as a result of misappropriation of client funds. Petitioner filed a Petition for Reinstatement to the Bar of the Supreme Court of Pennsylvania on June 20, 1996, which was denied on December 22, 1998. The Petition was denied, in part, due to Petitioner's late payment of taxes deducted from wages that had been paid to employees of his accounting firm.

In May 2000, Petitioner filed a second Petition for Reinstatement. A hearing was held before Hearing Committee [] on February 6, 2001, at which Petitioner testified and presented numerous witnesses on his behalf, including members of the legal and business community.

On December 19, 2001, the Hearing Committee issued a majority opinion recommending that reinstatement be denied. A dissenting opinion recommended that the Petition be granted.

Petitioner thereafter filed exceptions and requested oral argument which was held on May 6, 2002, before a panel consisting of Board Members Morris, Schultz, and Watkins. The panel reported to the full Board and the matter was adjudicated on May 15, 2002.

II. FINDINGS OF FACT

1. Office of Disciplinary Counsel (hereafter ODC), whose principal office is situated at Suite 3710, One Oxford Centre, Pittsburgh, Pennsylvania, is invested, pursuant to Rule 207 of the Pennsylvania Rules of Disciplinary Enforcement (hereafter Pa. R.D.E.), with the power and duty to investigate all matters involving alleged misconduct of any attorney admitted to practice law in the Commonwealth of Pennsylvania and to prosecute all disciplinary proceedings brought in accordance with the various provisions of said Rules.

2. Petitioner is [], age 51 and a graduate of [] University and [] School of Law.

3. Petitioner was admitted to the bar of the Supreme Court of Pennsylvania in 1978.

4. In 1984, Petitioner submitted a Resignation Statement which resulted in an order of the Supreme Court of Pennsylvania disbaring him upon consent in April 1985. (*N.T. 26.*)

5. Petitioner's disbarment was related to the misappropriation of client funds.

6. In May 1999, Petitioner graduated from [] University with an LLM in taxation. (*Exhibit ODC 1, page 2.*)

7. On October 20, 1999, the Commonwealth of Pennsylvania, Department of State, Bureau of Professional and Occupational Affairs, granted Petitioner's application to sit for the CPA examination.

8. Since 1995, Petitioner earned 43 substantive CLE credits and 13 ethics CLE credits (*Exhibit P1*), which the parties agreed met all requirements for purposes of reinstatement.

9. In or about 1994 and 1995, Petitioner was the sole proprietor of [A], an accounting firm. (*N.T. 31 and 32.*)

10. During 1994 and 1995, Petitioner, as sole proprietor of [A], had an obligation to withhold payroll taxes on behalf of his employees for payment to the Internal Revenue Service. *(N.T. 71.)*

11. During 1994 and 1995, Petitioner failed to make timely payment of withheld taxes because he had used the money for personal financial needs. *(N.T. 76, 80-83.)*

12. These taxes, including interest and penalties, were paid soon thereafter and there have been no subsequent delinquencies. *(N.T. 76-77.)*

13. Petitioner is a recovering alcoholic, last drinking in 1994. Petitioner still attends AA meetings occasionally.

14. Petitioner has been in counseling with Reverend Dr. [B] of the United Methodist Church. *(N.T. 140.)*

15. Petitioner previously filed a Petition for Reinstatement. The Petition was denied by Order of the Supreme Court of Pennsylvania dated December 22, 1998.

16. The Report and Recommendations of the Disciplinary Board of the Supreme Court of Pennsylvania and prior Reinstatement Opinion dated October 29, 1998, concluded that Petitioner's previous misconduct was "not so egregious as to preclude immediate consideration of his Petition for Reinstatement." *(See ODC's Answer to the within Petition for Reinstatement, Exhibit B.)*

17. Effective January 2001, Petitioner and [C] formed and incorporated [D], an accounting firm.

18. Petitioner presented character letters from [E], Esquire *(Exhibit P-3)* and Reverend Dr. [B] *(Exhibit P-4.)*

19. [F], Esquire, has been a member of the bar of the Supreme Court of Pennsylvania since 1975. [F] testified that Petitioner has a reputation for honesty, integrity, and moral fitness within the legal community. Further, [F] testified that it was his opinion that Petitioner's reinstatement to the practice of law would not be detrimental to the integrity and standing of the bar, nor would it be prejudicial to the administration of justice. *(N.T. 129-132.)*

20. [G], Esquire, was admitted to the Supreme Court of Pennsylvania in 1975. [G] is an adjunct professor at the [] Law School in the graduate program. Petitioner served as a graduate assistant for Professor [G]. Professor [G] testified that Petitioner's reputation for honesty and integrity is impeccable. Professor [G] also testified that he did not believe Petitioner's re-admission to the bar would be detrimental to the integrity or standing of the bar, nor would it be prejudicial to the administration of justice. *(N.T. 133-139.)*

21. [H], Esquire, has been a member of the bar of the bar of the Supreme Court of Pennsylvania since 1977. [H] is a former District Attorney. [H] testified that Petitioner has a good reputation for honesty and integrity both in the legal community and the business community in [] County. Further, [H] testified that, in his opinion, Petitioner's reinstatement would not be detrimental to the integrity of the bar, nor would it be prejudicial to the administration of justice. *(N.T. 140-142.)*

22. [I], Esquire, has been a member of the bar of the Supreme Court of Pennsylvania since 1970. [I] has known Petitioner since 1984 and testified that Petitioner has a very good reputation for honesty, integrity, and competence. *(N.T. 143-144.)*

23. [J], Esquire, has been a member of the bar of the Supreme Court of Pennsylvania since 1978. [J] has known Petitioner since 1982. [J] also testified that Petitioner is active in the Boy Scouts. [J] testified that petitioner's reputation for honesty and integrity is good. *(N.T. 146-149.)*

24. [K], Esquire, has been a member of the bar of the Supreme Court of Pennsylvania since 1980. Prior to that, [K] was admitted to the practice of law in the states of Texas and Louisiana. [K] has known Petitioner for approximately 15 years. [K] testified that Petitioner's reputation for honesty and integrity is good. *(N.T. 150-153.)*

25. [L] is a pastor at [] United Methodist Church. He testified that Petitioner is an active member of the congregation and is the treasurer for the church. [L] testified that Petitioner's reputation for honesty and integrity is good. Further, [L] testified that Petitioner's reinstatement would not be, in his opinion, detrimental to the public interest. *(N.T. 154-156.)*

26. [M] is President of [] Services. She has known Petitioner for the past eight years and has employed Petitioner as the accountant for her business. [M] testified that Petitioner's reputation has been very honest and "he has a great deal of integrity." Furthermore, [M] testified that in her opinion, she did not believe that Petitioner's reinstatement would be detrimental to the public interest. *(N.T. 157-159.)*

27. [N], Esquire, has been a member of the bar of the District of Columbia and the State of Iowa. [N] is a professor of law at [] Law School and has been Director of the graduate program of that school since 1988. He also teaches Taxation and Professional Responsibility. [N] testified that Petitioner has been retained by the law school at the Professor's recommendation to audit matching grant activity at the tax clinic. Finally, Professor [N] testified that Petitioner is "an extremely competent tax practitioner." *(N.T. 160-167.)*

28. [C], testified that he and Petitioner are shareholders in a corporation, [D], Inc. [C] testified that he has taken the responsibility for the payroll and employee portion of the corporation. Finally, [C] testified that Petitioner's reputation for honesty and integrity is very good. *(N.T. 167-174.)*

29. The testimony of Petitioner, [], is credible.

30. The witnesses who appeared on behalf of Petitioner were credible.

III. CONCLUSIONS OF LAW

31. Although Petitioner was disbarred upon consent, there is no expectation of a right to resume practice at some future point in time.

32. Petitioner bears the burden, by clear and convincing evidence, to establish that he is fit to be readmitted to the practice of law.

33. Petitioner must establish that "the magnitude of the breach would permit the resumption of practice without a detrimental affect upon the integrity and standing of the bar or the administration of justice nor subversive of the public interest." *(Office of Disciplinary Counsel v. Keller, 509 Pa. 573, 605 A.2d 872 (1986).)*

34. Petitioner has met his burden of proof and should be re-admitted to the practice of law in the Commonwealth of Pennsylvania.

IV. DISCUSSION

Petitioner was disbarred in 1985 for misappropriation of client funds. After his disbarment, Petitioner maintained an accounting business and has advanced in that profession by completing an advanced tax program at [] University and becoming a Certified Public Accountant. In the meantime, he has satisfied all aggrieved parties including the Client Security Fund.

As set forth in *Office of Disciplinary Counsel v. Keller*, 509 Pa. 573, 605 A.2d 872 (1986), Petitioner bears the burden of establishing (1) that his underlying offense is not so egregious as to preclude reinstatement, (2) that sufficient time has passed to permit qualitative rehabilitation, and (3) that he currently possesses the moral and professional fitness to resume practice. In light of the passage of 17 years during which Petitioner has recovered from the alcoholism which led to his single misappropriation of \$8,000.00, the first two prongs of the test are not in dispute.

At issue is the question of Petitioner's current fitness. Despite the overwhelming and convincing evidence of Petitioner's good character and excellent reputation and despite his impressive professional advancement and service to the community through involvement with Boy Scouts and his church, ODC remains troubled with a single event which we will discuss in detail.

In 1994 and 1995, Petitioner fell behind in his payment of withholding taxes due on employees at his accounting firm. Petitioner disclosed this delinquency to the Internal Revenue Service, entered into a repayment plan and promptly paid over the overdue sums. This event caused the denial of Petitioner's initial Petition for Reinstatement in 1996 and forms the sole basis of Hearing Panel's majority recommendation. It remains the view of ODC that this tax delinquency evidences a predisposition to commit future violations. *See In re Costigan*, 664

A.2d 518 (Pa. 1995). Similarly, but less forcefully, ODC argues that re-admission of a former tax delinquent would undermine the public trust. *See In re Greenberg, 749 A.2d 434 (Pa. 2000)*.

We believe that ODC misperceives the legalities and realities of federal withholding taxes. Although wages which are withheld by employers are termed as “trust funds,” 26 U.S.C.A. § 7501(a), they are in fact merely a tax obligation which is due and owing like any other tax. It is not a crime to be delinquent in payment; nor is the employee affected by the delinquency. Withheld taxes are not required to be placed in any trust account. The “trust fund” concept is in fact utilized by the Internal Revenue Service solely to facilitate collectibility against the responsible party. *See 26 U.S.C.A. § 6672*.

The fact of the matter is that eight years ago, Petitioner was short of money and late in paying a federal tax obligation. He reported and corrected the problem with no harm to anyone. In our view, this long-corrected problem does not negate the strong record of rehabilitation and fitness which Petitioner has presented. We are confident that Petitioner has established by clear and convincing evidence that he is morally fit and professionally competent to resume practice.

V. RECOMMENDATION

The Board unanimously recommends that the Petitioner be reinstated to the practice of law.

It is further recommended that the expenses incurred in the investigation and prosecution of this matter are to be paid by the Petitioner.

Respectfully submitted,

THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

BY: _____
John W. Morris, Member

Date: September 3, 2002

PER CURIAM:

AND NOW, this 12th day of December, 2002, a Rule having been issued upon [Petitioner] to show cause why an order denying reinstatement should not be entered, upon consideration of the responses filed, the Rule is discharged, the Petitioner for Reinstatement is hereby granted and petitioner's request for oral argument is dismissed as moot.

Pursuant to Rule 218(e), Pa.R.D.E., petitioner is directed to pay the expenses incurred by the Disciplinary Board in the investigation and processing of the Petition for Reinstatement.