Supreme Court of Florida

No. AOSC17-21

IN RE: IRWIN R. EISENSTEIN V. MEDIATOR QUALIFICATIONS BOARD

ADMINISTRATIVE ORDER

Irwin R. Eisenstein has submitted a "Notice of Appeal," seeking review of a decision issued by a hearing panel of the Mediator Qualifications Board (MQB), denying his application for recertification as a county court mediator. This filing has been treated as a Notice of Review of Mediator Disciplinary Action, pursuant to rule 10.880 of the Florida Rules for Certified and Court-Appointed Mediators (Mediator Rules).[1] As set forth in this order, I find that the hearing panel's conclusion that Eisenstein failed to establish his good moral character, as required for mediator certification, is supported by competent, substantial evidence. However, I also find that the hearing panel's award of costs to the Florida Dispute

1. Although the Mediator Rules were amended effective January 1, 2017, see In re Amendments to Florida Rules for Certified and Court-Appointed Mediators, 202 So. 3d 795 (Fla. 2016), this review proceeding was conducted pursuant to the 2016 version of the rules.

Resolution Center is not authorized in this proceeding, and I disapprove that portion of its decision.

Eisenstein originally applied for and was granted certification as a county court mediator in 2006; he was recertified in 2009, 2010, and 2012. In July 2014, Eisenstein submitted an application for recertification with the Florida Dispute Resolution Center (DRC). Because he disclosed on the application that the Florida Board of Bar Examiners denied his application for admission to The Florida Bar, the DRC retained an investigator and referred the matter to the Qualifications Complaint Committee for review. Formal Charges were prepared, and Eisenstein appeared for a hearing before a hearing panel. Following the hearing, the hearing panel issued its "Decision Including Findings and Conclusions of the Panel," finding that Eisenstein does not possess the good moral character required for continuing certification as a county court mediator.

At the time of his hearing, Eisenstein was 71 years old. He earned a Bachelor of Arts degree from Brooklyn College in 1966, a Masters in Business Administration from Baruch College in 1972, and a Juris Doctor degree from Barry University in 2008. He took and passed the Florida Bar Examination in 2009, and the New York Bar Examination in 2010.

Eisenstein applied for admission to The Florida Bar in 2008. The Florida Board of Bar Examiners (FBBE) conducted its investigation as to Eisenstein's

character and fitness, and ultimately issued a sixty-two-page report recommending that Eisenstein's application be denied, and that he be disqualified from reapplying for admission for two years. The hearing panel here found:

> Among the matters highlighted in the FBBE's report were the Mediator's filing of pro se lawsuits against individuals who were connected to litigation in which he had previously been involved or was presently involved, whether those individual were parties, related to parties, or attorneys or judges in prior or pending litigation. In addition, each and every lawsuit was dismissed because the lawsuit failed to comply with the applicable statutes, rules or instructions of the court in which it was pending. Further, the FBBE report described the Mediator's commission of a fraud on the court in a prior litigation.

Eisenstein sought review of FBBE's recommendations in this Court. The Court issued an order approving FBBE's findings of fact, conclusions, and recommendation; however, the Court disapproved FBBE's recommendation that Eisenstein be disqualified from reapplying for admission for two years, and instead ordered that he be precluded from seeking admission for a period of five years.

Eisenstein also applied for admission to the New York State Bar; his application was denied. The hearing panel noted that New York's Committee on Character and Fitness expressed concern as to Eisenstein's judgment and his tendency to use the courts as a tool for personal vindication and retribution rather than the redress of legitimate grievances in good faith.

Additionally, the hearing panel found that during a preliminary telephonic hearing before the Chair of the hearing panel to address various motions,

Eisenstein made inappropriate and unprofessional comments towards the Chair. Specifically, Eisenstein told the Chair: "I'm going to question you also because you've been given judicial notice of the cases that I've cited, you've been given judicial notice of the failure of the prosecutor to investigate further, and I will bring you up on charges also."

Based on these facts, the hearing panel concluded:

> A. The Mediator's actions show that he sees only one side of any dispute, is not receptive to the views and positions of others, and that anyone who does not agree with his view is wrong and subject to attack. His actions reflect the opposite of what is required of a mediator.
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> B. As indicated by the findings and conclusions of the FBBE, and the statements of the New York Bar Committee on Character and Fitness, the Mediator's view of the legal system is that things should be done his way.
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> C. The Mediator's actions indicate he has little regard for the legal system, the rules of Court, or the decorum which should govern legal proceedings and mediations as a part of legal proceedings.
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> D. The threat that the Mediator made, that he will "bring [the Panel Chair] up on charges" for ruling against him on a procedural motion, indicates that the Mediator's past actions are continuing and that the reasons which underlie the FBBE and New York Bar's findings that he does not possess the character and fitness to be admitted to the Bar persist.

After considering the evidence and testimony presented at the hearing, the hearing panel found that Eisenstein does not possess the good moral character required for mediator certification, and it denied his application. It also permanently barred

him from applying for any certification as any type of Florida Supreme Court Certified Mediator. Finally, the hearing panel awarded reasonable costs to the Dispute Resolution Center in an amount to be determined by the Chair.

Eisenstein seeks review of the hearing panel's findings and decision to deny his recertification. The Mediator Rules provide: "The chief justice or designee shall review the findings and conclusions of the panel using a competent substantial evidence standard, neither reweighing the evidence in the record nor substituting the reviewer's judgment for that of the panel." See Fla. R. Med. 10.880(c)(1); see also In re: Edwin L. Ford v. Mediator Qualifications Board, Fla. Admin. Order No. AOSC07-50 (Sept. 7, 2007).

As a preliminary matter, Eisenstein argues that he was denied a fair and impartial hearing before the hearing panel, in violation of due process. Mediator Rule 10.820 outlines general procedures that apply to the hearing in a mediator review proceeding. The hearing may be conducted informally, but with "decorum." See Fla. R. Med. 10.820(d)(2). The rules of evidence applicable in civil cases will apply but may be liberally construed. See Fla. R. Med. 10.820(d)(3). Additionally, the applicant or mediator shall have the right "to defend against all charges and shall have the right to be represented by an attorney, to examine and cross-examine witnesses, to compel the attendance of witnesses to

testify, and to compel the production of documents and other evidentiary matters through the subpoena power of the panel." Fla. R. Med. 10.820(e).

In addressing Eisenstein's claims, I also find guidance in the standards of due process applied in Bar discipline and admission proceedings. In the context of a Bar discipline case, the Court has made clear that due process "requires both notice to the lawyer involved and reasonable opportunity to be heard in person and through witnesses if he desires to explain the circumstances of the offense and otherwise mitigate the disciplinary penalty." Fla. Bar v. Fussell, 179 So. 2d 852, 854 (Fla. 1965); see also Fla. Bar v. Carricarte, 733 So. 2d 975, 978-79 (Fla. 1999) ("An attorney is entitled to due process in disciplinary proceedings. As to the discipline imposed, due process requires that the attorney be permitted to explain the circumstances of the alleged offense and to offer testimony in mitigation of any penalty to be imposed.") (internal citations omitted). Similarly, in cases involving applicants for admission to The Florida Bar, the Court has stated:

> A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. . . . A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law.

In re Fla. Board of Bar Examiners, 358 So. 2d 7, 9 (Fla. 1978) (citing Schware v. Board of Bar Examiners, 353 U.S. 232 (1957)).

In this proceeding, there is no dispute Eisenstein was provided notice of charges against him and he was allowed to appear at a formal hearing to defend against the charges. At this hearing, Eisenstein was allowed the opportunity to make arguments as to his good moral character, to present and cross-examine witnesses, and to submit his own evidence.

Eisenstein argues that the Chair of the hearing panel and the prosecutor both made a number of errors throughout the course of the hearing that had the effect of denying him a fair and impartial hearing. However, I do not find his arguments persuasive. Eisenstein's central point seems to be that the prosecutor and the Chair improperly limited his arguments and evidence solely to the issue of good moral character and did not allow him to submit other evidence and testimony that he contends would have shown that his prior cases in New York and New Jersey, and in particular his Bar admission case in Florida, were decided based on incomplete or misstated facts. However, pursuant to the Mediator Rules, the pertinent question before the hearing panel was whether Eisenstein possessed the *present* good moral character required for recertification as a county court mediator, and/or whether he showed sufficient evidence of rehabilitation from past misconduct. The Chair reasonably limited Eisenstein's arguments, evidence, and testimony to this issue. On a number of occasions Eisenstein sought to challenge FBBE's findings and conclusions in his Bar admission case. The Chair of the hearing

panel, in the exercise of his discretion, appropriately refused to allow such challenges. Eisenstein may not use this mediator proceeding to re-litigate issues already decided by FBBE and this Court. Accordingly, I find that due process was satisfied in this matter.

Eisenstein next challenges the hearing panel's decision that he lacked good moral character. The Mediator Rules provide that an applicant for certification or recertification must establish his or her good moral character. Rule 10.110(a) states: "No person shall be certified by this Court as a mediator unless such person first produces satisfactory evidence of good moral character." The applicant's good moral character may be subject to inquiry "when the applicant's or mediator's conduct is relevant to the qualifications of a mediator." Fla. R. Mediator 10.100(c)(1). The purpose of the good moral character requirement "is to ensure protection of the participants in mediation and the public, as well as to safeguard the justice system." Fla. Med. R. 10.110(b).

In determining whether an applicant's conduct demonstrates a "present lack of good moral character," the hearing panel shall consider eleven factors: (1) the extent to which the conduct would interfere with a mediator's duties and responsibilities; (2) the area of mediation in which certification is sought; (3) the factors underlying the conduct; (4) the applicant's age at the time of the conduct; (5) the recency of the conduct; (6) the reliability of the information concerning the

conduct; (7) the seriousness of the conduct as it relates to mediator qualifications; (8) the cumulative effect of the conduct; (9) any evidence of rehabilitation; (10) the applicant's candor; and (11) denial of an application for, or disbarment or suspension from, any profession. See Fla. R. Mediator 10.110(c)(4) (emphasis added).

Here, the primary evidence before the hearing panel was FBBE's decision in Eisenstein's Bar admission case. FBBE issued a sixty-two-page report recommending that Eisenstein's application for admission to The Florida Bar be denied. FBBE's findings indicate that Eisenstein and his former wife were divorced in a New Jersey court in November 1992. However, for years after the judgment of divorce was entered, Eisenstein filed frivolous and abusive pleadings and lawsuits in both state and federal courts against a number of parties, including his former wife, his former wife's attorney, his former wife's mother, and a psychologist who treated his son. The courts in these cases noted that Eisenstein would file a steady stream of motions and other pleadings, that his arguments were often unfounded or nonsensical, and that he refused to comply with directives from the court. In addition to his legal history, FBBE also found that Eisenstein did not timely file his tax returns in 2004, 2005, 2006, 2007, and 2008, and that he failed to list five of his lawsuits on his Florida Bar Application.

Nearly all of the conduct found by FBBE to be disqualifying occurred before Eisenstein first applied for certification as a mediator in 2006. However, it is apparent that Eisenstein has not made any effort to change his behavior; indeed, there is evidence that he has continued to file frivolous and abusive pleadings or legal actions whenever he disagrees with a decision against him. For example, in his case in this Court seeking review of FBBE's findings and recommendation, Eisenstein filed numerous motions, letters, and other filings. The Court issued an order finding that Eisenstein had abused the legal process by filing numerous frivolous pleadings in this Court, and that it may be necessary to limit his ability to continue to file such pleadings in order to conserve the Court's resources to consider legitimate claims filed by others. Accordingly, the Court directed Eisenstein to show cause why he should not be sanctioned, including by directing the Clerk of this Court to reject future pleadings from Eisenstein unless signed by a member of The Florida Bar. Ultimately, the Court discharged its show cause order and approved FBBE's findings of fact, conclusions of law, and the recommendation that Eisenstein not be admitted to The Florida Bar. However, based in part on Eisenstein's abusive filings, the Court disapproved FBBE's recommendation that he be disqualified from reapplying for admission for a period of two years, and instead ordered that Eisenstein was precluded from seeking admission for five years.

Additionally, in his "Motion in Support of Granting the Appellee an Extension of Time to File SN [sic] Answer Brief and Requests this Court Join the Florida Bar as a Necessary Party" Eisenstein indicates that he filed a complaint with The Florida Bar against general counsel for the Florida Board of Bar Examiners, accusing general counsel of losing materials Eisenstein submitted to FBBE and of lying to the Court to cover up his mistake. And, in a hearing in this proceeding before the Chair on preliminary motions, Eisenstein similarly threatened to bring the Chair "up on charges" when the Chair ruled against him. The hearing panel found that Eisenstein's comments are evidence that "his past actions are continuing and that the reasons which underlie the FBBE and New York Bar's findings that he does not possess the character and fitness to be admitted to the Bar persist." I agree with this conclusion. Considering FBBE's findings as to Eisenstein's character, together with his more recent actions indicating that he continues to abuse the legal process whenever he disagrees with a decision against him, I find that the hearing panel's conclusion that Eisenstein lacks good moral character is supported by competent substantial evidence, and I approve the panel's decision to deny his application for recertification. Because Eisenstein's unprofessional conduct spans of a number of years, and continues today, I also approve the hearing panel's decision that he be permanently barred from applying for certification as a Florida Supreme Court Certified Mediator.

Also as a sanction, the hearing panel awarded the Dispute Resolution Center its reasonable costs. Although Eisenstein does not challenge this portion of the hearing panel's decision, I find the award inconsistent with my prior decision in In re: Les Paul Sternberg v. Mediator Qualifications Board, Fla. Admin. Order No. AOSC15-29 (September 11, 2015). In Sternberg, the hearing panel denied Sternberg's application for certification as a mediator and awarded the Dispute Resolution Center its costs. However, the administrative order disapproved the award of costs:

> Mediator Rule 10.830 outlines the types of sanctions that the hearing panel may impose in its decision, including the costs of the proceeding. See Fla. R. Med. 10.830(a)(1). However, it is not apparent that rule 10.830 applies when a hearing panel denies an application for certification (as opposed to when the panel sanctions an already certified mediator). Rule 10.800(a)(4) provides that the hearing panel "shall take appropriate action on the issue of good moral character by dismissing the charges, denying the application in relation to an applicant, or imposing sanctions against a certified mediator pursuant to rule 10.830." (Emphasis added.) This rule indicates a distinction between the hearing panel's decision as to an application for certification, and its decision as to a certified mediator whose conduct demonstrates a lack of good moral character; only a currently certified mediator is subject to sanctions under rule 10.830. Additionally, rule 10.820(n) provides: "If, after a hearing, a majority of the panel finds by preponderance of the evidence that an applicant should not be certified as a mediator, the panel shall deny the application and report such action to the [DRC]." This provision does not authorize the panel to impose a sanction (including costs).
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> Based on these Mediator Rules, I find that the hearing panel's award of costs was not authorized in this proceeding, where Sternberg sought mediator certification. Accordingly, I disapprove that portion

> of the panel's Decision. Sternberg shall not be made to pay the DRC's costs.

Id. at 7-8.

Here, Eisenstein applied for recertification as a county court mediator. Thus, this proceeding is in the posture of an *application* proceeding, rather than a *discipline* proceeding. Indeed, the hearing panel's decision concludes that Eisenstein's "application for certification is denied due to a lack of good moral character." Accordingly, pursuant to In re: Les Paul Sternberg v. Mediator Qualifications Board, I find that the hearing panel's award of costs is not authorized in the Mediator Rules.

Finally, Eisenstein's "Motion in Support of Granting the Appellee an Extension of Time to File SN [sic] Answer Brief and Requests this Court Join the Florida Bar as a Necessary Party" is hereby denied.

DONE AND ORDERED at Tallahassee, Florida, on April 4, 2017.

Chief Justice Jorge Labarga

ATTEST:

John A. Tomasino, Clerk of Court

Served:

IRWIN R. EISENSTEIN
SUSAN MARVIN
ROBERT L. OSTROV