In re Shadel, 16 ROP 254 (2009)
In the Matter of DAVID SHADEL,
Respondent

Disciplinary Proceeding No. 08-008

Supreme Court, Disciplinary Tribunal
Republic of Palau

Order on Motion for Reconsideration

Decided: August 25, 2009
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Disciplinary Counsel: William L. Ridpath

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LOURDES F. MATERNE, Associate Justice; KATHERINE A. MARAMAN, Part Time Associate Justice

PER CURIAM:

Before the Tribunal is Respondent David F. Shadel's "Motion for Reconsideration, for New Trial and/or For Relief from Judgment." On April 17, 2009, we found Respondent violated Model Rule of Professional Conduct 4.4 for making threats to an opposing party in a debt collection matter. Respondent now argues that he was denied procedural due process and that the Tribunal's findings of law and fact were clearly erroneous. For the reasons set forth herein, Respondent's Motion is denied.

BACKGROUND

Both Ms. Robles, the complainant, and Respondent testified at the hearing on April 6, 2009. Ms. Robles testified that on February 4, 2008, she went to the courthouse and met alone with Respondent in Judge Salii's chambers. Ms. Robles testified that during this meeting, Respondent stated that she needed to pay $100 bi-weekly towards her debt, and she informed him that she could not afford to pay that much at that time. She testified that he then told her "you are lucky that I am not bringing you to court and putting you in jail for passing bad checks." She testified that she then became scared that she would go to jail, and told him that she couldn't leave her children and go to jail, so she "agreed" to the payment terms. These were contained in the order in aid of judgment of February 4, 2008. Thus, when Judge Salii came into the room and asked Ms. Robles whether she agreed to pay, she stated that she did. When cross-examined as to why she could remember this conversation, but not the specifics of the previous conversations with Respondent, she stated that when someone says the word "jail" to you, you remember it because it scares you.

Ms. Robles testified that after the hearing while walking down the stairs by Judge Salii's chambers, Respondent said to her "you are lucky I am just asking you to pay because I can put you in jail for passing bad checks."

In his testimony, Respondent vehemently denied making the alleged threats against Ms. Robles. He testified that Ms. Robles came to his office in November, 2007, and he asked if she could pay 50% of her future wages towards her debt. When she said that she could not, he stated that they "agreed" on 40%. When asked about the February 4, 2008 meeting, Respondent answered that he did not make the alleged threats inside or outside of Judge Salii's chambers. He further testified that he and Ms. Robles agreed to reduce the 40% payments to $100 bi-weekly.[1] p.256 Thus, Respondent maintained that even if he did make the alleged threats, they were during the course of negotiations and therefore permissible under the applicable version of the Model Rules.

In our Opinion of April 17, 2009, we found by clear and convincing evidence that on February 4, 2008, Respondent made threats about jailing Ms. Robles to her both in Judge Salii's chambers and in the stairwell outside her chambers. We also found that although the stipulated payment of 40% of her wages towards the debt was changed to $100 bi-weekly, this was still roughly 40% of her wages, and that therefore, no real, meaningful negotiation occurred during the February 4, 2008 meeting. Because there was no meaningful negotiation, and because Respondent's threats were more like harassment and less like a genuine, implicit offer to refrain from seeking criminal prosecution, we found Respondent violated Rule 4.4 of the Model Rules of Professional Conduct.

Respondent now argues that the Tribunal violated his rights to due process of law and that many manifest errors of law are made in our Opinion of April 17, 2009.

STANDARD FOR RECONSIDERATION

ROP Rule of Civil Procedure 7(b)(5) was amended in 2008 to include a standard for a motion for reconsideration. It states that:

> The motion shall point out with specificity the matters which the movant believes were overlooked or misapprehended by the court, any new matters being brought to the court's attention for the first time, and the particular modifications being sought in the court's prior ruling. Motion for reconsideration are disfavored and the court will ordinarily deny such motions in the absence of a showing of manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to the court's attention earlier in the exercise of reasonable diligence.

This new rule reflects case law in Palau regarding Rule 59 (e) motions to amend or alter judgment and Rule 60 motions for relief from judgment. A manifest error of law is defined in

[1]We found $100 bi-weekly to be roughly equivalent to 40% of Ms. Robles' income, as she stated she would be making about $250 every two weeks at her new job. Respondent argues in his Motion for Reconsideration that $100 bi-weekly was actually about 38% of her actual net income, not her gross income. At the time, however, Ms. Robles had only received two paychecks, and the information available to both parties was that she would be making roughly $250 per paycheck. Thus, we found that no meaningful negotiation occurred on February 4, 2008, nor any other day between Ms. Robles and Respondent.

this jurisdiction as "the wholesale disregard, misapplication, or failure to recognize controlling precedent." *Dalton v. Borja*, 8 ROP Intrm. 302, 304 (2001). The motions are considered under these standards.

DISCUSSION

On April 17, 2009, the Tribunal found by p.257 clear and convincing evidence that Respondent violated Model Rule of Professional Conduct 4.4 ("Rule 4.4"). We found that Respondent harassed Ms. Robles on February 4, 2008 without substantial purpose, beginning during a conversation in Judge Salii's chambers and concluding after a hearing held there. Respondent now argues that he is entitled to a new trial, to an amended judgment, or to reconsideration because the Tribunal violated his rights to due process of law under the Palau Constitution, in finding the facts deduced at the hearing on April 6, 2009 and erred manifestly in finding him in violation of Rule 4.4.

A. Due Process

Respondent asserts that his due process rights were violated by the Tribunal because he was never put on notice that the precise conversation that occurred on the stairs after the hearing that took place on February 4, 2008, would be an issue at trial. Respondent cites United States criminal and disciplinary case law to the effect that a retroactive charge violates the due process clause of the Constitution because respondents/defendants are not given notice nor an opportunity to be heard on that charge. In addition he states that he could have produced evidence refuting the existence of the conversation.

He argues the prejudice arose by the omission of this specific conversation in the second amended formal complaint. Respondent additionally argues that he was wrongfully led to believe that the conversation in the stairwell would not be a part of the charges brought against him because Disciplinary Counsel mentioned it in his first report to the Tribunal, but the Tribunal did not reference this specific conversation in its order to initiate formal charges, nor any of its orders before the hearing on April 6, 2009. Respondent further suggests that because Disciplinary Counsel "conceded the Rule 4.4 charge" during his closing remarks at the hearing, that it was his intention to leave the stairwell conversation out of the formal complaints.

Lastly, Respondent argues that the facts supporting the finding that he violated Rule 4.4 were not the same facts alleged in the formal complaints. He argues that the Tribunal found that he violated Rule 4.4 because he made "empty threats outside the context of negotiations," whereas he was charged with threatening to send Ms. Robles to jail. These two charges, according to Respondent, are entirely different, and therefore the finding of the Tribunal was a retroactive addition to the charges Respondent was apprised of in the formal complaints.

Disciplinary Counsel argues that, while Respondent is absolutely entitled to due process of law, he was fully apprised of the nature and specific conversations that were at issue in this matter and was given ample opportunity to be heard. Disciplinary Counsel refers to his Report, Findings and Recommendations, where both the conversation inside Judge Salii's chambers and

that on the stairwell were cited. He contends that because Respondent was made aware that his entire line of conduct with Ms. Robles was called into question, he should have been aware that the entire chain of events would be an issue at trial, especially those events occurring on February 4, 2008.
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Further, Disciplinary Counsel argues that Ms. Robles testified at the hearing consistently with the report, findings and recommendations, and that Respondent was given ample time to testify on his behalf upon the completion of Ms. Robles' testimony at the hearing. Lastly, Counsel distinguishes the law cited by Respondent in demonstrating that in the cases cited, additional, separate incidents of misconduct arose during the trial that led to added charges after the close of trial. Here, however, Disciplinary Counsel contends, no new charge, nor issue of law, nor even new fact, was raised at the hearing that had not been mentioned at least once prior to the hearing.

Respondent's first basis for reconsideration, we can assume, is under Article IV, Section 7 of the Palau Constitution. This provision states that "[a] person accused of a criminal offense . . . shall enjoy the right to be informed of the nature of the accusation and to a speedy, public and impartial trial." Const. art. IV § 7. Because, as Respondent asserts, disciplinary actions are quasi-criminal in nature, he is entitled to many of the same protections under the Constitution, including due process of law. As criminal defendants must be "informed of the nature of the accusation[s]" against them, Respondent argues that his due process rights were violated when the Tribunal found him liable for threats alleged by Ms. Robles after the filing of the second amended complaint.

First, and most critically, Respondent was not found to have violated Rule 4.4 simply based on the one statement in the stairwell. He was found liable for one, single charge of Rule 4.4, not two separate charges, based on threats made both in the stairwell and in Judge Salii's chambers. Respondent appears to have misapprehended the Tribunal's Opinion of April 17, 2009, assuming that because the Rule 4.4 violation was based on several facts, Respondent was liable for separate counts of Rule 4.4 violations. Nowhere in our Opinion did we conclude that Respondent was liable for a second count of Rule 4.4. Although this makes most of Respondent's arguments moot, we will make it unequivocally clear below why due process was not violated by the Tribunal's findings. In addition, even without the statements in the stairwell, the Tribunal would find that Respondent violated Rule 4.4. Thus, even if evidence of the stairwell statement was received in error it is harmless error.

Second, we agree with Disciplinary Counsel, and find that Respondent was given notice of the Rule 4.4 charge against him sufficient to satisfy the due process clause of the Constitution. Respondent is correct in that disciplinary proceedings are quasi-criminal in nature, and therefore afford him the right to due process of law. *See In re Ruffalo*, 391 U.S. 961, 966 (1968). However, notice of every fact that may arise at the factual hearing is not required in the complaint. *See In re Marshall*, 160 Wash.2d 317, 341 (Wash. 2007) (distinguishing the *Ruffalo* trap of adding charges after respondent had testified from the case where all the facts supporting the charges were adduced before respondent testified, giving him fair opportunity to refute them). It is true that new charges, for separate violations of disciplinary rules, cannot be

retroactively added at the close of trial. *Ruffalo*, 391 U.S. at 966. That is simply not the case currently before the p.259 Tribunal.

In the instant matter, Respondent was charged with a violation of Rule 4.4 for threatening, harassing, or embarrassing a third party. The operative formal complaint, the second, stated that "[o]n that day, Respondent threatened that he could seek to have Ms. Robles sent to jail for writing the bad checks." Sec. Amend. Form. Compl. ¶11. This statement refers to the day of February 4, 2008, not only the single conversation in Judge Salii's chambers. In addition, when added to the other charges in the second amended formal complaint, Respondent's entire professional relationship with Ms. Robles was quite clearly subject to scrutiny by the Tribunal at the hearing. This complaint begins with Respondent's first interaction with Ms. Robles in November, 2007, includes the drafting of the stipulation, the order in aid of judgment of November, 2007, and the circumstances surrounding the Order entered February 4, 2008.

Moreover, as Disciplinary Counsel has pointed out his first report, findings and recommendation include specific reference to not only the threat made inside Judge Salii's chambers, but also to that made on the stairs. While neither the Tribunal's pre-trial summations of the facts, nor the second amended formal complaint mention the stairwell comment in particular, Respondent was certainly on notice that his entire course of conduct regarding Ms. Robles would be the issue at the hearing, which necessarily includes any and all conversations that occurred on February 4, 2008. We do not deduce from these facts that either Disciplinary Counsel or the Tribunal, intended to mislead Respondent in any way.

Finally, Respondent's arguments regarding Disciplinary Counsel's concession of facts are without merit. He is mistaken in stating that Disciplinary Counsel conceded the Rule 4.4 charge. In fact, Disciplinary Counsel strongly urged the Tribunal to find that Respondent had violated Rule 4.4 but conceded the Rule 4.1 charge.[2]

Due process in disciplinary proceedings requires that a Respondent be on notice of the charges against them, not all evidence supporting the charges. "The *charge* must be known before the proceedings commence. They become a trap when, after they are underway, the *charges* are amended on the basis of testimony of the accused." *Ruffalo*, 391 U.S. at 966 (emphasis added). Although the Respondent claims he was surprised by the evidence of the stairwell conversation and this was a "new"[3] fact that arose at the hearing he presented evidence regarding the conversations he held with Ms. Robles on February 4, 2008. He claims that there is evidence to prove that the conversation could not have occurred. However, this is not newly discovered evidence. Respondent was afforded an opportunity to present evidence at the trial. If he had requested a brief continuance p.260 to retrieve the evidence he now seeks to admit there is no doubt he would have been able to present it. Pursuant to ROP Rule of Civil Procedure 7(b)(5) since this is not new evidence the finding of fact regarding the stairwell conversation will not

[2]For which Respondent was not, in fact, found liable.

[3]"New" is in quotes only because the fact was not contained in the Second Amended Formal Complaint. However, it was not entirely new, as Disciplinary Counsel included it specifically in his report, findings and recommendation.

be reconsidered.

Addressing Respondent's contention that he was newly charged with making "empty threats outside the context of negotiations," we likewise find this conclusion of liability is firmly rooted in the amended charges. Respondent was charged with making threats, harassing, and/or embarrassing a third party without a substantial purpose, in violation of Rule 4.4. We found that he made threats without a substantial purpose, or in other words, without the purpose of negotiation, in violation of Rule 4.4. "Empty threats," in other words, harassing statements made without purpose, are precisely what Rule 4.4 forbids. Regardless of whether we categorize the statements as empty threats or harassing statements made without substantial purpose, Respondent violated Rule 4.4 of the Model Rules of Professional Conduct.

B. Meaningful Negotiation

Respondent next contends that, even if he admits that he threatened Ms. Robles with going to jail, the threats had a substantial purpose because they were a negotiation tactic for getting Ms. Robles to agree to payment terms. He argues that the Tribunal made a manifest error in finding that the threats were made after negotiations had concluded. Respondent maintains that a negotiation was ongoing on February 4, 2008, because Ms. Robles stated that she only agreed to the payment terms because she was threatened with going to jail. Moreover, he posits that because the payment schedule had yet to be determined before the February 4, 2008 meeting, at least the schedule was negotiated during that meeting.

Disciplinary Counsel opposes reconsideration of the facts supporting the Tribunal's finding, arguing that there was never a negotiation on February 4, 2008, because Respondent "held all the cards." Rather, Counsel contends that the threat was "largely gratuitous" and should instead be construed as a harassing and embarrassing statement to Ms. Robles. Regarding the threat in the stairwell, Counsel maintains that there was absolutely no negotiation ongoing at that time, and that it was purely a harassing statement.

We find no manifest error of fact, nor of law, warranting a new trial, reconsideration, nor an amendment of the judgment of April 17, 2009. Respondent's arguments that a negotiation occurred on February 4, 2008, are not new arguments, and have been rejected by the Tribunal before. *See* Opinion 4/17/09 at 16. Although we heard testimony from Respondent that payment terms were slightly altered, and that a payment schedule was agreed upon that day, we found that this was not a meaningful negotiation. Rule 4.4 forbids harassing statements that have no substantial purpose. Respondent argues that the purpose of the threats was to get Ms. Robles to agree to payment terms to which she had not previously agreed. We heard testimony from Ms. Robles that she only agreed to the payment terms because she was threatened with going to jail. Respondent contends that this statement shows that the threats had a purpose, which was that Ms. p.261 Robles would not have agreed to the terms had he not made these threats. We disagree, and have always disagreed, with this contention.

The Tribunal did not find that Ms. Robles would not have agreed to Respondent's payment terms had Respondent not made threats to her, as Respondent asserts. Respondent cites

our Order of March 17, 2009 to support this assertion, calling our summations of the alleged facts "findings." To the contrary, the March 17, 2009 Order was a pre-hearing document, and thus no findings of fact had yet been made. That Order merely stated that certain facts were in dispute, and therefore that a Motion to Dismiss was improper at that time. Statements made therein are not findings to scrutinize in this motion for reconsideration of our April 17, 2009 Opinion.

In fact, the Tribunal did find that the threats had no substantial purpose, implying that Ms. Robles would have agreed to the payment terms without the threat. Because, as Disciplinary Counsel avers, Respondent "held all the cards," we found that although Respondent believed a negotiation was occurring on February 4, 2008, Ms. Robles did not believe so, and nor do we. "Negotiation" is defined as "a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter." Black's Law Dictionary 1059 (7th ed. 1999). Respondent presented no evidence at trial, nor any new evidence in support of this motion for reconsideration, that a consensual bargaining process occurred in Judge Salii's chambers. Negotiation requires bargaining, rather than simply stating one possible solution with an accompanying threat and getting the other party to unwillingly "agree." Ms. Robles had no substantial choice, and therefore cannot be said to have bargained for what she received.

Respondent's numerous other claims of Tribunal error present no "wholesale disregard, misapplication, or failure to recognize controlling precedent," as required to show a manifest error warranting reconsideration, a new trial or an amended judgment. *Dalton v. Borja*, 8 ROP Intrm. 302, 304 (2001). We therefore reject them as grounds for relief.

CONCLUSION

We find that Respondent has not presented any facts, nor arguments, to show that the Tribunal manifestly erred in its April 17, 2009 Opinion. We additionally find that, because no new charges were added after the hearing on April 6, 2009, there has been no due process violation by the Tribunal. Respondent's motion is therefore **DENIED**. The parties are directed to the case *In re Tarkong*, 4 ROP Intrm. 121, 131-32 (Disc. Pro. 1994), for a list of aggravating and mitigating factors this jurisdiction weighs in deciding on a sanction.