

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case No. 11-V-17744-PEM
)	
KENT PEARCE TIERNEY,)	
)	DECISION
Member No. 186685,)	
)	
<u>A Member of the State Bar.</u>)	

I. Introduction

The issue in this case is whether petitioner Kent Pearce Tierney has established his rehabilitation, present fitness to practice, and present learning and ability in the general law so that he may be relieved from his actual suspension from the practice of law. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.4(c)(ii).)¹

The court finds that petitioner has shown by a preponderance of the evidence that he has satisfied the requirements of standard 1.4(c)(ii) and therefore, finds that his actual suspension should be terminated. Accordingly, the court **GRANTS** petitioner’s petition for relief from actual suspension from the practice of law.

¹All further references to standards are to this source.

II. Significant Procedural History

On October 21, 2011, petitioner filed a verified petition for relief from actual suspension, seeking the termination of his actual suspension and claiming he has satisfied the requirements of standard 1.4(c)(ii).

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) filed its opposition to the petition on December 5, 2011, and requested a hearing in this matter.

A hearing was held on January 3, 2012. Attorney Jonathan I. Arons represented petitioner. Deputy Trial Counsel Manuel Jimenez appeared for the State Bar. The court took the petition under submission on January 3, 2012.

III. Findings of Fact

The following findings of fact are based on the evidence and testimony introduced at this proceeding, the petitioner's verified petition and the State Bar's response to that petition. The court finds petitioner to be a credible witness.

Petitioner was admitted to the practice of law in California on December 19, 1996, and has been a member of the State Bar since that time.

A. Underlying Disciplinary Background

In 2010, in the underlying matter, petitioner stipulated to having been convicted three times for driving under the influence of alcohol and one time for felony evasion. (Supreme Court case No. S186377, effective December 24, 2010; State Bar Court case Nos. 10-C-03931, 10-C-03739; 08-C-14618.)

Case No. 10-C-03739 (1998 DUI Conviction)

On October 1, 1998, petitioner was arrested and charged with violation of Vehicle Code (VC) section 23152, subdivisions (a) and (b), driving under the influence (DUI) of alcohol with a blood alcohol (BAC) in excess of .08. On December 1, 1998, petitioner was convicted of VC § 23152, subdivision (b) (driving with a BAC of .08 or more). He was sentenced to four days in the county jail and placed on probation for three years. He completed his sentence and probation without incident.

On June 11, 2010, the Review Department of the State Bar Court issued an order referring the matter to the Hearing Department on the following issues: a hearing and decision recommending the discipline to be imposed in the event the Hearing Department found the facts and circumstances surrounding petitioner's conviction of VC § 23152, subdivision (b), involved moral turpitude or other circumstances warranting discipline.

Case No. 10-C-03931 (2005 DUI Conviction)

On May 28, 2005, petitioner was arrested and charged with violation of VC § 23152, subdivision (a), driving under the influence of alcohol. On August 30, 2005, petitioner was convicted of violation of VC § 23152, subdivision (a). He was sentenced to 10 days imprisonment in county jail and four years' court probation. Petitioner's probation was in effect until August 29, 2009. Petitioner completed his county jail time.

On May 13, 2010, the Review Department issued an order referring the matter to the Hearing Department on the following issues: a hearing and decision recommending the discipline to be imposed in the event the Hearing Department found the facts and circumstances surrounding petitioner's conviction of VC § 23152, subdivision (a), involved moral turpitude or other circumstances warranting discipline.

Case No. 08-C-14618 (2009 Felony Evasion and DUI Convictions)

On March 5, 2008, to evade a police officer, petitioner drove 120 miles per hour on a public highway on the center divide and the right shoulder. He eventually parked and locked the car in a residential neighborhood, where police found and arrested him. Officers found an assault rifle and high cap magazine. Petitioner pled guilty to felony evasion and DUI. He was sentenced to 180 days' confinement in county jail and five years' probation.

On November 17, 2009, the Review Department issued an order referring the matter to the Hearing Department on the following issues: a hearing and decision recommending the discipline to be imposed in the event the Hearing Department found the facts and circumstances surrounding petitioner's conviction of VC §§ 2800.2, subdivision (a), and 23152, subdivision (b), involved moral turpitude or other circumstances warranting discipline.

The Hearing Department consolidated the three conviction referral matters. A stipulation in the matter was filed July 27, 2010.

In mitigation, the parties stipulated to the following factors: (1) *Remorse* – petitioner had remorse in that in his criminal proceedings, petitioner admitted to culpability and was proactive in reaching a resolution with the District Attorney's office; (2) *Emotional difficulties* – between 2003 and 2004 petitioner experienced substantial family and emotional difficulties which contributed to his alcohol abuse. His mother, for whom he provided care, died from cancer and he went through a contentious divorce from his first wife; and (3) *Rehabilitation* – petitioner had been actively treating his alcoholism since his arrest in 2008. In April 2008, petitioner voluntarily entered a 30-day residential rehabilitation facility. He also began attending Alcoholics Anonymous (AA) meetings and obtained a sponsor. Pursuant to his probation conditions, petitioner began treating with a licensed addiction specialist, enrolled in an 18-month DUI program in January 2010, and enrolled in an intensive outpatient program in April 2010.

In aggravation, there was harm in that peace officers from several law enforcement agencies had to be dispatched to apprehend petitioner, creating a burden on the personnel and resources of those agencies.

As for discipline, the State Bar and petitioner stipulated that petitioner should be suspended for four years, that execution of the suspension be stayed and that he be placed on probation for four years on conditions, including that he be actually suspended for two years and until he has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii). The stipulation was approved by the State Bar Court hearing judge. On November 24, 2010, the Supreme Court filed an order in case No. S186377, effective December 24, 2010, imposing the stipulated discipline on petitioner. He was also ordered to take the Multistate Professional Responsibility Exam (MPRE) and comply with rule 9.20 of the California Rules of Court. Because he was given credit for the interim suspension that began on November 6, 2009, his two-year actual suspension under that order began on that date.

B. Rehabilitation and Present Fitness to Practice Law

The State Bar argues that petitioner has not been rehabilitated and does not have present fitness to practice law. The court disagrees.

The court finds by a preponderance of the evidence that petitioner has demonstrated the rehabilitation and present fitness to practice law, and so meets the requirements of this portion of standard 1.4(c)(ii).

1. Compliance With Probation Conditions

Pursuant to Supreme Court case No. S186377 (State Bar Court case Nos. 10-C-03931, 10-C-03739; 08-C-14618), effective December 24, 2010, petitioner was suspended for four years,

execution stayed, and placed on probation for four years on conditions, including that he be actually suspended for two years and until he satisfies standard 1.4(c)(ii). Petitioner's four years' probation conditions included quarterly reports, State Bar Ethics School, substance abuse conditions and compliance with his probation conditions in the underlying criminal matter. Petitioner was also required to file an affidavit under California Rules of Court, rule 9.20, by February 2, 2011, and take and pass the MPRE during his actual suspension.

By the time petitioner filed his verified petition for relief in October 21, 2011, he had complied with the State Bar Ethics School requirement (completed on August 18, 2011) and he had taken and passed the MPRE in March 2011. Petitioner also made contact with the Office of Probation in a timely manner and met with the probation deputy as scheduled. Petitioner, however, did not timely file the rule 9.20 affidavit by February 2, 2011. Instead, he filed it on February 15, 2011.² He also did not file all of his quarterly reports in a timely manner. His April 10, 2011 report was timely. However, his July 10, 2011 report was one day late and his October 10, 2011 report was three days late. The testimony at trial is that he sent the reports before the due dates but they were late because of mail delivery problems. The court finds such tardiness inexcusable but at the same time, insignificant.

2. *Alcohol Addiction Issues*

The behaviors that gave rise to petitioner's suspension are clear inasmuch in the stipulation petitioner admitted he was an alcoholic, experiencing substantial family and emotional problems that exacerbated his alcohol use. Following his last arrest and conviction for DUI, petitioner

² Petitioner filed his rule 9.20 affidavit on January 24, 2011, which was before the February 2, 2011 deadline. But it was rejected by the Office of Probation because he failed to provide an address. Petitioner mistakenly thought that it was unnecessary to put it down since his address had not changed. On February 8, 2011, the Office of Probation had to remind him to redo the rule 9.20 affidavit. Petitioner filed it within the week.

committed himself to living a clean and sober life. On April 1, 2008, he went to Azure Acres, a residential in-patient treatment facility and completed a 30-day program. After his release from the residential program he began seeing a drug and alcohol therapist weekly. He attended AA meetings daily for three months. He also found a dedicated experienced sponsor who frequently met with him. In approximately a year he completed the 12-step program of AA. He has complied with all of the Alameda County probation conditions in his criminal matter and completed an 18-month Multiple Offender DUI program, which covered a variety of topics related to substance and alcohol abuse. The last time petitioner had a drink was April 1, 2008, about a month after he was last arrested for a DUI.

Moreover, petitioner has attended counseling with a marriage and family therapist. This has given him the tools to deal with the loss of his 59-year old mother from ovarian cancer and the contentious divorce proceedings with his first wife. His counseling has saved his second marriage and helped him create a stable relation with his second wife.

3. *Responsibility and Remorse*

Respondent has expressed remorse for his multiple DUI convictions and has taken the necessary actions to change the direction of his life to ensure that he suffers no more DUI convictions.

4. *Character References*

In support of his petition, petitioner submitted 19 favorable reference letters including 14 from attorneys (Christopher K. Karic, Paul Hausknecht, Sarah Burke, Michael J. Cochrane, Jason Estavillo, Matthew Harrington, John Van De Poel, Jr., David Darroch, Sami I. Shamieh, Jane L. Shamieh, Marianne F. Skipper, Jonathan King, Brian Kowalski, and Darrell V. Nguyen). Many of those who wrote character references have known petitioner for at least 15 years. They all

believed petitioner to be rehabilitated and found him to be of good moral character. Many spoke of his deep remorse. They were aware of petitioner's DUI convictions and suspension from the practice of law. The State Bar did not rebut any of the evidence submitted.

In summary, all of the letters strongly recommend petitioner's reinstatement to the practice of law. Accordingly, in this proceeding, petitioner has shown that his favorable character testimony and reference letters from attorneys and his friends are entitled to considerable weight. (*Feinstein v. State Bar* (1952) 39 Cal.2d 541, 547.) The court finds the favorable character evidence to be of sufficient value to support petitioner's rehabilitation and present fitness.

Petitioner's Candor

The State Bar's argument that petitioner has been less than candid regarding his employment is without merit. Petitioner is not currently employed largely due to the fact that he is a convicted felon. Until his incarceration petitioner made all of his child support payments. After his incarceration his child support was modified so that neither party is court ordered to pay child support because custody is equally shared.

C. Present Learning and Ability in the General Law

On August 18, 2011, petitioner completed the State Bar Ethics School. Petitioner also took and passed the Multistate Professional Responsibility Examination on March 5, 2011.

Since his suspension petitioner has kept current with the law. He has also completed 70 hours of MCLE credit. Based upon the record as a whole, the court finds that petitioner has demonstrated by a preponderance of the evidence that he possesses present learning and ability in the general law, and so meets the requirement of this prong of standard 1.4(c)(ii). Moreover, the parties stipulated that petitioner has present learning and ability in the law.

IV. Discussion

In order to be relieved of his actual suspension, petitioner has the burden of proving in this proceeding, by a preponderance of the evidence, that he is rehabilitated, has present fitness to practice, and present learning and ability in the general law. (*In the Matter of Murphy* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 571, 578.)

To establish rehabilitation, the court must first consider the prior misconduct from which petitioner seeks to show rehabilitation. The amount of rehabilitation evidence varies according to the seriousness of the misconduct at issue. Second, the court must examine petitioner's actions since the imposition of his discipline to determine whether his actions in light of the prior misconduct, sufficiently demonstrate rehabilitation by a preponderance of the evidence. (*In the Matter of Murphy, supra*, 3 Cal. State Bar Ct. Rptr. at p. 581.)

Petitioner must show: (1) strict compliance with the terms of probation in the underlying disciplinary matter; (2) exemplary conduct from the time of the imposition of the prior discipline; and (3) "the conduct evidencing rehabilitation is such that the court may make a determination that the conduct leading to the discipline . . . is not likely to be repeated." (*In the Matter of Murphy, supra*, 3 Cal. State Bar Ct. Rptr. at p. 581.)

"In weighing such a determination, the court should look to the nature of the underlying offense, or offenses; any aggravation, other misconduct or mitigation that may have been considered; and any evidence adduced that bears on whether the cause or causes of such misconduct have been eliminated." (*In the Matter of Murphy, supra*, 3 Cal. State Bar Ct. Rptr. at p. 581.)

A. Rehabilitation and Present Fitness to Practice Law

Petitioner's prior misconduct involved multiple DUI convictions. In aggravation, petitioner caused harm in that his last conviction entailed multiple peace officers, creating a burden

on the personnel and resources of those agencies. In mitigation, petitioner experienced substantial family and emotional difficulties which contributed to his abuse of alcohol and has actively sought treatment for his alcoholism.

The court concludes that petitioner has demonstrated remorse for his misconduct, as evidenced by his initial stipulation to the misconduct and his subsequent commitment to comply with all of his probation requirements. The remaining issue is whether he has shown rehabilitation and whether the conduct leading to his discipline is “not likely to be repeated.”

The court finds petitioner to be credible and finds his position well-substantiated. He has not used any alcohol since April 2008. He has completed a 30-day in-patient treatment in May 2008. He also completed 10 weeks of intensive outpatient treatment in June of 2010. He then attended an outpatient aftercare treatment for one year. He currently attends AA meetings and has a sponsor. His second marriage is stable. The evidence demonstrates that petitioner has undergone introspection.

As discussed, *ante*, petitioner presented strong evidence of good character through the favorable reference letters from attorneys and friends. All of whom believed in his fitness and moral character and strongly support petitioner’s request for relief from suspension. The letters show that petitioner has been open and forthright with his character references by providing them with a full understanding of the nature and scope of his prior misconduct. They believe that petitioner is committed to avoiding any misconduct in the future.

After carefully reviewing and weighing all the evidence and taking into account petitioner’s demeanor at the hearing in this proceeding, the court finds that petitioner has addressed the issues that led to his suspension. Petitioner has demonstrated an understanding and insight into the nature and scope of his past misconduct. He has accepted responsibility for all prior acts of misconduct

and has expressed remorse for his behavior. He has established a strong support system through his participation in AA and he has vowed to avoid similar misconduct in the future. The fact that petitioner understands his professional responsibilities and has a proper attitude towards his prior misconduct is evidence of rehabilitation. (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 317.)

Accordingly, the court finds, by a preponderance of the evidence, that petitioner is rehabilitated such that the misconduct in the underlying matter is unlikely to recur.

B. Present Learning and Ability in the Law

In the instant proceeding, the parties stipulated that petitioner has present learning and ability in the law. Therefore, based upon evidence presented in this proceeding and upon the findings of fact set forth above, this court concludes, by a preponderance of the evidence, that petitioner has present learning and ability in the general law.

V. Conclusion

The court finds that petitioner has satisfied the requirements of standard 1.4(c)(ii) and that he has demonstrated, by a preponderance of the evidence and to the satisfaction of this court, that he is rehabilitated, that he is presently fit to practice law, and that he has present learning and ability in the general law.

Accordingly, petitioner's petition for relief from actual suspension from the practice of law pursuant to standard 1.4(c)(ii) is hereby **GRANTED**. It is further ordered that petitioner's actual suspension from the practice of law in California is hereby terminated and he is entitled to resume the practice of law in this state upon the payment of all applicable State Bar fees.

Dated: January ____, 2012

PAT McELROY
Judge of the State Bar Court