

The Supreme Court
State of Washington

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November 16, 2020

Anne M. van Leynseele



Dear Ms. van Leynseele:

I write to advise you of my review and disposition of the issues raised in your letter dated August 3, 2020, which alleges the Office of Disciplinary Counsel (ODC) negligently dismissed your grievance against your former law partner, Aaron Pelley, as part of an ongoing pattern of ODC failing to zealously prosecute ethical violations by Washington attorneys. You requested that I review your grievance and that the Washington Supreme Court conduct an audit of ODC's investigative process. Please know that I have fully reviewed your complete grievance file and take your allegations seriously, but as explained below, have found no grounds on which to overturn the dismissal of your grievance.

As to your request for an audit of ODC's investigative processes, Washington law does not grant the Washington Supreme Court the power to audit the Washington State Bar Association (WSBA) or its subdivisions, including ODC. Instead, RCW 2.56.200 authorizes the office of the administrator for the courts to conduct performance audits of Washington courts. Because ODC is not a court, the statute does not authorize conducting a performance audit of ODC's investigative process.

Turning to your challenge to ODC's dismissal of your grievance, I first note that your letter to this court enclosed several exhibits, including another letter dated August 3, 2020, exercising your right under the Rule for Enforcement of Lawyer Conduct (ELC) 5.7(b) to request a review of ODC's dismissal of your grievance. Although the Review Committee's decision is final and not subject to further review, *see* ELC 5.7(f), the Washington Supreme Court occasionally receives an objection to a Review Committee order. The Court has decided that requests to review grievance dismissals will be reviewed by the Chief Justice. After reviewing the request, the Chief Justice decides whether to deny review of the grievance dismissal or refer the matter to the full court for

consideration. To obtain review by the full court, the grievant must show that an ELC has not been followed or that there are extraordinary circumstances, clear error, or substantial injustice. On the other hand, if the OCD's actions were conducted according to this court's rules and there is no indication of extraordinary circumstance, clear error, or substantial injustice, the request will be denied and the grievant notified by letter.

For the sake of efficiency, I have treated your letter as an objection to the Review Committee's then-pending decision. I therefore allowed the Review Committee to complete its work before conducting my own independent review of your grievance. In the meantime, I requested ODC provide me with your complete grievance file, ODC File No. 18-00464.

As you know, the Review Committee affirmed ODC's dismissal of your grievance in a ruling dated October 14, 2020. In the weeks since, my office has reviewed the matter in full. For the reasons explained below, I have concluded that ODC's actions were conducted according to this court's rules and that there is no indication of extraordinary circumstances, clear error, or substantial injustice.

Your first argument is that ODC applied the wrong standard of proof. To prevail in a disciplinary hearing against an attorney accused of misconduct, disciplinary counsel must prove that misconduct by a "clear preponderance of the evidence." ELC 10.14(b). That standard of proof is higher than the "preponderance of the evidence" standard applicable in most civil proceedings. In its letter dismissing your grievance, ODC clearly explained that "insufficient evidence exists to prove unethical conduct by Mr. Pelley by a clear preponderance of the evidence in this matter." That is the correct standard, which ODC applied consistently.

Nevertheless, you maintain that ODC applied a criminal burden of proof in its discussion of your allegations that Mr. Pelley committed federal computer crimes, committed various acts of theft, and embezzled firm funds. But in that discussion, ODC clearly explained that "we do not believe we could meet our burden of proving the criminal allegations *by a clear preponderance of the evidence.*" That ODC acknowledged the criminal nature of your allegations does not suggest ODC applied the criminal "beyond a reasonable doubt" standard of proof in its dismissal, particularly where ODC expressly stated otherwise.

You also suggest ODC inappropriately applied "a fact specific civil standard" to your civil allegations against Mr. Pelley. Again, there is no indication ODC applied the wrong standard in dismissing your grievance. You object specifically to ODC's lack of reliance on the findings contained in your interim award in arbitration against Mr. Pelley. But after Mr. Pelley challenged the legitimacy of the arbitration evidence, the King County Superior Court vacated the award and ordered a new hearing with a different arbitrator to re-evaluate that evidence, and you stipulated to vacating the award and then moved the case be dismissed with prejudice. Vacated findings of fact in dismissed civil proceedings are not binding on ODC, and ODC's apparent lack of reliance on those vacated findings does not demonstrate that it applied the wrong standard of proof or otherwise erred.

Second, you claim ODC abused its discretion in myriad ways, including by (1) conducting a biased and incomplete investigation, (2) misinterpreting the separation agreement between you and

Mr. Pelley, (3) erring in its credibility determinations, (4) basing its decision on allegedly mismanaged evidence, and (5) committing plain error of judgment. You specifically allege that, among other things, ODC conducted an inappropriately limited investigation, made determinations prior to investigation, sought only interview responses that supported its predetermined outcome, gave too much weight to the testimony of others, disregarded your own testimony, and otherwise failed to consider to give due weight to your proffered evidence. Based on my review of the full grievance file, these allegations against ODC appear to be unfounded and do not show ODC abused its discretion. Instead, each appears to take issue with the fact that ODC found the available evidence insufficient to prove the alleged misconduct of Mr. Pelley by a clear preponderance of the evidence. That you disagree with ODC's conclusions as to the sufficiency of the evidence is not proof of extraordinary circumstances, clear error, or substantial injustice.

Relatedly, you argue ODC's finding of insufficient evidence is a result of its negligent failure to adequately consider the "substantial evidence" of Mr. Pelley's wrongdoing as a whole. While some of your evidence circumstantially suggests Mr. Pelley may have engaged in misconduct in violation of the Rules of Professional Conduct, that evidence is far from conclusive. Some of your explanations of events are contradicted by other evidence and testimony in your grievance file; others appear to lack any support. For example, you claim without evidence that Mr. Pelley's behavior in the office changed because he began to engage in significant substance abuse. Mr. Pelley, through counsel, acknowledged his demeanor had changed but explained the cause was a temporary separation from his domestic partner. Finally, as ODC's dismissal letter notes, some of your proffered evidence does not appear to support your allegations at all. ODC's conclusion that the evidence as a whole is insufficient to prove your allegations against Mr. Pelley by a clear preponderance of the evidence is sustainable.

In sum, after a thorough review, I conclude ODC conducted its investigation in accordance with this court's rules and there is no evidence of extraordinary circumstance, clear error, or substantial injustice sufficient to overturn ODC's dismissal of your grievance. Therefore, your objection to ODC's dismissal of your grievance is denied, and this matter is final.

Sincerely,



Debra L. Stephens, Chief Justice
Washington State Supreme Court