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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. 98-147

IN THE MATTER OF
TY HYDERALLY
A/K/A TAYEB HYDERALLY
AN ATTORNEY AT LAW

Decision

Argued: June 11, 1998 and November 19, 1998

Decided: June 9, 1999

Richard J. Engelhardt appeared on behalf of the Office of Attorney Ethics on June 11, 1998 and Lee A. Gronikowski appeared on November 19, 1998.

Respondent waived appearance for oral argument on June 11, 1998. He appeared pro se on November 19, 1998.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter was before the Board on a Motion for Reciprocal Discipline filed by the Office of Attorney Ethics ("OAE"), based upon the decision of the Judge Advocate General of the United States Navy ("JAG") to suspend respondent's certification to practice law

before Navy courts or boards for two years. The JAG found that respondent had violated JAG Rule of Professional Conduct 8.4(a)(2), which is analogous to RPC 8.4(a)(2) (criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer).

Oral argument on this matter was originally heard by the Board on June 11, 1998. The Board then directed the OAE and respondent to brief the issue of whether the Board had jurisdiction to act on the matter as a motion for reciprocal discipline under R. 1:20-14(a). The issue was briefed and reargued orally on November 19, 1998.

Respondent was admitted to the New Jersey bar in 1994. He has no prior disciplinary history.

* * *

Respondent was a lieutenant and a judge advocate in the United States Navy. From May 1, 1996 to July 30, 1997, he was stationed in Sasebo, Japan. According to respondent, he was the sole "legal assistance/defense counsel" for a base population of more than 5,000 people.

On December 31, 1996, Maki Ramos filed a sexual harassment complaint against respondent for an incident that had occurred in July 1996. Ramos had sought legal advice from respondent concerning a divorce and child support matter. According to Ramos, during a meeting with respondent at his office, respondent had made inappropriate sexual comments to her.

On January 9, 1997, another client of respondent, Mamiko Stanfield, filed a complaint against him for inappropriate sexual conduct that had allegedly occurred in December 1996.

The Navy conducted "preliminary" and "follow-up" investigations of Ramos' and Stanfield's complaints. The investigators interviewed Ramos, Stanfield, respondent and several other people. Respondent denied any inappropriate behavior toward Ramos or Stanfield. The investigators concluded that there were "reasonable grounds" to believe that respondent had made inappropriate sexual comments to Ramos and Stanfield and that the conduct had violated the Uniform Code of Military Justice ("UCMJ"). The "follow-up" investigator also concluded that there were "reasonable grounds" to believe that respondent's actions might have constituted a violation of JAG Rule of Professional Conduct 1.17 (prohibited sexual relations). The investigator recommended that the charges be referred for a non-judicial punishment ("NJP") proceeding.¹

Respondent's Waiver of a Trial by Court-Martial

Prior to the NJP hearing, respondent was advised of and waived his right to a trial by court-martial. On February 12, 1997, respondent signed a form captioned "CAPTAIN'S MAST ACCUSED'S NOTIFICATION AND ELECTION OF RIGHTS." Among other things, the form advised respondent of the following:

¹ Although respondent stated that he received a non-punitive letter of reprimand on January 14, 1997, the letter is not part of the record. Furthermore, there was no reference to that letter in subsequent proceedings, with the exception of respondent's attorney's reference to it in his submission to the JAG ethics investigator.

The commanding officer was considering imposing NJP because of violations of Articles 128 (assault) and 133 (conduct unbecoming an officer and gentleman) of the UCMJ;

Respondent had the right to demand trial by court-martial, in lieu of NJP;

At a court-martial, respondent would have the right to be represented by counsel;

At the NJP hearing, respondent had the right to appear personally and to be accompanied by a spokesperson, who need not be a lawyer;

Neither the spokesperson nor respondent would be entitled to question witnesses at the NJP hearing, except at the discretion of the commanding officer;

At the NJP hearing, respondent had the right to present matters in defense, extenuation and mitigation orally, in writing or both;

Respondent had the right to have witnesses attend the NJP proceedings;

The maximum punishment that could be imposed by NJP was a punitive letter of admonition or reprimand and restriction to "specified limits" for not more than thirty days, with or without suspension from duty;

Respondent had the right to a military lawyer, free of charge, to help him decide whether or not to demand a court-martial or to exercise any of his rights.

On the February 12, 1997 notification form, respondent represented that he had consulted a lawyer on February 6, 1997. He waived his right to a court-martial and requested that four witnesses be present at the NJP hearing.

The NJP Hearing

In addition to the three grievants, there were three witnesses that testified at the NJP

hearing. According to respondent, he was not permitted to question the witnesses; however, he submitted questions for the commanding officer to ask the witnesses.

After the hearing, but before the punishment was imposed, respondent signed another document stating his understanding that NJP could not be imposed if, before the imposition of the punishment, he were to demand a court-martial. That document also indicated that the commanding officer would issue a written reprimand.

Of five alleged offenses the commanding officer dismissed three and found respondent guilty of the remaining two. In a February 13, 1997 "punitive letter of reprimand," the commanding officer made the following findings:

On or about July 1996, while performing duties as a legal assistance attorney in Sasebo, Japan, you said to Ms. Maki Ramos, your legal assistance client, "after you get divorced, how many guys are in line?" and "I bet you can do the wild sex" or words to that effect.... and on or about 10 December 1996, while performing duties as a legal assistance attorney, you wrongfully and dishonorably locked your office door and said to Ms. Mamiko Stanfield, your legal assistance client, "how long since you had sex?" or words to that effect, and asked her to kiss you and invited her to your house for a drink.

On February 21, 1997, respondent waived his right to appeal the NJP.

The JAG Ethics Investigation

On April 22, 1997, the Rules Counsel of the Office of the JAG appointed Lieutenant Commander Brian O'Donnell to conduct an ethics investigation of respondent's conduct. The referral letter states that, if requested by respondent, O'Donnell was to conduct a hearing in accordance with the complaint processing procedures of the JAG. Respondent was also provided an opportunity to review all the statements and other evidence that O'Donnell

considered in his inquiry and to submit a written statement or any other written material.

By letter dated June 6, 1997, respondent's counsel, Major Mark Whitson, requested a hearing in the ethics proceedings. However, the request was withdrawn on June 24, 1997 because respondent wanted to expedite the resolution of the matter.² Instead of a hearing, he elected to respond in writing to the allegations.

In his July 25, 1997 investigative report, O'Donnell found that there was "credible evidence" to support the statements of Ramos and Stanfield. O'Donnell also accepted the statements of two additional witnesses from the Staff Judge Advocate's office that women sought assistance from their office, rather than respondent's branch office, because of respondent's "inappropriate flirtatious" comments to clients. O'Donnell concluded that respondent had violated Rule 8.4(a)(2). He recommended that respondent not be placed in any legal assistance position where he could repeat his misconduct and that respondent's certification to practice in the military be suspended for two years.

After receiving a copy of O'Donnell's investigative report, respondent wrote to Rules Counsel requesting that his right to practice before the military not be suspended. In the letter, respondent stated that, "if a personal appearance before the Rules Board would be helpful in making this decision, I would willingly attend." However, as set forth below, under the JAG procedures the only hearing available takes place before the ethics

² By letter dated April 22, 1997, respondent had submitted his request for release from active duty effective August 1997 although his active service obligation was not due to expire until May 1999.

investigator and respondent waived that hearing.

By letter dated January 12, 1998, the JAG notified respondent of his determination that respondent had violated Rule 8.4(a)(2), finding clear and convincing evidence of such violation:

While serving as a legal assistance attorney at Naval Legal Service Office Branch Office, Sasebo, Japan, on or about July 1996 and December 1996, [you] committed misconduct in violation of article 133, Uniform Code of Military Justice, by saying to a client, Ms. Maki Ramos, 'After you get divorced, how many guys are in line?' and 'I bet you like wild sex,' and by saying to another client, Ms. Mamiko Stanfield, 'How long since you had sex' and by locking the door to your office and asking Ms. Stanfield to kiss you and come to your home for drinks, said misconduct reflecting adversely on your fitness as a judge advocate.

The JAG suspended respondent's certification to practice law before Navy courts or boards for two years. Notwithstanding the nature of respondent's discipline - a suspension - the OAE argued that, in New Jersey, respondent's conduct would warrant only a reprimand.

* * *

Upon a de novo review of the full record, the Board determined to grant the OAE's Motion for Reciprocal Discipline. The Board concluded that it had jurisdiction to act on this matter as a motion for reciprocal discipline under R. 1:20-14(a). That rule provides that the Board may discipline a New Jersey attorney based on discipline by "another jurisdiction including any federal court of the United States or the District of Columbia, a state or federal administrative agency or other tribunal, a court of any state, territory, commonwealth or

possession of the United States.”

The issue of whether a JAG's disciplinary order constitutes discipline by another “tribunal” has not been previously addressed by either the Board or the Court. The plain language of the rule -- “a state or federal administrative agency or other tribunal”-- is extremely broad and should encompass final JAG determinations, particularly when, as set forth below, JAG has promulgated disciplinary rules and procedures similar to those adopted in New Jersey.³

Although our R. 1:20-14(a) became effective March 1, 1995, the relevant language predates its enactment. Its predecessor was R. 1:20-7, which became effective on February 15, 1984. The relevant language of R. 1:20-7 regarding other jurisdictions included “a state or federal administrative agency or other tribunal.” The contemporaneous comment to the rule stated that it provided for reciprocal discipline and was “self-explanatory.”⁴

The courts of at least two other states, Massachusetts and Pennsylvania, have reciprocally disciplined attorneys based on discipline by a JAG. In re Diekan, 2/7/94 Mass. Law. Wkly. 44, (col. 3) and In re Walsh, 702 A.2d 361(Pa. 1997).

³ The Navy does not license attorneys. Every judge advocate must be licensed as an attorney in at least one state and remain in good standing in that state. The fact that the Navy does not license attorneys is not determinative of the issue of the Board's jurisdiction. Although the federal courts do not license attorneys, the New Jersey Supreme Court has reciprocally disciplined attorneys, based upon discipline by a federal district court. See, e.g., In re Mills, 127 N.J. 401 (1992).

⁴ The predecessor to R. 1:20-7, R. 1:20-(h), stated that, if a final determination had been made in either a criminal or a disciplinary proceeding in another jurisdiction, the determination “[should] be deemed to have established the facts upon which it rests.”

In deciding that R. 1:20-14(a) encompasses JAG disciplinary orders, the Board was also guided by the Court's determination, albeit in a different context, that the disciplinary system should not disregard a finding made by another tribunal. In re Garcia, 119 N.J. 86, 88 (1990). In Garcia, the Federal Communications Commission ("FCC") had found that an attorney, who had applied for a radio license, had violated 26 U.S.C.A. § 7203 by failing to file federal income tax returns for three years. In rejecting the attorney's argument that she should not be suspended because she had not been convicted of the crime, the Court stated as follows:

When the disciplinary system is presented with a finding in a collateral proceeding of this type, even though the standard of proof may be different (in that the licensee had the burden to prove her good standing), it cannot be disregarded in the disciplinary proceeding.

[In re Garcia, *supra*, 119 N.J. at 88-9]

In summary, the Board determined that R. 1:20-14(a) applies to JAG disciplinary determinations and that, therefore, the Board had jurisdiction to review this matter as a motion for reciprocal discipline. Pursuant to R. 1:20-14(a)(5) (another jurisdiction's finding of misconduct shall establish conclusively the facts on which the Board rests for purposes of a disciplinary proceeding), the Board adopted the findings of the JAG.

Reciprocal disciplinary proceedings in New Jersey are governed by R. 1:20-14(a), which directs that

[t]he Board shall recommend the imposition of the identical action or discipline unless the respondent demonstrates or the Board finds on the face

of the record upon which the discipline in another jurisdiction was predicated that it clearly appears that:

- (A) The disciplinary or disability order of the foreign jurisdiction was not entered;
- (B) The disciplinary or disability order of the foreign jurisdiction does not apply to the respondent;
- (C) The disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;
- (D) The procedure followed in the foreign disciplinary matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
- (E) The misconduct established warrants substantially different discipline.

Respondent argued that the proceeding in his case “was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process.” R. 1:20-14(a)(4)(D). However, the JAG has established professional rules and procedures that afford due process to judge advocates accused of professional misconduct. Those procedures were followed in respondent’s case.

The JAG Rules of Professional Conduct are similar to New Jersey’s Rules of Professional Conduct. The JAG Rules explicitly state that they apply to judge advocates, like respondent, who are certified by the JAG under the UCMJ.

In addition to the Rules, the JAG has established procedures for the processing of ethics complaints against judge advocates. Questions involving professional misconduct of

judge advocates are within the exclusive province of the JAG. When investigations into criminal conduct or poor performance reveal conduct that constitutes a violation of the JAG's Rules, the conduct "shall be reported to the Rules Counsel immediately." Although respondent argued that he was not aware that the NJP could lead to an ethics violation, the JAG procedures clearly indicate otherwise.

In general, where there has been no other proceeding concerning an alleged ethical violation by a judge advocate, a preliminary inquiry is made to determine whether the questioned conduct would, if proven, constitute a violation of the ethics rules. The matter may be dismissed after the preliminary inquiry or be referred for an ethics investigation. However, in cases in which it has been determined, in a separate proceeding, that an attorney committed the misconduct that forms the basis for the ethics charges, the Rules Counsel may dispense with the preliminary inquiry and proceed with an ethics investigation. Apparently that procedure was followed in respondent's case.

At the investigation stage, the attorney has the right to request a hearing before the investigating officer, inspect all evidence, present written or oral statements or materials, call witnesses at his or her own expense (local military witnesses are made available at no cost) and be assisted by counsel. Here, respondent first requested a hearing then waived it through his counsel. At the ethics hearing, the attorney or his counsel would have the right to question witnesses, although there is no right to subpoena witnesses. After completing the hearing and/or the investigation, the investigating officer completes a summary of the evidence and forwards it with a recommendation to the Rules Counsel. After reviewing the

report, the Rules Counsel may either forward it to the JAG with a recommendation or return it to the investigating officer for further inquiry. The JAG is not bound by the Rules Counsel's or the investigating officer's recommendations, but instead bases his or her findings on the record as a whole. There must be clear and convincing evidence of the ethics violation. The JAG can take such action as he or she considers appropriate in his or her sole discretion. Any action taken by the JAG is final, subject to any remedies afforded by Navy regulations.

Although respondent argued that he was denied due process during the JAG's ethics proceedings, the record shows that the proceedings adhered to the JAG's rules and procedures.⁵ Respondent was represented by counsel during the ethics proceedings. He had the right to a hearing, but waived that right. Although respondent complained that he had asked to personally plead his case before the JAG and was not allowed to do so, the JAG procedures do not provide for such appearance. Respondent waived the only hearing to which he was entitled under the JAG procedures. Furthermore, in his letter to Rules Counsel, respondent merely wrote that if "a personal appearance before the rules board would be helpful in making this decision, I would willingly attend." That statement does not

⁵ The issue of whether the procedures followed in the other jurisdiction were lacking in due process refers to the disciplinary proceeding. The procedures involved in respondent's NJP are not relevant. However, respondent was also afforded due process in that proceeding. He could have elected to be tried in a court-martial, but voluntarily waived that right. He was accorded a hearing prior to the NJP. Although respondent stated that he did not have a lawyer at the NJP, he was entitled to have a "spokesperson," who could have been a lawyer. He also consulted with a lawyer prior to agreeing to the NJP. Therefore, there was no violation of respondent's due process rights during the NJP proceeding.

equate to a request for a hearing before the JAG.

Finding that there was no violation of respondent's due process rights during the JAG's ethics proceedings, the Board determined to grant the OAE's motion for reciprocal discipline.

* * *

The JAG's discipline was based on a finding that respondent had committed a criminal act that reflected adversely on his honesty, trustworthiness or fitness to practice as a judge advocate. Here, respondent's misconduct would be deemed a violation of RPC 8.4(d) (conduct prejudicial to the administration of justice).

The JAG suspended respondent's certification to practice before military courts for two years. The Board agreed with the OAE that the fifth exception applies here, namely, that the misconduct warrants substantially different discipline. R. 1:20-14(a)(4)(E). As noted earlier, the OAE was satisfied that a reprimand is sufficient discipline for respondent's ethics offenses.

Respondent's actions toward his clients were serious. He made sexual advances to women who had sought his professional advice. Moreover, the women were legal aid clients, who might have been afraid to reject his advances out of concern that he would not represent them. Finally, respondent's misconduct was not one isolated incident. He made inappropriate sexual comments to at least two women.

Reprimands have been imposed in cases dealing with an attorney's sexual misconduct. See, e.g., In re Pearson, 139 N.J. 230 (1995) (attorney publicly reprimanded where attorney hugged his client, put his hands on her buttocks, pushed his head into her chest and commented about the size of her chest), In re Rea, 128 N.J. 544 (1992) (attorney publicly reprimanded where attorney had a sexual relationship with a client who, because of her past history and mental health, lacked the capacity to freely consent to the relationship), In re Liebowitz, 104 N.J. 175 (1985) (attorney publicly reprimanded for sexual misconduct with an assigned client where he invited the client to his apartment, requested that she enter his bedroom and sit on the bed next to him while he made business telephone calls, suggested that they commence sexual activity, unbuttoned the top of her dress, kissed her on the lips, removed his clothing and urged her to join him in bed. After the client told him that she had to leave and went into the living room, the attorney pulled her back into the bedroom, touched her and placed her hand on his genital area).

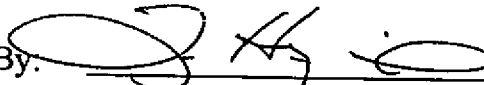
Cases involving more egregious sexual misconduct have resulted in suspensions and disbarment. Those cases generally involve criminal convictions, misconduct with a minor and/or sexual assault. See, e.g., In re X, 120 N.J. 459 (1990) (disbarment), In re Palmer, 147 N.J. 312 (1997) (disbarment), In re Herman, 108 N.J. 66 (1987) (three-year suspension), In re Ruddy, 130 N.J. 85 (1992) (two-year suspension), In re Gernert (1997) (one-year suspension), In re Addonizio, 95 N.J. 121 (1984) (three-month suspension).

Based on the foregoing, the Board unanimously determined that a reprimand is

adequate discipline in this case. One member recused herself. One member did not participate.

The Board further determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 6/9/99

By: 
LEE M. HYMERLING
Chair
Disciplinary Review Board