SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 10-031
District Docket No. XIV-07-0680E

IN THE MATTER OF	:
ELWOOD J. WALZER	:
AN ATTORNEY AT LAW	:

Decision

Argued: May 20, 2010

Decided: August 2, 2010

Michael J. Sweeney appeared on behalf of the Office of Attorney Ethics.

Respondent waived appearance for oral argument.

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

This matter came before us on a disciplinary stipulation between the Office of Attorney Ethics ("OAE") and respondent. Respondent stipulated violations of RPC 8.4(b) (criminal act that reflects adversely on a lawyer's honesty, trustworthiness or fitness as a lawyer) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

The OAE recommended a reprimand. We determine that a censure is the proper discipline for respondent.

Respondent was admitted to the New Jersey bar in 1974.[1] He has no history of discipline.

At the relevant time, respondent was employed by the New Jersey Department of Human Services ("DHS"), in Trenton, New Jersey. He was observed stealing items from a DHS refreshment vendor. The thefts were reported to the DHS Police, prompting the installation of a surveillance camera.

Thereafter, on at least fourteen occasions between September 19 and October 26, 2007, respondent was observed taking various food and/or beverage items from the refreshment vendor, without paying for the items. The vendor was a blind operator for the Commission for the Blind and Visually Impaired Enterprise Program.

The OAE investigator who viewed the surveillance tapes estimated that the total value of merchandise seen taken by respondent was under $100.

As part of a settlement agreement between respondent and the DHS, respondent paid the vendor $1,200. The offices of the Attorney General and the Mercer County Prosecutor reviewed the incident and neither elected to criminally prosecute respondent.[2]

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[1] The OAE attorney registration system lists him as retired.

[2] According to the January 2008 settlement agreement between respondent and the DHS, a Preliminary Notice of Disciplinary

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According to the stipulation, respondent's conduct consisted of at least fourteen "separate criminal acts of shoplifting in violation of *N.J.S.A. 2C:20-11(c)(4),*" which, in turn, violated RPC 8.4(b) and RPC 8.4(c). Citing a number of theft cases, the OAE determined that respondent's conduct was not as serious as the cases that led to suspensions and recommended a reprimand.

Following a full review of the stipulation, we are satisfied that the facts contained therein fully support a finding that respondent was guilty of unethical conduct.

Over the course of more than one month, on at least fourteen occasions, respondent shoplifted merchandise from a blind vendor, thereby violating RPC 8.4(b) and RPC 8.4(c). No mitigating or aggravating circumstances were set forth in the stipulation. We consider, however, that, in his thirty-six years

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(Footnote cont'd)

Action ("PNDA"), dated November 14, 2007, was filed against respondent, seeking his removal from service. The settlement agreement provided, among other things, that (1) the agreement would not be deemed an admission of the allegations of the PNDA; (2) the time that respondent had been out of work since November 14, 2007 was deemed a leave of absence without pay; (3) he would withdraw his appeal of the PNDA; (4) he would retire from the DHS, effective November 31, 2007; if his retirement was not approved by the Public Employee Retirement System, the agreement would be deemed to be a resignation in good standing, effective November 30, 2007; and (5) he would not seek or accept employment with the State of New Jersey or any of its departments, agencies, authorities, or commissions.

as a member of the bar, respondent had no ethics history (the record did not establish whether he ever practiced law; only that he was employed by DHS); that he paid $1,200 to the vendor; and that the attorney registration system shows that he is retired from the practice of law.

The only issue left for determination is the proper quantum of discipline for respondent's misconduct. The discipline for theft/shoplifting has ranged greatly, depending on the nature of the theft and the presence of mitigating or aggravating factors.

A reprimand was imposed in In re Devaney, 181 N.J. 303 (2004). The attorney, who had no history of discipline, pled guilty to two counts of an accusation charging her with the third-degree crime of theft of movable property, a violation of N.J.S.A. 2C:20-3(a), and the third-degree crime of obtaining a controlled dangerous substance by fraud, a violation of N.J.S.A. 2C:35-13. The attorney admitted taking prescription pads from two doctors, without their authorization, and using the scripts to unlawfully obtain prescription pain medication. The attorney had a history of serious physical ailments, for which she was legitimately prescribed painkillers. Ultimately, she became dependent on the pain medication and resorted to illegal means to obtain it. Following a police investigation and her arrest, the attorney cooperated fully with the police and

with ethics authorities. She was remorseful for her conduct, entered a Pre-Trial Intervention program ("PTI"), and seemed to have taken appropriate steps to overcome her addiction. We determined that a short-term suspension would have served no purpose, other than to punish her.

A three-month suspension was imposed on an attorney (no ethics history) who pled guilty to an accusation charging him with one count of third-degree theft by deception, in violation of N.J.S.A. 2C:20-4. In re Jaffe, 170 N.J. 187 (2001). Over a nine-month period, the attorney improperly received approximately $13,000 from Blue Cross Blue Shield of New Jersey, Inc. ("BCBS"), by submitting false health insurance claims for reimbursement for 175 cases of prescribed infant formula for his infant child, who had life-threatening medical problems. The attorney could account for only forty-four cases and was entitled to reimbursement of only $4,400.

We considered that the attorney's misconduct occurred during a period of "enormous personal, physical and emotional stress." His infant had severe health problems at birth and the prescribed formula was the only nourishment the infant could ingest.

When confronted by the BCBS investigator, the attorney accepted responsibility for his actions, made full restitution

($15,985) to the insurer, paid a $10,000 civil penalty and was admitted into PTI.

A six-month suspension was imposed in In re Pariser, 163 N.J. 574 (2000), on a deputy attorney general guilty of the third-degree crime of official misconduct (N.J.S.A. 2C:30-2a), for stealing items from co-workers. The thefts included small items taken from various offices and the inappropriate use of official telephones, after normal working hours. The attorney used a master key to enter locked areas. After video-surveillance was put in place, the attorney was observed taking $70 in cash that had been "planted" in one office. The attorney was sentenced to a three-year probationary term, ordered to pay a $5,000 fine, obligated to forfeit his public office and, as a condition of his probation, required to continue psychological counseling, until discharged.

In assessing discipline, we considered the attorney's psychiatric problems as mitigation, but concluded that "theft by an attorney must never be tolerated." We found that the attorney's misconduct was not an isolated incident, but a series of petty thefts occurring over a period of time.

See also In re Burns, 142 N.J. 490 (1995) (six-month suspension for admitting the commission of three instances of knowing and unlawful burglary of an automobile, two instances of

theft by unlawful taking and one instance of unlawful possession of burglary tools); In re Hoerst, 135 N.J. 98 (1994) (six-month suspension for county prosecutor who used $7,500 from the county's forfeiture fund to cover the costs of a trip to San Francisco for himself, a companion, his first assistant, and the first assistant's wife; the ostensible purpose of the trip was to attend a work-related conference); In re Farr, 115 N.J. 231 (1989) (six-month suspension for assistant prosecutor who, among other serious acts of misconduct, stole drugs from the evidence room in the prosecutor's office); In re Fisher, 185 N.J. 238 (2005) (one-year suspension for attorney who submitted a phony receipt to an insurance company to obtain insurance proceeds for his girlfriend, whose computer had been stolen, and filed a complaint against the insurance company based on the same claim; the attorney was convicted in Pennsylvania of one count each of insurance fraud, forgery and criminal conspiracy, all third-degree felonies; prior three-month suspension); In re Breyer, 163 N.J. 502 (2000) (three-year suspension for a law librarian employed by the Administrative Office of the Courts ("AOC"), who took more than $16,000 worth of law books from the library and sold or traded them to several companies, without the knowledge or approval of the AOC, keeping the money for himself); In re Bevacqua, 185 N.J. 161 (2005) (three-year suspension for

attorney who attempted to use a fraudulent credit card to purchase items at a department store; his wallet contained credit cards in different names; he was charged with identity theft, credit card fraud and theft, and was accepted into PTI; prior reprimand and six-month suspension); and In re Meaden, 165 N.J. 22 (2000) (three-year suspension for attorney who ordered golf clubs and other equipment worth $5,800 by using stolen credit card information; the attorney also made multiple misrepresentations on firearms identification cards and gun permit applications by failing to disclose his psychiatric condition and his involuntary commitment, as required by law; prior reprimand).

We agree with the OAE that respondent's misconduct was not as serious as the conduct of the attorneys who received suspensions. Here, respondent was caught stealing fourteen times, over a brief period. Although the value of the items he took was minimal, his offense is particularly repugnant because he took advantage of a blind operator.

Respondent's circumstances do not evoke the same sympathy as in the Devaney case (reprimand). There, the attorney's theft of prescription pads was motivated by her dependence on pain medication, which had previously been legitimately prescribed. She received a reprimand because of her cooperation with

authorities, remorse, admission into PTI, and efforts to overcome her addiction.

This case is also distinguishable from Pariser (six-month suspension) because respondent was not criminally charged for his misconduct, while Pariser was found guilty of official misconduct for his theft from coworkers.

Respondent's circumstances bear some similarities to and some differences from Jaffe (three-month suspension). Like attorney Jaffe, respondent's misconduct was not an isolated instance. However, unlike Jaffe, respondent offered no mitigation on his behalf. When Jaffe filed the excessive claims for medically prescribed formula for the life-threatening medical problems of his infant, he was under extreme personal, physical, and emotional stress. In this case, there were no reasons offered for respondent's shoplifting. Opportunity, rather than need, appears to have motivated respondent to commit the thefts. Jaffe, too, leapt at the opportunity to file claims for reimbursement. The amount at issue in Jaffe, $13,000, however, was significantly greater than the value of the merchandise respondent stole, less than $100.

Both respondent and Jaffe accepted responsibility for their actions and made restitution. Jaffe was admitted into PTI.

While respondent was not charged criminally, he forfeited any chance of future employment with the State of New Jersey.

Considering respondent's lack of an ethics history and retirement from the practice of law, counterbalanced by his taking advantage of a blind operator, we find that his case falls squarely between the Devaney reprimand and the Jaffee three-month suspension. We, therefore, find that a censure is the proper discipline for respondent's misconduct.

Member Stanton did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Louis Pashman, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Elwood J. Walzer
Docket No. DRB 10-031

Argued: May 20, 2010

Decided: August 2, 2010

Disposition: Censure

Members	Disbar	Suspension	Censure	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh			X			
Clark			X			
Doremus			X			
Stanton						X
Wissinger			X			
Yamner			X			
Zmirich			X			
Total:			8			1

Julianne K. DeCore
Chief Counsel