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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 96-395

IN THE MATTER OF :
 :
MARK W. FORD :
 :
AN ATTORNEY AT LAW :
 :

Decision

Argued: December 18, 1996

Decided: June 9, 1997

John McGill, III appeared on behalf of the Office of Attorney Ethics.

Respondent appeared pro se.

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

This matter was before the Board based on a stipulation of facts between respondent and the Office of Attorney Ethics ("OAE"), dated October 7, 1996. Respondent was charged with violation of RPC 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) by accepting unemployment benefits while fully employed.

Respondent was admitted to the New Jersey bar in 1983. At all relevant times, respondent maintained offices in Gloucester City, New Jersey. He has no prior ethics history.

The relevant facts, as set forth in the stipulation, are as follows:

From June 5, 1989 to June 5, 1992, respondent was employed as an associate attorney in the law firm of Console & Curcio. In the spring of 1992, the only remaining name partner of the firm was convicted of a federal offense that resulted in the termination of the law practice.

On May 31, 1992, respondent filed an application for unemployment benefits with the State of New Jersey, Department of Labor, Division of Unemployment and Disability Insurance. On June 3, 1992, respondent filed papers incorporating the law office of "Mark W. Ford, P.C." This professional corporation remains in existence today. Initially, respondent worked out of his fiancée's home. In July 1992, he entered into a one-year lease of commercial space for \$5,000 per year at the same location he presently occupies.

On June 5, 1992, respondent was terminated from his employment with Console & Curcio and began building his own practice and looking for business. At the same time, respondent collected unemployment benefits for the weeks ending June 13, 1992 through November 28, 1992 at the rate of \$308 per week. His total unemployment compensation was \$7,700.

On or about April 27, 1994, the New Jersey Department of Labor notified respondent, by a Request for Refund of Unemployment or Disability Benefits, that he was ineligible for benefits received between June 13, 1992 and November 28, 1992 because he was actively involved in his own law firm on a full-time basis and was, therefore,

considered unavailable for work.

Respondent appealed from the Request for Refund to the Appeal Tribunal by letter dated April 29, 1994, on the grounds that he was not involved full-time in a law firm and also that he was available for work. On July 21, 1994, respondent testified under oath at an Appeal Tribunal hearing conducted before Appeals Examiner Marvin Bakley. Bakley issued a decision dated July 25, 1994, finding that respondent was ineligible for benefits from June 7, 1992 through November 28, 1992 and liable for a refund of the \$7,700, pursuant to statute.

Respondent appealed the Appeal Tribunal decision to the Board of Review, which affirmed the decision of the Appeal Tribunal. The stipulation contained an attachment with the following finding of the Board of Review:

Not only did the claimant have a lease on office space and maintain a business telephone, but he purchased computer equipment, fax machines, maintained a business checking account and had at least three other employees working for him during various periods. Furthermore, whether or not the claimant would give up his corporation and close down his office to work for another firm would depend on what kind of offer he would receive.

Respondent's final appeal was to the Appellate Division, which concurred with the determination of the Board of Review and found as follows:

On June 3, 1992 the claimant established his own law office by incorporating as 'Mark W. Ford, P.C.' This professional corporation remains in existence. Initially, he worked out of his fiancee's home, but on July 21, 1992 he entered into a

lease of commercial space for \$5,000 per year. The telephone records for the new firm indicate that he thereafter placed calls on a regular basis between 8:30 am and 5:00 pm. Between June 7, 1992 and November 28, 1992 he opened nearly one hundred fifty case files and his gross receipts for the June through December 1992 period were \$32,855.

The Board of Review noted additionally that the claimant had purchased computer equipment and fax machines and maintained a business checking account. Additionally, he employed at least three other individuals to work for him in the latter half of 1992. Claimant also informed the Tribunal that his decision concerning his office would depend on what kind of offer he would receive for other employment.

N.J.S.A. 43:21-4(c)(1) conditions eligibility for unemployment compensation upon a finding that the claimant 'is able to work, and is available for work, and has demonstrated to be actively seeking work.' The Appeal Tribunal determined that since claimant had started his own business, continued in the business through the date of decision, and in fact had worked in this business through the dates for which he had claimed unemployment compensation, he could not be considered to be unemployed. Additionally, he was therefore unavailable for work during those weeks. The Tribunal thus directed him to refund the \$7,700. The Board of Review affirmed this conclusion, noting that 'the claimant was devoting full-time efforts to building his own business.' The Board therefore rejected claimant's testimony that he would have accepted other work outside his own corporation. The Board concluded, therefore, that 'the claimant has not therefore demonstrated that he was, in fact, available for work or genuinely attached to the labor market and he is ineligible for benefits from June 7, 1992 through November 28, 1992.'

We fully concur with the determination of the Board of Review . . . Where as here, the claimant was clearly pursuing a new business in furtherance of his own career, he was properly declared ineligible for unemployment compensation.

[Mark W. Ford v. Board of Review,
N.J. Super. , (App. Div. 1996) (slip op. at 4)]

As noted above, respondent opened nearly one hundred fifty files during the period from June 7, 1992 through November 28, 1992. Most, if not all, of the cases came from his old firm. A liquidating trustee "sold" the cases to respondent. His gross receipts for the calendar year 1992 were \$32,855. Phone records of the business indicate scores of telephone calls per day placed on a regular basis, during business hours, for that same time period.

By letter to the OAE dated June 3, 1996, respondent enclosed a copy of a \$7,700 check to the New Jersey Department of Labor as reimbursement for the overpayment of benefits. The check was dated May 23, 1996.

The parties further stipulated that

[t]he OAE understands that although [respondent] agrees to the facts as contained in this stipulation, including those found by the Appeal Tribunal, Board of Review, and Appellate Division, respondent denies that his conduct forms a basis to sustain a finding by clear and convincing evidence, that he has committed any violation of ethical conduct. The OAE further understands that respondent is free to argue that no misconduct has been committed and that lesser or no sanction should be imposed.

The OAE alleged that respondent violated RPC 8.4(c) (conduct involving dishonesty, fraud, deceit and misrepresentation) and recommended a reprimand.

* * *

Upon a de novo review of the record, the Board is satisfied that there is clear and convincing evidence that respondent's conduct was unethical.

Respondent appealed to the Appellate Division the initial determination of the Department of Labor that he was ineligible to receive unemployment benefits. The Appellate Division upheld the findings of each tribunal below.

The threshold question for the Board was whether or not respondent knew, or should have known, that he was not "unemployed" and, therefore, ineligible to collect unemployment benefits after he started his own law practice. Based on the within facts, it is undeniable that, during the relevant time period, respondent was, in fact, employed. Indeed, respondent was self-employed. He did everything in his power to "hedge his bets" against becoming unemployed by taking over files from the former law practice. He was developing a business, the way every sole practitioner initially operates. Respondent suggested that "not enough business" plus "sending out resumes" equal unemployment. In fact, respondent was sending out resumes in hopes of finding a better opportunity. In short, respondent might not have had enough business, but he was surely employed.

The next issue is whether respondent misrepresented his employment status to the

Division of Labor in order to collect unemployment benefits. While this record does not specifically speak to respondent's conduct, the Appellate Division hinted at it, in dicta:

. . . .We trust that the Division of Unemployment and the Board of Review accepts the principle that an unemployed individual who is actively seeking employment may seek some independent professional income or consulting fees to 'keep the wolf from the door' while contemporaneously receiving unemployment benefits. Of course total candor must be shown in the application for benefits with all such income and efforts properly revealed. [Emphasis added].

Disturbing is the suspicion that respondent knew well before the trustee was appointed that the liquidation would take place in such a way that he could bid for the cases being liquidated. It is likely that respondent knew precisely when to incorporate his own practice, how the liquidation would take place, when he would have to leave the firm and when to file for benefits. He also knew that it would be a few months before the trustee could actually turn cases over to him. That does not mean that respondent was unemployed, only that it would take some time (as in any start-up business) to generate some business and, of course, income.

While the record does not speak to or contain them, respondent was required to file certifications with the Department of Labor every two weeks during the time he collected benefits. These certifications are used to monitor a claimant's employment status and search efforts. This means that, on at least ten occasions, respondent certified that he was unemployed and available for work. Had he not so certified his statements, he would not

have received the benefits.

At the Board hearing, respondent argued that the Appellate Division ordinarily publishes its opinions only to set precedent or to clarify points of law, as in this case. He argued that not only was he unsure that he was not entitled to benefits, but that the Department of Labor also changed its own arguments against him along the way. Respondent then cited Borromeo vs. Board of Review, 196 N.J. 576 (App. Div. 1984) for the proposition that he, like Borromeo, may have been entitled to some benefits. The Board, however, found it unnecessary to rule on respondent's Borromeo argument as the Appellate Division found, in no uncertain terms, that respondent failed the four criteria for entitlement, holding that ". . . in the case before us, the claimant would have failed each of these criteria."

The Board concluded that respondent did not fully disclose his new law practice to the Department of Labor. Respondent discounted the extent of his efforts to establish his practice in the certifications to the Department of Labor, thereby engaging in misleading statements. Respondent watched his practice grow from June 1992 through November 1992 into a healthy practice and, in the face of his own success, continued to falsely assert that he was unemployed.

For all of the above reasons, respondent's misconduct violated RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

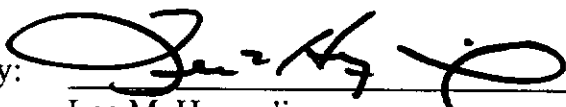
Of the recent cases decided by the Court dealing with misrepresentation, In re

Blanch, 140 N.J. 519 (1995), most closely resembles this matter. In that case, the attorney received a reprimand after he failed to disclose secondary financing to a mortgage company, contrary to the company's written instructions. The attorney contended that he had been told by the lending institution not to list that information and that he was simply following its instructions.

Respondent's misconduct was as serious as Blanch's and motivated by self-benefit. It cannot be said that it was an isolated incident; respondent falsely certified at least ten times to the Division of Unemployment that he was entitled to unemployment benefits. In light of the above, the Board unanimously determined to impose a reprimand. Two members did not participate. One member recused herself.

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

Dated: 6/9/87

By: 
Lee M. Hymerling
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Mark W. Ford
Docket No. 96-395

Hearing Held: December 18, 1996

Decided: June 9, 1997

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hyerling			X				
Zazzali							X
Huot			X				
Cole			X				
Lolla			X				
Maudsley						X	
Peterson			X				
Schwartz							X
Thompson			X				
Total:			6			1	2

By Robert Frank 6/11/97
Robyn M. Hill
Chief Counsel