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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 94-096

IN THE MATTER OF :
STEPHEN A. PEPE, :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: June 22, 1994

Decided: September 27, 1994

Nitza I. Blasini appeared on behalf of the Office of Attorney Ethics.

George L. Schneider appeared on behalf of respondent.

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

This matter was before the Board on a recommendation for public discipline filed by Special Master Stephen Orlofsky. The formal complaint charged respondent with violations of RPC 8.4(b) (committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects)

and RPC 8.4(d) (engaging in conduct prejudicial to the administration of justice).

Respondent was admitted to the New Jersey bar in 1971. He has no prior disciplinary history.

* * *

The formal ethics complaint against respondent, a former Superior Court judge, was based on a presentment filed by the Advisory Committee on Judicial Conduct of the Supreme Court of New Jersey ("ACJC"), recommending that the Court initiate proceedings to remove respondent from judicial office, pursuant to N.J.S.A. 2A:1B-1 et seq. On June 23, 1992, the Court ordered respondent's removal as a judge of the Superior Court and barred him from holding any future judicial office.

The presenter and counsel for respondent agreed that, based on In re Yaccarino, 117 N.J. 175 (1989), the prior determinations made in the judicial removal proceedings were conclusive and binding in subsequent attorney disciplinary proceedings.

The facts are as set forth in the ACJC presentment:

Respondent and [a confidential informant for the Division of Criminal Justice] had known each other for about 16 years. In 1986, the Informant lived with Respondent for two weeks, during which time the two smoked marijuana on many occasions each day. The Respondent furnished this marijuana. The Informant moved away from the area in 1987 and had no contact with the Respondent for several years.

In May 1990, Respondent was fishing with his son on the Toms River when he was approached by the Informant, whom he had not seen since before his appointment to the bench. During their brief conversation, Respondent mentioned that he had become a Judge of the Superior Court and that his chambers were in the Ocean County Court House. After that

conversation, Respondent and the Informant did not see one another again until the early morning of June 25, 1990, when the Informant visited Respondent at his chambers to ask for Respondent's help in getting a job. Respondent had the Informant wait outside his office and subsequently brought him back in and introduced him to a litigant in a matter that had been before Respondent for a calendar call and that was in the process of being settled. This litigant had known Respondent for many years and had built Respondent's house for him. The litigant and the Informant discussed the possibilities of employment, and they made arrangements to meet the following morning. Respondent and the Informant also agreed to meet the following day at the latter's apartment.

Respondent played a minimal role in the case involving the aforementioned litigant. When the case came before him at calendar call, the attorneys informed him that they were working out a settlement in the case. Respondent replied that any settlement would have to be put on the record before a different judge because he was recusing himself from any participation in the case on the basis of his knowledge of one of the parties, namely the litigant referred to above. The case was subsequently settled and the settlement was put on the record before a different judge.

Sometime between 5:00 and 5:30 p.m. on June 26, 1990, Respondent left the court house and went to the apartment rented by the Informant and his wife. There, the three of them smoked marijuana provided by the Respondent. They had used marijuana together in the past, prior to Respondent's appointment to the bench, as Respondent has admitted. At one point during the visit, when the Informant's wife was out of the room, the Informant suggested to Respondent that the two of them get together in the near future with some women known to the Informant and have a party at which all would smoke marijuana.

Subsequently, the Informant contacted law enforcement authorities and was put in touch with the New Jersey Division of Criminal Justice. He reported that Respondent had not only used marijuana but had also used and distributed other drugs. He agreed to serve as a confidential informant and to have all conversations between Respondent and him recorded. He informed the Division that the United States Drug Enforcement Administration had seized over 200 pounds of marijuana that he was transporting earlier that year, and he further advised that he was cooperating in the DEA's investigation. The Division of Criminal Justice agreed, inter alia, to inform the DEA of the Informant's cooperation with it in the present matter.

On July 2, 1990, the Informant visited Respondent in his chambers. Unbeknownst to Respondent, the Informant was wearing recording equipment, and their conversation was being recorded by Detectives of the State Police. During this conversation, the Informant and Respondent discussed the possibility of future meetings at which they would smoke marijuana. Respondent stated that there would be no problem in his finding marijuana.

On July 3, July 9, and July 10, the Informant placed telephone calls to Respondent at his chambers. During the conversations on July 3, the Informant arranged for a meeting with Respondent and two women for anytime after 12:30 p.m. on the following Tuesday. The two women were undercover officers of the State Police. On July 10, Respondent told the Informant that he was very busy and would not be able to attend the meeting that Respondent had arranged for that day.

On July 12, 1990, the Informant went to Respondent's chambers, again wearing a concealed recording device. When he entered chambers, Respondent wrote out and handed him a note reading 'Don't mention drugs' (Exhibit P-6). When the Informant said that the two women had been disappointed when Respondent did not show up for their meeting, Respondent wrote out another note reading 'I didn't like the idea that we had to have pot 1st-- made me nervous!' (Exhibit P-7). The Informant asked Respondent to visit his apartment the following week and to bring marijuana with him. After some discussion, Respondent replied that he had none. When the Informant asked about the marijuana that Respondent had brought to his apartment on June 26, Respondent replied that the marijuana in question was old and that he had no more.

After the conversation in Respondent's chambers, the Informant returned to the detectives who had been recording the conversation. The detectives reported what had occurred to the Division of Criminal Justice, and an application was made for a search warrant and for an order to compel Respondent to give a urine sample to the detectives. The application was granted, and the detectives went to Respondent's chambers shortly after noon. They informed him that he was under suspicion of possession and distribution of controlled dangerous substances and that both a search warrant and an order to produce a urine sample had been obtained. Respondent refused to permit a search until the warrant was physically delivered to him. When the warrant and the order arrived at Respondent's chambers, the detectives conducted a search and discovered two notes mentioned above crumpled up in Respondent's wastebasket. The writing on both notes had been crossed out but was still legible. Respondent also received the order to produce a urine sample, but he claimed to be unable to produce one even though he had attempted to use a

rest room when the detectives first arrived in his chambers. As the afternoon wore on, Respondent claimed to be unable to produce the required sample, and an extension of the order was obtained. The issuing judge also directed that Respondent compress his bladder in an effort to produce a sample and that the detectives physically assist him if he were unable to produce one after a certain amount of time. One of the detectives subsequently pressed respondent's abdomen but without result. The detectives remained until after 7:00 p.m. and eventually left without a sample.

[Exhibit C to the formal ethics complaint]

At the conclusion of the ACJC proceedings, the Committee found that respondent had used marijuana in the company of the informant and the informant's wife on June 26, 1990 (a charge that respondent admitted) and that he supplied the marijuana used on that date. The Committee also found that respondent "improperly lent the prestige of his office to advance the private interests of the Informant" when he arranged an introduction with a litigant in a matter before him, for the purpose of obtaining a job for the informant. The Committee was unable to conclude that respondent possessed or distributed controlled dangerous substance other than marijuana; that respondent had falsified his time reports to reflect that he was working when he was not; or that other court personnel participated with him in the use of marijuana.

* * *

Because the ACJC findings were binding in this ethics proceeding, the only issue to be determined by the Special Master was the appropriate quantum of discipline for respondent's misconduct. The OAE argued that, given respondent's position as a

Superior Court judge and, based upon various other drug-related offense cases, respondent should receive a term of suspension for his misconduct, albeit not a lengthy one. See OAE's letter memorandum of September 30, 1993 and T24-26.¹ The OAE further urged that respondent's "distribution" of the marijuana, though admittedly not for profit, and the repeated nature of his misconduct, were aggravating factors to be considered.

While recognizing the severity of the offense committed, respondent's counsel took the position that respondent's removal from the bench by the Supreme Court on the basis of the ACJC's findings and recommendations, as well as the great public humiliation suffered by respondent over the past several years, represents sufficient discipline for those offenses. Counsel objected to the use of respondent's status as a Superior Court judge as an aggravating factor, since respondent had already been disciplined for his infractions as a judge. Specifically, as noted above, the Supreme Court issued an order removing respondent from the bench (although he had previously voluntarily resigned from judicial office) and further barring him from holding any future judicial position. Finally, counsel for respondent objected to the OAE's characterization of respondent's actions as "distribution," albeit conceding that respondent's actions were technically considered as such under the applicable statute. Counsel maintained that respondent's conduct in providing the marijuana to

¹ T denotes the transcript of hearing before the Special Master on November 1, 1993.

his friends was more appropriately characterized as "sharing" and not distribution for profit.

The Special Master found that respondent's misconduct was both "deplorable and unbecoming a judge and an attorney at law." Report of Special Master at 8. In determining the appropriate quantum of discipline, the Special Master noted that respondent had exhibited great remorse over his actions and that he had suffered great public humiliation therefor. Had respondent not already suffered such "public indignity and professional humiliation," the Special Master would have recommended some term of suspension. Id. at 10. However, under all of these circumstances, including respondent's past and continuing unblemished history, the Special Master recommended the imposition of a public reprimand. In his view, such discipline, "coupled by the well-known and publicly reported circumstances which lead [sic] to his removal from the bench will . . . protect the public interest and maintain confidence in the integrity of our bar." Id. at 11.

CONCLUSION AND RECOMMENDATION

Because the ACJC determinations are binding in this disciplinary proceeding, the sole issue to be determined is the appropriate measure of discipline for respondent's misconduct.

While the Court and the Board have had several occasions to address the issue of drug-related offenses in the attorney disciplinary context, only one of those cases has involved the use

and possession of marijuana, as opposed to a differently scheduled drug, such as cocaine. Specifically, in In re Echevarria, 119 N.J. 272 (1990), the Board recommended, and the Court imposed, a public reprimand for the attorney's possession and use of a small amount of marijuana. In recommending the imposition of a public reprimand, however, the Board considered in aggravation that the attorney had, years earlier, received a conditional discharge for similar conduct. But for that prior conduct, the Board would have recommended the imposition of a private reprimand.

Here, respondent's misconduct was not limited to a single instance. Respondent engaged in such misconduct on several occasions — once on June 26, 1990, while a Superior Court judge, and many times, years earlier, in 1986, over a two-week period, when respondent's friend lived in respondent's home. In addition, respondent's misconduct was not limited to mere personal use of marijuana. He provided that illegal substance to third persons. It is true that respondent did not financially enrich himself from that action. Instead, as noted by the Special Master, his conduct was more realistically characterized as "sharing" the substance with friends. Nevertheless, as found by the ACJC, such "sharing" technically constitutes "distribution" under the criminal code. By virtue of that action, whether characterized as distribution or sharing, respondent, while a member of the bench and bar, involved third persons in an illegal activity.

Moreover, the ACJC found that, while in his chambers, respondent met with the informant on one occasion and spoke with

him by telephone on another in order to arrange for future meetings during which they planned to smoke marijuana. Therefore, not only did respondent engage in past illegal conduct and involve third persons in that conduct, but he also planned, from his chambers, to engage in future illegal activity.

Finally, and most significantly, respondent committed the misconduct while he held the position of judge of the Superior Court. The Court has consistently held attorneys who occupy positions of public trust to higher standards. See, e.g., In re Hoerst, 135 N.J. 98 (1994), In re Bock, 128 N.J. 270 (1992), and In re Kotok, 108 N.J. 314 (1987).

In mitigation, however, the Board considered respondent's cooperation with the disciplinary authorities, his past and continuing unblemished career and the extreme public and personal humiliation and indignation he has, thus far, suffered.

In light of the above mitigating circumstances, a four-member majority of the Board is convinced that a public reprimand is sufficient discipline for respondent's transgressions. The majority so recommends. One member would have imposed a three-month suspension, while two members would have imposed a private reprimand. One member disqualified himself. One member did not participate.

The Board further recommends that respondent be required to reimburse the Ethics/Financial Committee for administrative costs.

Dated: 9/27/1994

By: Raymond R. Trombadore
Raymond R. Trombadore
Chair
Disciplinary Review Board