

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 95-435

IN THE MATTER OF
RICHARD C. GERNERT
AN ATTORNEY AT LAW

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Decision of the
Disciplinary Review Board

Argued: January 31, 1996

Decided: July 15, 1996

Richard J. Engelhardt appeared on behalf of the Office of Attorney Ethics.

Craig Swenson 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 Motion for Final Discipline filed by the Office of Attorney Ethics (OAE), based upon respondent's criminal conviction of the petty disorderly persons offense of harassment by offensive touching, in violation of N.J.S.A. 2C:33-4b.

Respondent was admitted to the bar of the State of New Jersey in 1973. On May 24, 1995, respondent pleaded guilty to the offense of harassment by offensive touching, admitting that he had "touched the breast" of the teenage victim. On July 21, 1995, respondent was placed on probation for a period of five years, fined a total of \$325, ordered to have no contact with the victim or her family and to undergo psychiatric counseling.

Respondent became acquainted with the sixteen-year old victim in June 1993. The victim's statement indicates that she and her mother consulted respondent for legal advice following an incident where the victim was harassed by an acquaintance. After this initial consultation, respondent and the victim's mother began an affair that lasted approximately two months.

The victim and respondent were not in contact again until January 3, 1994, when the victim, at her mother's request, contacted respondent after being assaulted by the individual who had previously harassed her. The victim and respondent met at his office at approximately 4:00 or 5:00 p.m. According to the victim, respondent acted in an inappropriate manner by "stroking my hand, and talking to me about personal matters that...had nothing to do with why I was there to see him." The victim indicated that respondent was trying to "come on to her" or "pick her up."

At the end of the meeting, respondent offered to drive the victim home. She accepted the ride because she was frightened and did not want to anger him. During the ride home, respondent held the victim's hand and asked her to sit closer to him. She did not decline his advances because she was afraid of him. When they reached the victim's home, respondent kissed the girl on the cheek, and "[i]n so doing...touched her breast." Respondent admitted that "he knew what he was doing" when he touched the victim's breast.

The OAE urged the Board to suspend respondent from the practice of law. Although the OAE did not specify the term of

suspension, its brief cited cases dealing with sexual offenses that resulted in suspensions ranging from three months to three years.

Presumably, the OAE believed that a suspension of more than three months was appropriate, inasmuch as it distinguished this case from In re Addonizio, 95 N.J. 121 (1984), which led to a three-month suspension. In the OAE's view, this matter was more serious than Addonizio because, unlike that case, the within misconduct was not an isolated incident. The OAE was referring to a second matter involving an allegation of sexual misconduct against this respondent, in which the victim elected not to proceed with the prosecution of the matter.

* * *

The existence of a conviction is conclusive evidence of respondent's guilt. R. 1:20-13(c)(1); In re Gipson, 103 N.J. 75, 77 (1986). Respondent's conviction of the disorderly persons offense of harassment by offensive touching is clear and convincing evidence that he has violated RPC 8.4(b) (by committing a criminal act that reflects adversely on his honesty, trustworthiness, or fitness as a lawyer). The primary purpose of discipline is not to punish the attorney but to preserve the confidence of the public in the bar. In re Kushner, 101 N.J. 397, 400 (1986). Only the

quantum of discipline to be imposed remains at issue. R. 1:20-13(c)(2); In re Goldberg, 105 N.J. 278, 280 (1987).

Several disciplinary cases address sexual misconduct committed by attorneys. In re Addonizio, supra, involved an attorney who pleaded guilty to fourth-degree criminal sexual contact with a minor and was suspended for three months. In In re Herman, 108 N.J. 66, 70 (1987), an attorney pleaded guilty to one count of second-degree assault upon a ten-year old boy and was suspended for three years. In In re Ruddy, 103 N.J. 85 (1992), the Court imposed a two-year suspension on an attorney who pleaded guilty to four counts of endangering the welfare of a child, in violation of N.J.S.A. 2C:24-2.

Here, respondent's conduct was compounded by the fact that he committed an act of sexual misconduct against a vulnerable sixteen-year old girl. The girl had come to respondent for protection against a boyfriend who had harassed and assaulted her. She trusted that respondent would help her and not harm her. Instead, he betrayed that trust. In a letter to the Board, the victim complained that respondent's actions will leave her permanently damaged emotionally. That respondent would take advantage of his position of trust is even more egregious. Respondent's position as Hasbrouck Heights Prosecutor at the time is another aggravating circumstance. Attorneys who hold public office are vested with the public trust. Because of their higher visibility to the public, their conduct is subject to closer scrutiny. Similarly, in the event of misconduct, the degree of discipline imposed must be

higher in order to assure the public that any transgressions will be harshly sanctioned and, thus, maintain the public's confidence in the integrity of the system. See In re Magid, 139 N.J. 449, 455 (1995); In re McLaughlin, 105 N.J. 457, 461 (1987).

The primary purpose of discipline is not to punish the attorney but to preserve the confidence of the public in the bar. The appropriate discipline depends on many factors including the "nature and severity of the crime, whether the crime is related to the practice of law and any mitigating factors such as respondent's reputation, his prior trustworthy conduct, and general good conduct." In re Principato, 139 N.J. 456, 460 (1995); In re Lunetta, 118 N.J. 443, 445 (1989); In re Kushner, 101 N.J. 397, 400-02 (1986). Here, respondent offered as mitigating factors the absence of prior discipline; his reputable practice for the last twenty-three years; his status as a veteran; and the fact that he has been punished criminally, with conditions that he has already fulfilled.

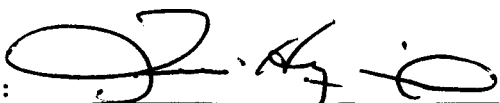
The Board considered both aggravating and mitigating factors. As to the OAE's contention that this case is more serious than Addonizio, the Board agrees. The basis for the Board's determination, however, is not the existence of a second allegation of sexual misconduct on respondent's part. For "the independent examination and evaluation of the entire record required of the Board is limited to the facts underlying respondent's convictions. It cannot and does not include consideration of unproven allegations." In re Gross, 67 N.J. 419, 424 (1975). What makes

this case more serious than Addonizio was the particular vulnerability of the victim, the existence of an actual attorney-client relationship and the special status of respondent as a public official. With these considerations in mind, the Board was convinced that a one-year suspension is warranted in order to preserve the public's confidence in the bar and the judicial system. The mitigating circumstances offered by respondent are not sufficient to lessen the appropriate measure of discipline in this case.

The Board unanimously determined to impose a one-year suspension. One member did not participate. One member recused himself.

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

Dated: 7/15/86

By: 
Lee M. Hymerling
Chair
Disciplinary Review Board