SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 13-208
District Docket No. XIV-2008-0627E

IN THE MATTER OF	
NEIL M. COHEN	
AN ATTORNEY AT LAW	

Decision

Argued: November 21, 2013

Decided: December 19, 2013

Hillary K. Horton appeared on behalf of the Office of Attorney Ethics.

Daniel J. McCarthy appeared on behalf of respondent.

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

This matter was before us on a motion for final discipline, filed by the Office of Attorney Ethics (OAE) pursuant to R. 1:20-13, following respondent's guilty plea to second-degree endangering the welfare of a child, in violation of N.J.S.A. 2C:24-4b(5)(a).

The OAE seeks a two-year suspension. We determine to impose a two-year prospective suspension.

Respondent was admitted to the New Jersey bar in 1978. Although he has no disciplinary history, he was temporarily suspended on January 13, 2011, as a result of his guilty plea. In re Cohen, 204 N.J. 588 (2011).

Respondent served as a legislator in the New Jersey General Assembly, from 1990 to 1991 and again from 1994 to 2008, representing the Twentieth Legislative District. He resigned from his position on July 28, 2008, after it was discovered that child pornography was being stored on a state-issued computer, in his legislative office.

On July 9, 2009, the State Grand Jury returned superseding indictment SGJ 09-07-00132S[1], charging respondent with second-degree official misconduct, in violation of N.J.S.A. 2C:30-2 (count one); second-degree endangering the welfare of a child, in violation of N.J.S.A. 2C:24-4b(4) (count two); second-degree endangering the welfare of a child, in violation of N.J.S.A.

[1] The State Grand Jury had previously returned a three-count indictment, on December 17, 2008.

2C:24-4b(5)(a) (count three); and two counts of fourth-degree endangering the welfare of a child, in violation of N.J.S.A. 2C:24-4b(5)(b) (counts four and five).

The investigation leading to this indictment uncovered evidence of respondent's guilt going back a number of years. Specifically, on July 14, 2008, staff members and employees of the Twentieth Legislative District Office discovered pornographic images, including pictures of young female victims, in the desk drawer of the receptionist. The New Jersey State Police were called to investigate and seized eleven hard drives from computers at the District Office.

The police investigation revealed that, during the previous several years, staff had encountered pornography at the District Office. At one point, prior to the July 2008 incident, the Office of Legislative Services directed that passwords be created for the District Office computers, due to the amount of pornography found in the office. Respondent, however, instructed a member of his staff to obtain the password for the receptionist's computer. On one occasion, after respondent had finished using the computer, a staffer reviewed the internet browsing history and found that respondent had visited pornographic websites.

From the interviews with the staff and their statements pertaining to prior discoveries of pornography at the District Office, it was evident that the focus of the investigation had to be on respondent. On several other occasions, staff had caught him viewing pornography on the receptionist's computer. Staff had also previously discovered pornographic images in the District Office, either during the morning hours or following a weekend. Respondent was known to exclusively use the receptionist's computer, when in the office, and would often use that computer during the evening and weekend hours, when others were not present.

Eventually, Senator Lesniak and Assemblyman Cryan confronted respondent about the most recent discoveries of pornography. Respondent admitted to them that he had viewed and printed child and adult pornographic images at the District Office. Respondent expanded on this admission to members of the New Jersey State Police, when he provided a taped, sworn statement, in which he admitted accessing both child and adult pornography on a state-issued computer and printer located in the District Office.

The State's investigation recovered a total of thirty-four images of child pornography accessed by respondent: sixteen

images on the computers at the District Office and eighteen images at respondent's law office. Dr. Johnson, the state's expert, concluded that the eighteen images retrieved from respondent's law office depicted nineteen girls under sixteen years of age. Some of the children in these images were later identified through the National Center for Missing and Exploited Children.

On April 12, 2010, respondent appeared before the Honorable Gerald J. Council, P.J.S.C., and pleaded guilty to count three of the indictment.

On November 4, 2010, respondent appeared before Judge Council for sentencing. Before sentencing respondent, Judge Council found aggravating factors three (risk of re-offending), nine (need for deterrence) and ten (offense involving fraudulent or deceptive practices committed against any department or division of State government). With regard to mitigating factors, the judge found factors seven (no history of prior delinquency) and twelve (willingness to cooperate with law enforcement authorities). The judge also noted that respondent had served as a state legislator for over fifteen years and, although not finding mitigating factor nine (unlikely to commit another offense), the judge noted that respondent's willingness

to seek mental health treatment indicated that he was unlikely to commit another offense. After determining that the aggravating and mitigating factors were in balance, the judge sentenced respondent in accordance with the terms of the plea agreement. The State moved to dismiss counts one, two, four, and five of the indictment.

Judge Council sentenced respondent to five years in state prison. He ordered respondent to register and comply with the applicable Megan's Law requirements and to pay appropriate fines and penalties. Judge Council prohibited respondent from accessing the internet, including social media websites. The judge expressed support for respondent's application to the Intensive Supervision Program. Respondent was incarcerated that same day and remained so until January 4, 2012, when he was released on parole. In total, respondent served one year and two months of his five-year sentence.

Following a review of the full record, we determine to grant the OAE's motion for final discipline. Under R. 1:20-13(c), a criminal conviction is conclusive evidence of guilt in a disciplinary proceeding. R. 1:20-13(C)(1); In re Maqid, 139 N.J. 449, 451 (1995); In re Principato, 139 N.J. 456, 460 (1995). Specifically, the conviction establishes a violation of

RPC 8.4(b). Pursuant to that rule, it is professional misconduct for an attorney to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer." Hence, the sole issue before us was the extent of discipline to be imposed on respondent for his violation of RPC 8.4(b). R. 1:20-13(c)(2); In re Magid, supra, 139 N.J. at 451-52; In re Principato, supra, 139 N.J. at 460.

In determining the appropriate measure of discipline, we must consider the interests of the public, the bar, and respondent. The primary purpose of discipline is not to punish the attorney but to preserve the confidence of the public in the bar." In re Principato, supra, 139 N.J. at 460 (citations omitted). We must take into consideration 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 Lunetta, 118 N.J. 443, 445-46 (1989).

That an attorney's conduct did not involve the practice of law or arise from a client relationship will not excuse the ethics transgression or lessen the degree of sanction. In re Musto, 152 N.J. 167, 173 (1997). The obligation of an attorney

to maintain the high standard of conduct required of a member of the bar applies even to activities that may not directly involve the practice of law or affect the attorney's clients. In re Schaffer, 140 N.J. 148, 156 (1995). "To the public he is a lawyer whether he acts in a representative capacity or otherwise." In re Gavel, 22 N.J. 248, 265 (1956). Thus, offenses that evidence ethics shortcomings, although not committed in the attorney's professional capacity, will, nevertheless, warrant discipline. In re Hasbrouck, 140 N.J. 162, 167 (1995).

As indicated above, the OAE recommended a two-year suspension. Respondent agreed that this is the appropriate discipline, but requested that the suspension be applied retroactively.

In cases involving possession of child pornography, the discipline imposed has ranged from a six-month suspension to disbarment. See, e.g., In re Armour, 192 N.J. 218 (2006) (six-month suspension for attorney, who, while at work, viewed more than fifty images of child pornography on a government-owned computer; he was sentenced to eighteen months' probation and ordered to pay fines, costs, and fees; he was prohibited from unsupervised contact with children under the age of sixteen and

from access to a computer with internet service); In re Haldusiewicz, 185 N.J. 278 (2005) (six-month suspension imposed on deputy attorney general who downloaded at least 996 images of child pornography on his office's desktop computer; the attorney was sentenced to three years' probation, ordered to pay a fine and costs, and prohibited from unsupervised contact with children under the age of sixteen; two psychologists opined that the attorney posed little danger to the community and was unlikely to re-offend in the future; although the attorney was a government lawyer, we declined to enhance the discipline because his misconduct had no bearing on his work; mitigation included the attorney's difficulty in establishing a new professional career at that point in his life and the forfeiture of his pension and other benefits); In re Kennedy, 177 N.J. 517 (2003) (six-month suspension imposed on attorney who admitted to downloading internet images of children engaged in sexual acts, several hundred of which were found on his computer; the attorney received three years' probation, paid a $5,000 fine, and was required to perform 500 hours of community service; two psychologists opined that he was not a risk to the community and that his collection of the images was partially due to a hoarding disorder); In re Rosanelli, 176 N.J. 275 (2003) (six-

month suspension imposed on attorney who admitted to possessing twenty-three pictures of children engaged in various sexual acts that he had downloaded from the internet; the attorney was admitted into the pre-trial intervention program; a psychiatrist, therapist, and psychologist opined that the attorney was not likely to engage in similar misconduct in the future, that he was not a risk to his clients, to children, or to the community, and that there was no "serious sexual psychopathology"); In re Peck, 177 N.J. 249 (2003) (attorney pleaded guilty to possession of child pornography, a violation of 18 U.S.C.A. § 2252(a)(4)(B); the attorney possessed at least three magazines depicting minors engaged in sexually explicit conduct; the attorney was sentenced to a fifteen-month prison term, followed by a three-year probationary term; the Court concluded that the term of the suspension to be imposed should be commensurate with the period of time that the attorney had been temporarily suspended and deemed his temporary suspension for nineteen months sufficient discipline for his misconduct); In re McBroom, 158 N.J. 258 (1999) (in the first child pornography case to come before us, a two-year suspension was imposed on an attorney who pleaded guilty in federal court to possession of computer files and images downloaded from the

internet, which depicted minors engaged in sexually explicit conduct, a violation of 18 U.S.C.A. 2252(a)(4); the attorney was sentenced to fifteen months' imprisonment, followed by three years' probation; on remand from the United States Court of Appeals for the Third Circuit, the attorney was resentenced to six months' imprisonment, followed by two months of home confinement; we noted that, although the attorney did not have personal contact with the victims, he was convicted of a crime that carried a maximum five-year prison sentence and a $250,000 fine; the suspension was retroactive to the date of the attorney's temporary suspension); In re Burak, 208 N.J. 484 (2012) (disbarment for attorney who pleaded guilty to one-count of possession of child pornography, which had been downloaded from the internet onto his personal computer, in violation of 18 U.S.C. § 2252A(a)(5)(B) and (b)(2); the attorney had been actively viewing child pornography for ten years; at the time his computer was seized, he had in his possession the equivalent of 753 images, which included "sadistic or masochistic conduct or other depictions of violence," such as bondage; the attorney traded these images with others; he was sentenced to more than eight years of a maximum ten-year term; he had been indicted for criminal sexual contact with a female minor relative during the

time that the FBI was investigating his child pornography activities); and In re Sosnowski, 197 N.J. 23 (2008) (disbarment for attorney who pleaded guilty in the New Hampshire federal court to possession of child pornography, a violation of 18 U.S.C.A. § 2252A(a)(5)(B); the attorney possessed sixty-seven images of child pornography and eight sexually-explicit video files of children engaged in sexual acts and exposing their genitals; in addition, the attorney had placed hidden cameras in a children's bathroom and bedroom; he was sentenced to thirty-seven months in prison, with five years of supervised release, and was ordered to pay a $100 assessment).

To make an assessment as to whether certain conduct on the part of one offender is more serious or less serious than that of another seems to trivialize the horror of child pornography at any level. Nevertheless, such an assessment is necessary for us to gauge the proper measure of discipline.

In this case, respondent pleaded guilty to a second-degree offense, carrying a maximum of ten years in prison. He was in possession of thirty-four images of child pornography, nineteen of which depicted girls under the age of sixteen. Some of those victims were identified through the National Center for Missing and Exploited Children.

At the outset, we note that disbarment in this matter is not supported by the precedent cited above. Although the two disbarment cases involved long-term prison sentences, as in the instant case, they included other aggravating factors. In Burak, the child pornography viewed was of a violent, sadistic nature. In Sosnowski, the attorney, in addition to possessing sixty-seven images and eight videos, had installed hidden cameras in a children's bathroom and bedroom. As repulsive as respondent's conduct was, it does not rise to the level of those two disbarment cases.

Further, respondent's conduct was more egregious than that of the attorneys in Armour, Haldusiewcz, Kennedy, and Rosenelli, the six-month suspension cases. Those cases involved a plea to fourth-degree endangering offenses. Here, respondent has pleaded to a second-degree charge. The behavior here is more akin to that in Peck and McBroom. In those cases, despite a fifteen-month prison term, the attorney had pleaded guilty to a crime carrying a maximum sentence of five years in prison and received a two-year suspension from the practice of law.

We agree with the OAE and respondent that a two-year suspension is appropriate in this matter. It should be noted that, while we do not philosophically disagree with the spirit

of the dissenting opinion regarding the appropriate quantum of discipline, we are not prepared to make such a large departure from precedent in this particular case. However, we do consider the aggravating factors sufficient to affect the discipline in a particular way.

Specifically, respondent was an elected public servant, and therefore, must be held to a higher standard. Although the loss of the attorney's position in Haldusiewicz was considered a mitigating factor in 2005, thoughts on the subject appear to have changed by 2007. In 2007, we reviewed the case of a municipal prosecutor who had pleaded guilty to fourth-degree false swearing, stemming from a domestic violence complaint against him. Being evenly split on the measure of discipline, we submitted the matter to the Court without a final determination on the suitable sanction. Four members voted for a three-month suspension, noting, among other aggravating factors, the attorney's position of public trust as a prosecutor. Four members voted for a censure, viewing the attorney's loss of his position as prosecutor as a mitigating factor. In the Matter of Abad A. Perez, DRB 07-238 (December 12, 2007) (slip op. at 2, 9-10, 11). The Court issued a three-month suspension, seemingly agreeing with the members who

considered the factor as an aggravating one. In re Perez, 193 N.J. 483 (2008). See also In re Stagliano, 213 N.J. 82 (2013) (reprimand for a lawyer who served as municipal attorney for the Borough of West Wildwood, but represented both the Borough as seller of tax lien certificates and the buyer of those certificates; in mitigation, we considered that the attorney had thirty-one years at the bar with no disciplinary history, that the sales at issue occurred ten years prior to the disciplinary action, that all transactions were done in the open and had even been approved by the Borough board, and that there was no harm to the parties; that mitigation was superseded, however, by the aggravating factor that the attorney was acting in his capacity as a public servant and, therefore, should be held to a higher standard).

The instant matter differs from Haldusiewicz, Perez, and Stagliano in that respondent was an elected public official, not merely a public employee. The betrayal of the voting public's confidence here is far greater than the violation of trust in those matters. Further, to consider the loss of his public position and pension as a mitigating factor, as in Haldusiewicz, would be a disservice not only to the public, but also to the members of the bar, who would be left to weather the distrust of

the public, should it appear that, as a profession, we take respondent's violations less seriously than other infractions that may come before us on a more regular basis and that, although not as grossly immoral, receive a seemingly more severe punishment.

In fact, in Haldusiewicz, the two public Board members dissented from the majority for similar reasons. First, their dissent noted that they disagreed with the determination that the attorney's actions were not work-related, noting that the illegal actions took place in a state office on a state computer. They further remarked that the time the attorney spent pursuing his prurient interests was time he should have devoted to his job as a deputy attorney general. In the Matter of Joseph J. Haldusiewicz, DRB 05-064 (2005) (Lolla and Wissinger dissenting) (slip op. at 1-2). Second, they believed that the discipline should have been enhanced because of the public position that the attorney held. As a public servant, he had a heightened duty to be above reproach. The dissent would have imposed a two-year suspension. Ibid.

In light of the aggravating factors, we determine that a retroactive suspension in this case is essentially a futile measure that fails to serve the intended purpose of discipline,

which is not to punish, but to preserve the confidence of the public in the bar. The message that "time served" discipline sends to the public does not square with any of the lofty mores to which we, as a profession, hold ourselves accountable. Therefore, we determine to impose a two-year prospective suspension on respondent.

Chair Frost and member Doremus, in a separate dissenting decision, voted for disbarment. Member Gallipoli did not participate. Members Singer and Hoberman abstained.

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
Edna Y. Baugh, Vice-Chair

By: Isabel Frank
Isabel Frank
Acting Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Neil M. Cohen
Docket No. DRB 13-208

Argued: November 21, 2013

Decided: December 19, 2013

Disposition: Two-year prospective suspension

Members	Disbar	Two-year Suspension	Reprimand	Abstained	Disqualified	Did not participate
Frost	X					
Baugh		X				
Clark		X				
Doremus	X					
Gallipoli						X
Hoberman				X		
Singer				X		
Yamner		X				
Zmirich		X				
Total:	2	4		2		1

for Isabel Frank
Acting Chief Counsel