SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 14-341
District Docket No. XIV-2012-0431E

IN THE MATTER OF

LEE D. GOTTESMAN

AN ATTORNEY AT LAW

Decision

Argued: January 15, 2015

Decided: April 28, 2015

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

Salvatore T. Alfano 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(c)(2), following respondent's guilty plea, in the United States District Court for the District of New Jersey, to tax evasion, in violation of 26 U.S.C. § 7201, and to willful failure to pay over payroll taxes, in violation of 26 U.S.C. § 7202. The OAE recommends that we impose a two-year suspension on

respondent. Respondent agrees with the OAE's recommendation, but requests that the suspension take effect on May 13, 2013, the date of his temporary suspension in New Jersey.

For the reasons set forth below, we determined to impose a three-year suspension on respondent, retroactive to the date of his temporary suspension.

Respondent was admitted to the New Jersey bar in 1981. During the relevant time, he maintained a law office in Toms River, New Jersey.

On November 15, 2005, respondent was censured, in a default matter, for lack of diligence, failure to communicate with a client, misrepresentations to a client, and failure to cooperate with disciplinary authorities. In re Gottesman, 185 N.J. 318 (2005). On May 13, 2013, he was temporarily suspended from the practice of law, as a result of his guilty plea to the charges that are the subject of this motion for final discipline. In re Gottesman, 213 N.J. 520 (2013). He remains suspended.

The conduct that gave rise to respondent's guilty plea was as follows: On July 19, 2012, Indictment Number 12-478 was filed with the United States District Court for the District of New Jersey, charging respondent with four counts of tax evasion, in violation of 26 U.S.C. § 7201, and fifteen counts of willful failure to pay over payroll taxes, in violation of 26 U.S.C.

§ 7202.

On April 30, 2013, before the Honorable Freda L. Wolfson, U.S.D.J., respondent pleaded guilty to counts one and nineteen of the indictment (tax evasion and willful failure to pay over payroll taxes, respectively). As to count one, respondent admitted that, for the 2006 tax year, although he owed the United States more than $24,000 in income taxes, he did not file an income tax return. He further admitted that he paid only $1,612.73 towards his income tax liability, that he used his trust account to conceal the true extent of his income, and that he knowingly and willfully evaded payment of the remainder of the income tax owed to the federal government for his actual income. As to count nineteen, respondent admitted that, in 2009, he willfully failed to remit to the Internal Revenue Service (IRS) $2,395.99 in payroll taxes that he had withheld from his employees' wages.

For purposes of the guilty plea, the government and respondent stipulated that his criminal conduct resulted in a tax loss to the federal government of more than $80,000, but less than $200,000.

On March 11, 2014, Judge Wolfson sentenced respondent to concurrent six-month terms of imprisonment on both counts. Additionally, the judge sentenced respondent to three years of

supervised release, again concurrent as to both counts, and ordered him to satisfy all financial obligations owed to the IRS and to undergo mental health treatment.

Final disciplinary proceedings in New Jersey are governed by R. 1:20-13(c). Under this rule, a criminal conviction is conclusive evidence of guilt in a disciplinary proceeding. R. 1:20-13(c)(1); In re Magid, 139 N.J. 449, 451 (1995); and In re Principato, 139 N.J. 456, 460 (1995). Specifically, a conviction establishes a violation of RPC 8.4(b). Pursuant to this 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." Respondent's convictions additionally establish violations of RPC 8.4(c) (dishonesty, fraud, deceit or misrepresentation), given the nature of the conduct admitted during his guilty plea. Thus, the singular question before us is the quantum of discipline to be imposed on respondent for his violations of RPC 8.4(b) and RPC 8.4(c). 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 fashioning the proper quantum of discipline in this case, the interests of the public, the bar, and respondent must be considered. "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. Thus, we must consider 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). Yet, even if the misconduct is not related to the practice of law, an attorney "is bound even in the absence of the attorney-client relation to a more rigid standard of conduct than required of laymen." In re Gavel, 22 N.J. 248, 265 (1956). "To the public he is a lawyer whether he acts in a representative capacity or otherwise." Ibid.

Violations of federal tax law are serious ethics breaches. In re Queenan, 61 N.J. 578, 580 (1972). "[D]erelictions of this kind by members of the bar cannot be overlooked. A lawyer's training obliges him to be acutely sensitive of the need to fulfill his personal obligations under the federal income tax law." In re Gurnik, 45 N.J. 115, 116-17 (1965).

The OAE relied on several cases in support of its recommendation of a two-year suspension for respondent. First, the OAE cited In re Foglia, 207 N.J. 62 (2011). In that case, we observed that "[c]ases involving an attorney's attempted or actual income tax evasion have resulted in suspensions ranging

from six months to three years, although two-year suspensions are imposed most often." In the Matter of Joseph A. Foglia, DRB 10-449 (June 23, 2011) (slip op. at 8-9). Foglia, who had no disciplinary history, pleaded guilty in federal court to attempted tax evasion and making false statements to a federal agency.

Next, the OAE cited In re Weiner, 204 N.J. 589 (2011), where the attorney received a two-year suspension, after pleading guilty in federal court to two counts of preparing and presenting fraudulent tax returns to the IRS, on behalf of a client. The fraudulent returns understated the client's tax liability, over a two-year period, by approximately $12,263. Weiner had no disciplinary history.

The OAE also cited the following cases, in which the attorneys received two-year suspensions following tax evasion convictions: In re McManus II, 179 N.J. 415 (2004) (in which we recognized that a two-year suspension was the "standard measure of discipline" even for attorneys with a previously unblemished record); In re Mischel, 166 N.J. 219 (2001) (attorney offered a false New York state tax return, including over $18,000 in fictitious business expenses, in order to reduce federal and state income tax due; the attorney had an unblemished disciplinary record); In re Rakov, 155 N.J. 593 (1998) (attorney

failed to report interest paid on personal loans that the attorney made; the attorney had an unblemished disciplinary record); In re Batalla, 142 N.J. 616 (1995) (attorney evaded $39,066 in taxes by underreporting his earned income in 1990 and 1991; the attorney had an unblemished disciplinary record); In re Nedick, 122 N.J. 96 (1991) (attorney failed to report $7,500 in cash received as payment for legal fees; the attorney had an unblemished disciplinary record and presented additional mitigating factors); In re Tuman, 74 N.J. 143 (1977) (attorney attempted to evade tax on $3,295 in income by filing a false and fraudulent return; the attorney had an unblemished disciplinary record); In re Becker, 69 N.J. 118 (1976) (attorney attempted to evade income taxes by filing false and fraudulent tax returns; the attorney had an unblemished disciplinary record since his 1938 admission to the bar); and In re Gurnik, 45 N.J. 115 (1965) (attorney willfully and knowingly attempted to evade and defeat a part of the income tax due and owing to the IRS; the attorney had an unblemished disciplinary record since his 1933 admission to the bar).

In the instant matter, in addition to evading taxes, respondent collected payroll taxes from his employees and failed to turn those taxes over to the IRS. The discipline for that conduct ranges from a reprimand to disbarment, depending on the

circumstances. See, e.g., In re Frohling, 153 N.J. 27 (1998) (attorney reprimanded for failure to pay federal withholding taxes in an unspecified amount and New Jersey unemployment compensation taxes of at least $11,000; conduct occurred over a five-year period; additionally, through W-2 forms, the attorney made misrepresentations to his employees and tax authorities that the taxes had been withheld; the attorney had an unblemished disciplinary record); In re Gold, 149 N.J. 23 (1997) (attorney suspended for six months for failure to pay his secretary's social security and federal and state income taxes for two calendar years, coupled with serious conflict of interest infractions; we found no clear and convincing evidence that the attorney's failure to pay the taxes had been intentional); In re Esposito, 96 N.J. 122 (1984) (attorney suspended for six months for failure to pay his employees' social security and income taxes for one calendar quarter; we found that the attorney's conduct "was not marked by any attempt at personal gain;" funds were untouched and available in attorney's business account; severe emotional distress caused by mother's illness and death taken into account; the attorney had an unblemished disciplinary record); and In re Buonopane, 201 N.J. 408 (2007) (attorney disbarred for failure to pay over taxes withheld from his employees, coupled with tax evasion,

amounting to the misapplication of $2.7 million in entrusted funds over a five-year period; in aggravation, the attorney's employees were denied benefits due to his failure to pay over withholdings to the taxing authorities).

Here, based on the above precedent and on the totality of respondent's criminal conduct, a three-year suspension is warranted. Standing alone, tax evasion typically leads to a two-year suspension, when an attorney has no disciplinary history. Respondent, however, has been previously censured. In addition, respondent committed a second serious offense – failure to remit payroll taxes that he had withheld from his employees' wages. His conduct in this regard is similar to that of the attorney in Esposito, who withheld and failed to remit employee payroll taxes for one calendar quarter. Esposito received a six-month suspension for his conduct, which was mitigated by compelling circumstances. Specifically, Esposito withheld the payroll taxes inviolate in his business account; Esposito had prepared, but not signed, the necessary forms to remit the taxes; Esposito was not motivated by personal gain; and Esposito was under severe emotional distress at the time, due to his mother's prolonged illness and consequent death.

Here, there is no such mitigation. We are unable to agree with the OAE, which cited the following mitigation: "respondent

cooperated with the IRS investigation. He was a respected member of the legal community, a highly skilled attorney who performed a significant amount of pro bono work. He also self-reported these charges and has been cooperative in this ethics investigation." We are not impressed by the above factors.

First, at sentencing, Judge Wolfson did not give respondent credit for cooperation with the IRS investigation. To the contrary, the government argued that, despite respondent's initial admission of misconduct to the IRS, he then did nothing to cooperate, requiring the matter to be indicted, in order to come to resolution. Apparently, Judge Wolfson accepted the government's position in sentencing respondent. Although respondent had no obligation to resolve the matter in a manner most convenient to the government, his purported actions towards cooperation are insufficient to be considered a mitigating factor.

Second, R. 1:20-13(a)(1) requires attorneys to report to the OAE, in writing, when they have been charged with an indictable offense. Similarly, R. 1:20-3(g)(3) requires attorneys to cooperate in disciplinary investigations. Respondent, thus, should not receive "credit" for carrying out his obligations.

Although an attorney's good reputation and performance of

pro bono work have been accepted as mitigating factors in prior cases, see, e.g., In re Christoffersen, 220 N.J. 2 (2014), and In re Sunberg, 156 N.J. 396 (1998), we find that, in the instant matter, such mitigation is insufficient to reduce what we determine to be the appropriate discipline in this case - a three-year suspension, retroactive to May 13, 2013, the date of respondent's temporary suspension.

Member Clark voted for a two-year suspension, retroactive to the date of respondent's temporary suspension. Member Gallipoli voted to recommend respondent's disbarment.

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
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Lee D. Gottesman
Docket No. DRB 14-341

Argued: January 15, 2015

Decided: April 28, 2015

Disposition: Three-year retroactive suspension

Members	Disbar	Three-year Retroactive Suspension	Two-year Retroactive Suspension	Dismiss	Disqualified	Did not participate
Frost		X				
Baugh		X				
Clark			X			
Gallipoli	X					
Hoberman		X				
Rivera						X
Singer		X				
Zmirich		X				
Total:	1	5	1			1

Ellen A. Brodsky
Chief Counsel