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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 06-140
District Docket No. XIV-05-592E

IN THE MATTER OF
MARK EUGENE JOHNSTON
AN ATTORNEY AT LAW

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Decision

Argued: July 20, 2006

Decided: August 30, 2006

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

Respondent did not appear for oral argument.¹

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

This matter came before us on a motion for reciprocal discipline filed by the Office of Attorney Ethics ("OAE") pursuant to R. 1:20-14, following respondent's three-year suspension in Pennsylvania on May 13, 2005. Our review of the record persuades us that a three-year suspension, retroactive

¹ Respondent was served by notice of publication in the New Jersey Law Journal, the New Jersey Lawyer, the West Chester Daily News, and the Palm Beach Post.

to May 13, 2005, is the appropriate level of discipline in this matter.

Respondent was admitted to both the New Jersey and Pennsylvania bars in 1991. He has no prior discipline in New Jersey.

In 2003, Pennsylvania ethics authorities filed three petitions against respondent, charging him with nine offenses: five involved respondent's convictions for Pennsylvania crimes; two involved his failure to report the criminal convictions to Pennsylvania ethics authorities; one involved a probation violation; and another involved a false application to a Pennsylvania "Accelerated Rehabilitative Disposition Program."

Pennsylvania disciplinary authorities found respondent guilty of violating RPC 8.4(b) (commission of criminal acts that reflect adversely on the attorney's honesty, trustworthiness or fitness to practice law), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), and RPC 8.4(d) (conduct prejudicial to the administration of justice).

Respondent's conduct is described in the Pennsylvania Supreme Court's Disciplinary Board report, issued on December 15, 2004:

Respondent's own admissions, based on the stipulation² as well as the evidence presented in the Hearing Committee, conclusively establish that respondent has been convicted of at least one count of knowing or intentional possession of a controlled substance, three separate driving under the influence offenses over a three year period from 1997 through 2000, filing false alarms to public agencies in 1997, driving under a suspended operator's license in 1999 and 2000, defiant trespass in 1997, disorderly conduct in 1997 and 2002, and harassment in 2002. Respondent has further been found in violation of parole in 2001 and violation of probation in 1997.

Respondent failed to report the conviction in 1997 to the Disciplinary Board as required and failed to report his arrest and subsequent conviction in Delaware County in 2000 to the Montgomery County Probation Department. Respondent was further the subject of two separate bench warrants for failure to report to prison in 1992 to commence serving his sentences.

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Specifically, on or about July 7, 1997, Respondent entered a negotiated plea of guilty to the charge of knowing or intentionally possessing a controlled substance in violation of 35 Pa. C.S. §780-113(a) and defiant trespass in violation of 18 Pa. C.S. §3503(b). The Court sentenced Respondent to one year probation on each charge, to run consecutively for a total period of two years. On January 29, 1997, Respondent entered a negotiated plea of guilty to the charge of driving under the influence of alcohol in Chester County in violation of 75 Pa. C.S. §3731 and was sentenced to twelve months probation. On or about January 29, 1997, Respondent entered negotiated pleas of guilty in Chester County to false alarms to agencies of public

² The report contains numerous citations to a stipulation of facts, a document not made a part of the record before us.

safety, in violation of 18 Pa. C.S. §5503(a)(4) and was sentenced to twelve months probation. On January 29, 1997, Respondent entered a negotiated plea of guilty to the charge of driving under the influence of alcohol in Chester County in violation of 75 Pa. C.S. §3731 and was sentenced to twelve months probation.³

On or about February 12, 1997, Respondent violated his probation by consuming alcoholic beverages and engaging in abusive and excessive conduct in violation of the terms of his probation. The same day, Respondent violated the terms of his probation by leaving the courthouse, contrary to the instructions of his probation officer and, further, providing false information to the Adult Probation Office of Chester County in denying that he had used alcohol in violation of the terms of his probation. On or about March 10, 1997, Respondent tested positive for the use of cocaine during the term of his probation, in violation of those terms. A second positive result for the use of cocaine was determined on March 14, 1997 and again, on or about March 27, 1997, the Court of Common Pleas of Chester County found Respondent in violation of his probation as a result of the positive test for cocaine.

On or about February 28, 1986, Respondent was arrested in Montgomery County charged with driving under the influence of alcohol. Subsequent to his arrest, Respondent made written application for, and was admitted to, the Accelerated Rehabilitative Disposition program, through the Montgomery County District Attorney's office. On or about March 14, 1995, Respondent was subsequently arrested in Delaware County for knowingly and intentionally possessing a controlled substance and defiant trespass. The Respondent submitted an A.R.D.

³ This second reference to the January 29, 1997 guilty plea for driving under the influence of alcohol is repetitive and does not refer to a second plea that day on another charge. Rather, it appears to be an error.

application for the Delaware County charges on or about October 18, 1995 stating there that he had never been arrested or charged with any criminal or vehicular offense as an adult or juvenile and failed to disclose the prior conviction in 1986 for driving under the influence of alcohol in Montgomery County. Respondent's A.R.D. was subsequently revoked on or about May 28, 1997 for failing to disclose the prior offense.

The Respondent was under an affirmative duty, pursuant to Rule 214(a) of the Pennsylvania Rules of Disciplinary Enforcement, to notify the Disciplinary Board of the Supreme Court of Pennsylvania of his conviction on July 7, 1997 of knowingly and intentionally possessing a controlled substance and defiant trespass in Delaware County following the revocation of his A.R.D. Respondent failed to report the conviction as required. Similarly, on or about January 29, 1997, Respondent entered a plea of guilty to driving under the influence of alcohol in Chester County and charges of false alarms to agencies of public safety and disorderly conduct. Respondent was under legal obligation, pursuant to Rule 214(a), Pennsylvania Rules of Disciplinary Enforcement, to report the convictions to the Disciplinary Board of the Supreme Court of Pennsylvania and failed to do so.

Most recently, on or about October 30, 2000, Respondent entered a negotiated plea of guilty to the charge of driving under the influence of alcohol and driving with a suspended driver's license and was sentenced to a term of imprisonment of not less than thirty days nor more than twenty-three months in Delaware County. On or about November 10, 1999, Respondent entered a negotiated plea of guilty to driving under the influence of alcohol and driving under a suspended operator's license and was sentenced to a term of imprisonment of not less than thirty days nor more than twenty-three months.

By Respondent's own admissions, he has been convicted of at least one count of knowingly or intentionally possessing a controlled substance, three separate convictions of driving under the

influence of alcohol, filing false alarms to public agencies, twice for driving with a suspended operator's license, once for defiant trespass, twice for disorderly conduct and harassment. Respondent has also been found in violation of parole, and a separate unrelated violation of probation. Respondent clearly failed to report several convictions for which he was under legal obligation to report to the Disciplinary Board. Respondent further filed a false application for A.R.D. in 1996.

[OAEbEx.G16-20.]⁴

The OAE seeks the imposition of a one-year suspension. The OAE's position is that respondent's conduct would not be met with a three-year suspension in New Jersey. In addition, the OAE recommends that respondent not be reinstated in New Jersey until he is reinstated in Pennsylvania.⁵ The OAE points out that Pennsylvania, respondent's home jurisdiction, is in a better position to assess whether he has rehabilitated himself from his significant problems with alcohol and controlled dangerous substances.

Following a review of the record, we determine to grant the OAE's motion for reciprocal discipline. Pursuant to R. 1:20-14(a)(5) (another jurisdiction's finding of misconduct

⁴ OAEb refers to the OAE's brief.

⁵ This requirement would amount to more than a one-year suspension in New Jersey, because respondent may not seek reinstatement in Pennsylvania before May 13, 2008.

shall establish conclusively the facts on which the Board rests for purposes of a disciplinary proceeding), we adopt the findings of the Supreme Court of Pennsylvania.

Reciprocal disciplinary proceedings in New Jersey are governed by R. 1:20-14(a) (4), which provides:

[t]he Board shall recommend the imposition of the identical action or discipline unless the respondent demonstrates, or the Board finds on the face of the record on which the discipline in another jurisdiction was predicated that it clearly appears that:

(A) the disciplinary or disability order of the foreign jurisdiction was not entered;

(B) the disciplinary or disability order of the foreign jurisdiction does not apply to the respondent;

(C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;

(D) the procedure followed in the foreign matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(E) the unethical conduct established warrants substantially different discipline.

A review of the record does not reveal any conditions that would fall within the ambit of subparagraphs (A) through (D). As to subparagraph (E), the OAE's position is that

respondent's conduct would not justify a three-year suspension in New Jersey. According to the OAE,

a number of respondent's Pennsylvania violations would not, in and of themselves, normally merit discipline in New Jersey. For example, we do not discipline attorneys for DWI convictions or for driving with a suspended license.⁶ However, the fact that the respondent was found to have used cocaine on several occasions, and was convicted of disorderly conduct, harassment, filing false alarms and defiant trespass would be grounds for the imposition of discipline, as would his misrepresentation to his probation officer and his filing of a false application for the ARD program.

[OAEb7.]

In support of its position that a one-year suspension is appropriate, the OAE cited three-month suspension cases for cocaine possession, several reprimand and short-term suspension cases for disorderly conduct, and six-month suspension cases analogous to respondent's filing of false documents for the A.R.D. program.

⁶ Pennsylvania ethics authorities cited four DUI incidents to which respondent pleaded guilty. In summarizing respondent's misconduct, however, they inadvertently reference only three incidents.

We are unable to agree with the OAE that a one-year suspension is sufficient discipline for respondent's overall conduct.

In a factually similar case, the Court imposed a three-year suspension. In In re Lloyd, 183 N.J. 228 (2005), also a reciprocal discipline matter, an attorney pleaded nolo contendere in Florida to two counts of purchasing cocaine, a second-degree felony; one count of use or possession of drug paraphernalia, a first degree misdemeanor; four counts of contributing to the delinquency or dependency of a child, a first degree misdemeanor; and one count of driving under the influence ("DUI"), a misdemeanor. The attorney was a "crack" cocaine user who abused the drug on numerous occasions, including several times in motel rooms with a sixteen-year old female acquaintance. While out on bail, the attorney was arrested and charged with DUI. Thereafter, he failed to cooperate with law enforcement authorities regarding required drug tests, by failing to disclose the name of the testing laboratory or the results of his tests. In addition, on one occasion, he tested positive for cocaine on the day he was to appear in court for a hearing on the above felony charges. The attorney's arrest for DUI, while out on bond, was considered an aggravating factor.

Although, in this case, respondent's criminal offenses did not include contributing to the dependency or delinquency of a child, the seriousness of his overall conduct parallels that of attorney Lloyd. In addition, aggravating factors abound here. Pennsylvania disciplinary authorities found that respondent was not truthful at his disciplinary hearing, showed no remorse for his misconduct, and was unwilling to acknowledge any of his mistakes:

Parts of Respondent's testimony at the disciplinary hearing were not truthful Specifically, Respondent testified under oath that he had no "trouble" after 2000, a statement that was false, as he later admitted that he was arrested in Chester County in September 2002 and charged with misdemeanors, which were bargained down to summary convictions. Respondent's only explanation was that he just did not remember.

. . . .

Respondent has shown no remorse for his actions and seems unwilling to comprehend their seriousness.

[OAEbEx.H10.]

Furthermore, respondent violated the terms of his probation numerous times by leaving the courthouse, contrary to his probation officer's instructions; engaging in abusive and excessive conduct; consuming alcoholic beverages; and testing positive for cocaine on three occasions.

In light of respondent's convictions of possession of cocaine, defiant trespass, false alarms to agencies of public safety, disorderly conduct, and harassment, coupled with his false application for A.R.D. and with numerous aggravating factors -- untruthful statements at his Pennsylvania disciplinary proceeding, absence of contrition, refusal to acknowledge any wrongdoing, four DUI convictions in Pennsylvania, driving with a suspended license, violations of parole and probation, and failure to report several convictions to Pennsylvania disciplinary authorities -- it is obvious that respondent has no regard for the law and for the professional responsibility rules. We, thus, see no reason to deviate from the three-year suspension meted out in Pennsylvania.

We determine that respondent should be suspended for three years, retroactively to the date of the Pennsylvania suspension (May 13, 2005), and that he be precluded from applying for reinstatement in New Jersey until he is restored to the practice of law in Pennsylvania. Before reinstatement, respondent must submit proof of fitness, including satisfactory drug-testing results, the latter to continue as a requirement for a period of two years after reinstatement.

Vice-Chair Pashman did not participate.

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
William J. O'Shaughnessy, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

**SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD**

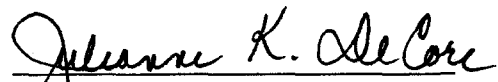
In the Matter of Mark Eugene Johnston
Docket No. DRB 06-140

Argued: July 20, 2006

Decided: August 30, 2006

Disposition: Three-year suspension

Members	Disbar	Three-year Suspension	Reprimand	Dismiss	Disqualified	Did not participate
O'Shaughnessy		X				
Pashman						X
Baugh		X				
Boylan		X				
Frost		X				
Lolla		X				
Neuwirth		X				
Stanton		X				
Wissinger		X				
Total:		8				1


Julianne K. DeCore
Chief Counsel