

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 02-102

IN THE MATTER OF
PETER E. HESS
AN ATTORNEY AT LAW

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Decision
Default [R. 1:20 4(f)]

Decided: June 7, 2002

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

Pursuant to R.1:20-4(f), the District VIII Ethics Committee (“DEC”) certified the record in this matter directly to us for the imposition of discipline, following respondent’s failure to file an answer to the formal ethics complaint.

Respondent was admitted to the New Jersey bar in 1988. In 1996 he received an admonition for failing to maintain a bona fide office in New Jersey and practicing law while ineligible for non-payment of the annual assessment to the New Jersey Lawyers’ Fund for Client Protection (“CPF”). In the Matter of Peter E. Hess, DRB Docket No. 96-262 (September 24, 1996).

The one-count complaint alleged that respondent practiced law while ineligible to do so for failure to pay the annual assessment, New Jersey Lawyers' Fund for Client Protection ("CPF").

On November 27, 2001 the DEC sent a copy of the complaint via certified mail and regular mail to respondent's office address at 3 Mill Road, Suite #301, Wilmington, Delaware 19806. The cover letter stated that his failure to timely file an answer would cause the matter to be certified directly to us for the imposition of discipline. The certified mail receipt was returned, signed by "B.G. Heglund." The DEC certification is silent about the regular mail.

On May 8, 2002 respondent filed a motion to vacate the default and submitted a proposed answer. His motion did not address the reason for his failure to file an answer, other than to allege that the New Jersey disciplinary system lacked jurisdiction over him. In his motion, respondent did not allege lack of notice of the DEC's various requests for information or of the formal ethics complaint. The motion did raise, however, a defense to the allegations of the complaint. As noted below, after considering respondent's motion to us, we determined to deny it.

On or about November 4, 1998 respondent entered his appearance as attorney for the plaintiff in an admiralty case in the U.S. District Court for the District of New Jersey ("DNJ"). Thereafter, he made further appearances and filed pleadings in the case. At the

time, respondent was ineligible to practice law in New Jersey for failure to pay the 1997 annual assessment to the CPF, having been declared ineligible by Supreme Court order dated September 15, 1997.

Respondent's motion to vacate the default did not contest his ineligibility to practice law in New Jersey state courts at the time. Rather, it alleged that the New Jersey Supreme Court has no jurisdiction to question his eligibility to practice law in the DNJ. Respondent cited a federal case, Abdallah v. Pileggi, 914 F.Supp. 1115, 1120 (1996), which states that attorneys are not required to make annual CPF payments to remain eligible to practice law in the DNJ because the federal district court, not the state courts, controls whom it will recognize as members of its bar.

On the other hand, in the underlying matter, the grievant, Timothy D. Barrow, Esq., cited Civil Rule 101.1(b), a local DNJ rule pertaining to attorneys practicing before that court. That rule states as follows, in relevant part:

Any attorney licensed to practice by the Supreme Court of New Jersey may be admitted as an attorney at law on motion of a member of the bar of this Court, made in open court, and upon taking the prescribed oath and signing the roll. Any New Jersey attorney deemed ineligible to practice law by order of the New Jersey Supreme Court entered pursuant to New Jersey Court Rule 1:28-2(a) shall not be eligible to practice law in this Court during the period of such ineligibility.

While the ruling in Abdallah, supra, 914 F.Supp. 1115 (1996), is in direct conflict with Civil Rule 101.1(b), a comment to the rule clarifies the issue, as follows:

Note that attorneys admitted to plenary membership in the [DNJ] bar are subject to all applicable rules of the New Jersey Supreme Court even as to matters handled in the federal system. See e.g. *Kelley Drye & Warren v. Murray Industries, Inc.*, 623 F.Supp. 522 (D.N.J. 1985) (Debevoise), where the Court required attorneys admitted in New Jersey to submit to the state fee arbitration rule rather than pursue their contract claim in a federal suit against a company they had represented in another federal action. The result in *Kelley Drye* was reaffirmed in *Guralnick v. Supreme Court of New Jersey*, 747 F. Supp. 1109, 1116 (D.N.J. 1990) (Fisher), *aff'd mem.* 961 F.2d 209 (3d Cir. 1992), where a broad-based challenge to the fee arbitration rule was rejected by the court. This federal-state link was expanded when the predecessor of L.Civ.R. 101.1(b) – Rule 4B – was amended in 1996 to provide that any attorney ineligible to practice in New Jersey for failure to pay the annual fee to the New Jersey Lawyers' Fund for Client Protection under state Court Rule 1:28-2(a) is automatically ineligible to practice in the federal court. Adoption of the fund provision followed the decision in *Abdallah v. Pileggi*, 914 F. Supp. 1115 (D.N.J. 1996) (Hedges), where plaintiff – a lawyer ineligible to practice in state courts for failure to pay the fund fee – originally appeared pro se and thereafter sought to appear through his firm as counsel for purposes of an attorney's fee award. Magistrate Judge Hedges declined to read the state court requirement into the federal rules in the absence of specific rule-making on the issue. Rules 4B and 4C were then amended on August 21, 1996 to incorporate the state fund requirement not only for New Jersey lawyers but for attorneys admitted pro hac vice in civil cases as well. Those amendments were carried over into the renumbered rule. See L.Civ.R. 101.1(b) and (c). [Lite, N.J. Federal Practice Rules, Comment 3(a) to Civ.R. 101.1(b) (Gann)]

Respondent did not address Civil Rule 101.1(b), which explicitly refutes his position.

Respondent also requested a hearing to “properly present this important question of federalism and jurisdiction.” We found no reason to hold a hearing, however. There are no constitutional issues that need to be preserved. Civil Rule 101.1(b) already addresses respondent's concerns by requiring him – and all other similarly situated DNJ attorneys – to comply with the same CPF requirements governing New Jersey attorneys practicing in New Jersey state courts. In addition, the salient facts are not in dispute. Respondent admitted that he was ineligible to practice law in New Jersey state courts on November 4, 1998 as a

result of his failure to pay annual assessments to the CPF. For these reasons, respondent will not be prejudiced in any way by our considering the matter without a remand for a hearing. In denying respondent's motion to vacate the default, we specifically rejected respondent's jurisdictional arguments and found that Civil Rule 101.1(b) requires New Jersey attorneys practicing in the DNJ to pay the CPF annual assessment in order to be able to practice before that court.

* * *

As noted above, on or about November 4, 1998 respondent entered his appearance as attorney for a plaintiff in an admiralty case (Cleary v. RMS Republic, et al) venued in the DNJ. Thereafter, respondent made further appearances and filed pleadings in the case. At the time, respondent was ineligible to practice law in New Jersey for failure to pay the 1997 annual assessment to the CPF, having been declared ineligible by Supreme Court order dated September 15, 1997. See December 22, 2000 and July 30, 2001 letters from Kenneth J. Bossong, Director, to the grievant and Susan M. Hagerty, investigator, respectively.

The complaint alleges that respondent's conduct violated R.1:28-2(a), more properly RPC 5.5(a) (engaging in the unauthorized practice of law).

In a March 18, 2002 letter to us, the Office of Attorney Ethics ("OAE") requested that the complaint be amended to include a charge of failure to cooperate with the investigation of this matter and failure to answer the complaint, in violation of RPC 8.1(b). Specifically,

on September 18 and October 2, 2001 the DEC investigator sent respondent letters by certified and regular mail, requesting information about the matter. The October 2, 2001 certified mail was accepted by "J. Taylor." The DEC certification is silent about the regular mail. Respondent never complied with the DEC investigator's requests for information about the grievance.

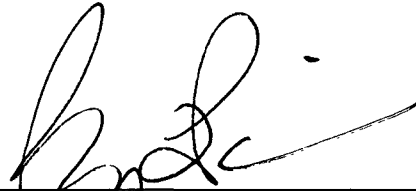
* * *

Service of process was properly made. Following a review of the record, we found that the facts recited in the complaint support the charges of unethical conduct. Because of respondent's failure to file an answer, the allegations of the complaint are deemed admitted. R.1:20-4(f).

Practicing law while ineligible for failure to pay annual CPF fees generally results in an admonition. See, e.g., In the Matter of Edward Wallace, Docket No. DRB 97-381(1997) and In the Matter of Joseph V. Capodici, Docket No. DRB 00-294 (November 21, 2000). Here, however, respondent's conduct was aggravated by his prior admonition for similar misconduct. Moreover, because of respondent's failure to cooperate with the investigation of this matter and to answer the complaint, thereby allowing the case to proceed as a default, enhanced discipline is required. We, therefore, unanimously determined to impose a

reprimand.¹ One member did not participate.

We also determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative expenses.



ROCKY L. PETERSON
Chair
Disciplinary Review Board

¹Because failure to cooperate with ethics authorities is an integral part of a default matter, we need not amend the complaint to include that specific offense.

SUPREME COURT OF NEW JERSEY

**DISCIPLINARY REVIEW BOARD
VOTING RECORD**

**In the Matter of Peter E. Hess
Docket No. DRB 02-102**

Decided: June 7, 2002

Disposition: reprimand

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not participate
Peterson			X				
Maudsley			X				
Boylan							X
Brody			X				
Lolla			X				
O'Shaughnessy			X				
Pashman			X				
Schwartz			X				
Wissinger			X				
Total:			8				1

Robyn M. Hill 6/17/02
Robyn M. Hill
Chief Counsel