SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. 99-100

IN THE MATTER OF	:
SAMUEL V. CONVERY, JR.	:
AN ATTORNEY AT LAW	:

Decision

Argued: April 15, 1999

Decided: November 17, 1999

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

Jack Arseneault 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 April 17, 1998 guilty plea to the

federal misdemeanor of promising employment or other benefit for political activity, in violation of 18 U.S.C. § 600.

Respondent was admitted to the New Jersey bar in 1969. He has no prior disciplinary history.

In July 1995, Shobna Patel retained respondent's law firm to represent Pooja M. Inc. ("Pooja") in connection with its purchase and development of real estate in Edison Township, including all zoning matters. Pooja needed zoning variances to develop what had been church property as a banquet hall, art gallery, offices and a retail store. Respondent's firm was to receive a $100,000 legal fee for the representation, regardless of the success or failure of the project.[1]

In February 1996, respondent filed an application for zoning variances and site plan approval with the Edison Zoning Board. The first public hearing took place on April 16, 1996, at which time there was considerable public opposition to Pooja's project.

Respondent's criminal conviction was based on his admission that, in August 1996, he promised Robert F. Engel and his son, Robert J. Engel, that he would assist the son in obtaining permanent employment with Middlesex County in exchange for the Engels'

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[1] Respondent disputed the OAE's contention that his offense was motivated, in part, by financial gain. The OAE's contention was based upon a statement in the pre-sentence report that Pooja was unable to pay respondent's legal fee until the project had been completed. Respondent stated that Pooja never paid the full fee, only $72,240, of which $44,000 was paid before the Zoning Board approved the project.

assistance in obtaining favorable votes from two zoning board members on the Pooja project.[2]

Apparently, after the Engels agreed to assist respondent, Robert J. Engel allegedly on behalf of respondent, promised a job to Gerard Kenny, a zoning board member who intended to vote against the project. However, that was not part of respondent's plea. Respondent denied that he had agreed with the Engels that they would make such an offer to Kenny and objected to the inclusion of that allegation in the pre-sentence report.

As part of his plea, respondent admitted that his actions to obtain the Engels' assistance and the members' votes on the project were a form of political activity. However, he stated that, in 1996, he considered his actions to be permissible "lobbying."

There is no dispute that respondent's agreement with the Engels was the basis for the conviction. However, during the guilty plea, respondent made additional admissions. He admitted that, shortly after the April 1996 Zoning Board hearing, he had telecopied a newspaper article concerning the Pooja project to John Wade. The article dealt with Kenny's opposition to the project. Respondent also spoke to Wade by telephone about the article.[3] Wade was the business manager of Ironworkers' Local Union 373. As the business manager,

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[2] Robert J. Engel had been an at-will employee with Middlesex County for several years.

[3] The record does not contain any information about the telephone conversation.

Wade determined which union member to send out on union jobs. Kenny was also an ironworker, who worked out of Local 373.

After speaking with respondent, Wade visited Kenny at a union job site. Wade showed Kenny the copy of the newspaper article. He told Kenny that he should reconsider his opposition to the project and that he "was biting the hand that feeds him." However, those facts did not form the basis for respondent's plea. Furthermore, in his objections to the pre-sentence report, respondent denied having asked Wade to make any such comments to Kenny and objected to their use in the sentencing proceeding.

The information to which respondent pleaded guilty states that he

> knowingly and willfully, directly and indirectly, did promise employment, and a position, compensation, contract, appointment and other benefit ... and special consideration in obtaining such a benefit, to another person as consideration, favor, and reward for political activity, that is, as consideration for the other person's assistance in obtaining the favorable votes of one or more Zoning Board members for the application for zoning variances ....

Respondent was sentenced to three years' probation. He was also confined to his residence for three months, required to perform five hundred hours of community service and pay a fine of $5,000.

The OAE urged the Board to suspend respondent for six months.

* * *

Following a review of the full record, the Board determined to grant the OAE's motion for final discipline.

The existence of a criminal 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 misdemeanor conviction for promising employment or other benefit for political activity constituted a violation of RPC 8.4(b) (commission of a criminal act that reflects adversely on his honesty, trustworthiness or fitness as a lawyer). Only the quantum of discipline to be imposed remains at issue. R. 1:20-13(c)(2); In re Lunetta, 118 N.J. 443, 445 (1989).

In motions for final discipline based on criminal convictions, it is appropriate "to examine the totality of circumstances," including the pre-sentence report, in reaching a decision as to the sanction to be imposed. In re Spina, 121 N.J. 378, 389 (1990). "The uncontested pre-sentence reports and the sentencing hearings shed light on the totality of the circumstances surrounding [the attorney's] guilty pleas." In re Goldberg, 142 N.J. 557, 566 (1995). Here, however, the pre-sentence report was contested. Respondent denied any involvement in the promise of employment made by Engel to Kenny or in Wade's statements to Kenny. He argued that those allegations in the pre-sentence report were not part of the misdemeanor to which he pleaded guilty and could not be used in sentencing him.

Apparently, the sentencing court agreed with respondent. When Kenny's mother requested that she be allowed to address the court prior to sentencing, respondent's counsel

objected on the basis that respondent's guilty plea was specifically limited to conduct dealing with the Engels. The court advised Mrs. Kenny that "my concern is that there may be issues beyond where this court actually is with respect to sentence for the charges that have been made in this case which essentially is a misdemeanor charge."

Furthermore, the court rejected the probation officer's conclusion as to the base offense level for violation of 18 U.S.C. § 600, an offense not listed in the federal guidelines manual for sentencing. The probation officer had concluded that the "most analogous guideline" for the offense was that for "offering, giving, soliciting, or receiving a bribe, which calls for a base offense level of 10." Respondent objected to the use of that guideline because it covered bribery and extortion felony offenses, which are specific intent crimes. Respondent argued that the "most analogous guideline" was that for "payment or receipt of unauthorized compensation," the guideline applied to misdemeanor, nonspecific intent crimes, which calls for a base offense level of six. The court determined that, consistent with the stipulations between the government and respondent, the appropriate guideline was that used for other misdemeanor, general intent offenses.

Therefore, in determining the appropriate disciplinary sanction, it would do "violence to the procedures that govern our disciplinary function," In re Spina, supra, 121 N.J. at 389, to analogize respondent's misconduct to a bribery offense or to attribute to respondent the promises or statements made by others to Kenny.

The level of discipline imposed in disciplinary matters involving the commission of a crime depends on numerous 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, supra, 118 N.J. at 445-46. The appropriate sanction for the misdemeanor offense of violating 18 U.S.C. § 600 has not been previously addressed by either the Board or the Court. In fact, there is only one reported decision citing the statute.

In support of its position that respondent should be suspended for six months, the OAE cited four cases in which "the Court has ruled that attorneys who commit crimes in the course of 'doing a favor' for a friend or client should receive substantial suspensions...." See In re Bateman, 132 N.J. 297 (1993) (attorney suspended for two years for mail fraud conspiracy and making a false statement on a loan application to assist a client); In re Gassaro, 123 N.J. 395 (1991) (attorney suspended for two years following conviction for conspiracy to defraud the Internal Revenue Service on behalf of his father-in-law); In re Chung, 147 N.J. 559 (1997) (attorney suspended for eighteen months following a guilty plea to a federal information charging him with having failed to report a cash transaction of more than $10,000; attorney, on behalf of a client, had made fifteen cash deposits of less than $10,000 each into five different escrow accounts at five different banks to avoid the reporting requirement) and In re Silverman, 80 N.J. 489 (1979) (attorney suspended for eighteen

months following a guilty plea to a federal indictment charging him with obstruction of justice for having filed an answer in a bankruptcy action that stated that his client had a lawful right to maintain custody of certain vehicles, knowing that the statement was false). As recognized by the OAE, however, the attorneys in the cited cases had been convicted of felony offenses requiring specific intent and "clearly knew that they were committing crimes at the time that their offense was committed," while respondent pleaded guilty to a misdemeanor and did not realize, at the time, that his conduct was criminal. Therefore, the cases cited by the OAE are inapposite.

The OAE also argued that respondent's criminal sentence -- three years' probation, three months' home confinement and community service -- was similar to sentences imposed for some felony convictions. Although mindful of the sentencing court's determination, the Board's primary consideration must be the "the nature and severity of the crime." In re Lunetta, supra, 118 N.J. at 445. Respondent pleaded guilty to a misdemeanor, not a felony.

In matters involving federal misdemeanor charges, the Court has imposed terms of suspension. See, e.g., In re DiBiasi, 102 N.J. 152 (1986) (three-month suspension for misapplication of bank funds) and In re Leahy, 118 N.J. 578 (1990) (six-month suspension for willful failure to file income tax return). Nevertheless, in In re Rushfield, 142 N.J. 617 (1995), the Court reprimanded an attorney who had pleaded guilty to a three-count federal information charging him with violating ERISA's reporting requirements, a federal

misdemeanor. There were compelling mitigating circumstances in Rushfield, including respondent's cooperation with the government, his admission of wrongdoing, his offer to make restitution and his genuine remorse.

There are similar compelling mitigating circumstances in this case. During his career, respondent has been actively involved in professional, civic and charitable organizations. His family, friends and clients have attested to his good character and the fact that he has, except for this incident, led an exemplary life. Although restitution was not applicable in respondent's case, he has agreed to perform community service in excess of that required by the court. Finally, like Rushfield, respondent has shown genuine remorse for his misconduct.

Lastly, respondent has enjoyed a previously unblemished thirty-year legal career.

The Board is also mindful of the fact that respondent was sentenced to perform five hundred hours of community service. The prosecutor had requested that the court direct respondent to perform legal services for the poor of Middlesex County. Respondent agreed to complete eighty-six real estate closings for a developer of affordable housing. He anticipates that the transactions will continue through 2000. If he were to be suspended, he would be unable to continue his community service, at least during the period of the suspension.

In light of the above circumstances, the Board was convinced that a reprimand sufficiently addresses both the goal of the disciplinary system – to protect the public – and

the nature of respondent's offense. Two members voted to withhold decision on the motion and to require the OAE and respondent to submit supplemental briefs on the scope of respondent's unethical conduct and the appropriate discipline. One member recused himself. One member did not participate.

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

Dated: 4/12/99

By: _____
LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Samuel V. Convery
Docket No. DRB 99-100

Argued: April 15, 1999

Decided: November 17, 1999

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Admonition	Supplemental Briefing and proceedings	Disqualified	Did not Participate
Hymerling			x				
Cole						x	
Boylan			x				
Brody					x		
Lolla					x		
Maudsley			x				
Peterson			x				
Schwartz			x				
Thompson*	Board member on temporary leave of absence*						
Total:			5		2	1	1*

By Robyn M. Hill 12/16/99
Robyn M. Hill
Chief Counsel