SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 01-452

IN THE MATTER OF

JAMES S. DEBOSH

AN ATTORNEY AT LAW

Decision

Argued: March 14, 2002

Decided: June 10, 2002

Judith Babinski appeared on behalf of the District XIII Ethics Committee.

Thomas Curtin 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 based on a recommendation for discipline filed by the District XIII Ethics Committee ("DEC"). The two-count complaint charged respondent with violations of RPC 1.7(c)(2) (conduct creating the appearance of impropriety) (count one) and RPC 8.1(b) (failure to respond to a lawful demand for information from a disciplinary authority).

Respondent was admitted to the New Jersey bar in 1992. He maintains a law office in Phillipsburg, New Jersey. In July 2000, he received a reprimand in a default matter for violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate with client), RPC 1.5(b) (failure to prepare a written retainer agreement) and RPC 8.1(b) (failure to cooperate with ethics authorities). In re DeBosh, 164 N.J. 618 (2000). In December 2001, he was suspended for three months for violations of RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate with client), RPC 1.15(c) (failure to return funds to a client), RPC 1.16(d) (failure to turn over papers and property to a client) and RPC 8.1(b) (failure to cooperate with ethics authorities). In re DeBosh, 170 N.J. 185 (2001). That case also proceeded on a default basis.

* * *

The facts in this matter are not in dispute. Respondent admitted a violation of RPC 8.1(b) for failure to reply to the May 19, 2000 grievance, failure to return the DEC investigator's telephone call and failure to reply to the investigator's October 2, 2000 letter. Respondent's answer admitted that he did not file a timely reply to the investigator's inquiries until he retained an attorney.

Respondent denied a violation of RPC 1.7(c)(2). Specifically, respondent was sworn in as a Warren County freeholder on January 1, 2000. At that time, he was also counsel for the Phillipsburg Housing Authority ("housing authority"). The complaint

alleged that respondent's failure to resign from his position with the housing authority created a conflict of interest.

Relying on an opinion obtained by the housing authority from the Department of Community Affairs, respondent denied that his dual role violated the ethics rules.

At the DEC hearing, the parties stipulated, among other things, that the housing authority exists and operates pursuant to federal and state law and provides housing for qualified low income and senior citizens from Phillipsburg, New Jersey; it is funded by the federal government through a Department of Housing and Urban Development ("HUD") program; and is comprised of seven members, one of whom is appointed by the New Jersey Department of Community Affairs, one by the mayor of Phillipsburg and one by the town's governing body.

The housing authority is funded by federal and state funds and does not, for the most part, interact with the county board of freeholders. It does not receive funds from the county board of freeholders and has no ongoing litigation, disputes, contracts, agreements or other interaction with the board of freeholders.

At the DEC hearing, grievant Mark Turker testified that he is a commissioner for the housing authority. He stated that the housing authority "is the governing body for making and paying . . . bills on behalf of the authority . . . ." It owns approximately 520 units of low income housing and can engage in the construction of dwellings. According to Turker, there are several committees in the housing authority, including finance, personnel, buildings and grounds and tenants' issues. Each committee reports to its chair,

who is a de facto member of that committee. The executive director manages the day-to-day operations of the authority.

Turker testified that, because of his position, he was required to take an ethics class. As a result of the class, he believed that county freeholders cannot maintain the dual role of elected official and attorney for the housing authority because of the potential for a conflict-of-interest situation.

On May 10, 2000, Turker wrote to the Department of Community Affairs, Division of Housing and Community Resources, expressing his concerns about respondent's dual role. On May 11, 2000, he filed a grievance with the Office of Attorney Ethics ("OAE").

By letter dated September 26, 2000, the chair for the local finance board informed the housing authority that respondent's roles did not create a "per se conflict," but that, if an actual conflict were to arise, respondent would be required to recuse himself. The letter suggested that the Supreme Court's Advisory Committee on Professional Ethics could be contacted for an opinion. Neither respondent, nor Turker or anyone on behalf of the housing authority requested such an opinion.

Turker testified that, as commissioner of the housing authority, he was not aware of any link between the housing authority and the county. He perceived that a conflict could arise if the housing authority were to obtain a redevelopment grant from HUD to tear down old housing for the construction of new housing. He explained that, once a grant is approved, a series of construction documents have to be prepared and submitted to the planning board and soil conservation district at the county level.

Respondent testified that he has been the housing authority's attorney since 1996 and became a freeholder in January 2000. During that period, no issues required interaction between the two bodies; there was no relationship between the county of Warren and the housing authority with regard to funding or supervision; there was no litigation between the two of which he was aware; there were no written contractual obligations between the entities; and, in his opinion, the interests of the two entities were not antagonistic.

Respondent was asked whether the housing authority would be required to go to the local planning or zoning boards if renovations were to be made to its units. He replied that there was no interaction between the housing authority and the county planning board. He added that there was no impact on the county, as the housing units did not front on county property or utilize county facilities. Respondent conceded that, if planning board approval were required, he would not be able to participate in that aspect of the application. Respondent stated that, before he became a freeholder, the housing authority had filed an application with the planning board about improvements to a community center. That application, however, had involved the Phillipsburg Planning Board, not the county planning board.

Since respondent has been a freeholder, he has had no interaction with the county planning board.

* * *

The DEC found no clear and convincing evidence of an actual conflict of interest. It concluded, however, that to avoid an appearance of impropriety respondent had to resign from one of his positions. The DEC also found that respondent failed to cooperate with its investigation of the matter. It recommended an admonition, if this were respondent's only violation of RPC 8.1(b), or a reprimand, if it were "a repeat violation." (As can be seen from respondent's ethics history, this is respondent's third violation of RPC 8.1(b)).

* * *

Following a de novo review of the record we are satisfied that the DEC's conclusion that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence. Respondent admitted that he failed to cooperate with the DEC investigation, in violation of RPC 8.1(b).

The question of whether respondent's dual representation is an actionable violation is not as simple. There are no advisory opinions directly on point. We can, however, find some guidance from earlier ACPE opinions and Court decisions:

In Opinion 524, 113 N.J.L.J. 232 (March 1, 1984), the committee determined that an elected freeholder-attorney could practice law, other than criminal defense, in the county in which he was elected, except in cases that might present a conflict or appearance of impropriety; could serve as prosecutor in a municipality within the county; and could not serve as a solicitor for a municipality within the county.

In In the Matter of Opinion No. 653, 132 N.J. 124 (1993), the Court reversed an advisory opinion. It found that the committee erred in its determination that an attorney or his/her partner or associate could not serve as counsel to a vocational school board and as counsel to the county in which the vocational school board was located. It found that the interests of the school board and of the county were rarely antagonistic. In reaching its decision, the Court reviewed a number of opinions in which the common element was the concern for public confidence in our system of government and the public's perception of the independence and integrity of the legal profession. The Court noted that its manifest concern about the appearance of impropriety is directed to "something more than a fanciful possibility." (Citations omitted). The appearance of impropriety must have some reasonable basis. The Court noted that an analysis of actual or apparent conflict of interest does not take place in a vacuum, but is highly fact-specific. In assessing the reasonable basis for the appearance of impropriety, the Court adopted the perspective of an "informed citizen." (Citations omitted). The Court, thus, considered whether there was a reasonable likelihood for an actual conflict of interest or if the petitioner's situation would create an appearance of impropriety in the mind of a reasonable and informed citizen.

Previously, in In re Opinion 415, 81 N.J. 318 (1979), the Court had assessed the actual frequency and potential likelihood of conflicting interests between the governmental entities whose representation was involved by considering three factors: (1) contractual obligations and business transactions between the public entities; (2) the frequency of litigation that arises between the two public entities; and (3) the frequency

in which the two entities have antagonistic interests. In the Matter of Opinion No. 653, supra, at 133. (Citations omitted).

Guided by the above principles and accepting the witnesses' testimony, we may conclude that there are no contractual obligations or business transactions between the entities, that there was no recent litigation between the two entities and there was no evidence presented of any antagonistic interests between the two entities. Thus, the likelihood of a conflict is virtually non-existent and there is no appearance of impropriety. Moreover, even if an actual conflict had occurred, respondent's recusal from the matter would have been sufficient.[1]

Based on the foregoing, we unanimously determined to dismiss the charge of an appearance of impropriety under RPC 1.7(c)(2).

We are left only with respondent's violation of RPC 8.1(b). Generally, we do not impose discipline when an attorney has failed to cooperate with an investigation, but files an answer and appears at the ethics hearing. Because, however, this is respondent's third instance of failure to cooperate with disciplinary authorities, we find that discipline should follow. The range of discipline lies between an admonition and a reprimand. See, e.g., In the Matter of Wesley S. Rowniewski, Docket No. DRB 01-335 (January 10, 2002) and In the Matter of Erik Shanni, Docket No. DRB 98-488 (April 21, 1999) (admonitions for violations of RPC 8.1(b)); In re Burnett-Baker, 153 N.J. 357 (1998), and In re Williamson, 152 N.J. 489 (1998) (reprimands for violations of RPC 8.1(b)).

[1] At the Board hearing, respondent's counsel remarked that respondent did not seek reappointment to the housing authority and had resigned from his position as freeholder.

Because this is respondent's third brush with the ethics system and because he has repeatedly failed to cooperate with disciplinary authorities (the two prior matters proceeded on a default basis), we unanimously determined to impose a reprimand. Two members did not participate.

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

By: _____
ROCKY L. PETERSON
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of James S. DeBosh
Docket No. DRB 01-452

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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:			7				2

Robyn M. Hill 6/13/02
Robyn M. Hill
Chief Counsel