

XIV-03-281E

DISCIPLINARY REVIEW BOARD OFFICE OF ATTORNEY ETHICS

OF THE

SUPREME COURT OF NEW JERSEY Oct 26 1 22 PM '04

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October 25, 2004

Stephen W. Townsend, Clerk
Supreme Court of New Jersey
P.O. Box 970
Trenton, New Jersey 08625-0962

Re: In the Matter of Christian A. Pemberton
Docket No. DRB 04-271
District Docket No. XIV-03-281E

Dear Mr. Townsend:

The Disciplinary Review Board reviewed the motion for discipline by consent ("reprimand or such lesser discipline as the Board may determine is warranted") filed by the Office of Attorney Ethics ("OAE"), pursuant to R. 1:20-10(b). Following a review of the record, the Board determined to grant the motion. In the Board's view, a reprimand is the appropriate measure of discipline for respondent's ethics infractions.

Specifically, beginning in 1995 and through 2003, respondent did not pay quarterly federal withholding taxes and, for several years, filed tax reports only sporadically. In 1999, respondent's problem became overwhelming. His practice was to "fax" his payroll information to his accountant, who then prepared his quarterly returns. Respondent would issue payroll checks for the net amount due to his employees, whereupon his accountant would give him the amount of the payroll taxes.

When the accountant gave respondent Form 1941 for the second quarter of 1999, respondent noted that his tax obligation had soared from about \$5,000 to \$56,742.32. Respondent questioned his accountant, who assured him that the figures correctly corresponded to the payroll data that respondent had

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provided. In fact, respondent's tax liability was incorrect because he had erroneously included his own "draws" as payroll. The accountant did not advise respondent that his "draws" should not be included as salary. Only in 2003 did respondent discover that mistake.

For the third quarter of 2000, respondent's tax obligations increased to \$23,343.36 because of the same mistake. Respondent did not have sufficient funds in his business account to satisfy the inflated tax liabilities. Therefore, his taxes became overdue, causing him to incur substantial penalty and interest charges.

The OAE's review of respondent's business account statements confirmed that respondent did not always segregate enough funds to pay employee withholding taxes. Nevertheless, respondent misrepresented, on the W-2 forms that he issued to his employees, that such taxes had been paid.

In early 1999, respondent set up a payment plan with the IRS to reduce his overdue tax debt and the penalties and interest accrued. The plan called for the payment of \$5,000 a month. From July 1999 to August 2000, respondent made seven payments, thereby substantially reducing the balance in his business account. As a result, he did not have sufficient funds to satisfy his new tax obligations. According to the stipulation between respondent and the OAE, "the income reporting errors for the second quarter of 1999 and third quarter of 2000 severely aggravated respondent's problems." The OAE and respondent stipulated that, if not for those errors, "respondent's tax obligation payments would have exceeded the amount due on behalf of his employees and he may have had additional monies available to apply to future tax obligations."

According to the stipulation, since January 2002, respondent has timely made all filings, deposits, and payments, except for a late filing for the second quarter of 2002 and a late payment for the fourth quarter of 2002. As of April 5, 2004, respondent's outstanding debt to the IRS, which dated back

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to 1995, totaled \$406,618.28 (\$180,614.49 in taxes and \$226,003.79 in penalties and interest). In February 2004, respondent submitted an offer of compromise agreement to the IRS, which is still pending.

According to the stipulation, "[r]espondent has been truthful in his dealings with the IRS; although he failed to follow through with some of his promises, he made good faith efforts to pay his tax obligations and to resolve his problems". Paragraph C of the Stipulation of Discipline by Consent cites additional mitigating circumstances: (1) respondent has no disciplinary record; (2) he cooperated with the OAE in all phases of its investigation; (3) there is no indication that he "irresponsibly expended money on 'wining and dining' his clients. Instead, [his] practice generated modest revenues and [he] maintained modest spending practices;" (4) his "immense" tax arrearages were the result of an inadvertent error in reporting his own "draws;" (5) had he correctly attributed his own "draws," his payroll tax obligations would have been overpaid; and (6) he attempted to settle his debt with the IRS by entering into a payment plan and a compromise of debt plan.


Respondent stipulated that his conduct violated RPC 1.15(b) (failure to promptly deliver funds that a party (the government) was entitled to receive) and RPC 8.4(c) (misrepresentation). The Board agreed with the parties that a reprimand is appropriate discipline in this case. See, e.g. In re Frohling, 153 N.J. 27 (1998) (reprimand for attorney who did not pay all or part of federal withholding taxes for five years and state unemployment compensation taxes for two years; the attorney presented his employees with W-2 forms indicating that certain sums had been deducted from their gross salaries and either had been or would be paid to the government; the attorney used those funds to "wine and dine" his clients).

In this case, respondent's failure to pay the taxes stemmed from a lack of funds and, most of all, from an innocent mistaken reporting his own "draws" as payroll. Nevertheless, the Board's view is that discipline lesser than a reprimand is insufficient to address the nature of the conduct.

Enclosed are the following documents:

1. Notice of motion of discipline by consent, dated July 27, 2004.
2. Stipulation of discipline by consent, dated July 27, 2004.
3. Affidavit of consent, dated May 15, 2004.
4. Stipulation of facts, dated July 27, 2004, with exhibits.
5. Investigative report, dated April 5, 2004, with exhibits.
6. Ethics history, dated October 25, 2004.

Very truly yours,


Julianne K. DeCore
Chief Counsel

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Encls.

c: Mary J. Maudsley, Chair, Disciplinary Review Board
✓ David E. Johnson, Jr., Director, Office of Attorney Ethics
Roland G. Hardy, Jr., Respondent's Counsel