

IN THE SUPREME COURT OF OHIO

Disciplinary Counsel
Relator

v.

Loren J. Margolis
Respondent

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CASE NO. 2006-2331

RELATOR'S ANSWER TO
RESPONDENT'S
OBJECTIONS TO THE
BOARD OF COMMISSIONERS'
REPORT AND RECOMMENDATIONS

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REPORT AND RECOMMENDATIONS

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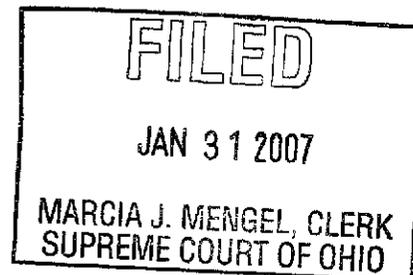


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Now comes relator, Disciplinary Counsel, and hereby submits its answer to respondent's objections.

STATEMENT OF FACTS

This disciplinary case is based on respondent's federal felony conviction for violating two counts of the Sherman Antitrust Act, 15 U.S.C. §1. (Stip. 2)

At all relevant times, respondent was an employee of M. Weingold & Co., a scrap metal processing company which was also engaged in the buying and selling of scrap metal. The business was owned by respondent's father-in-law, who was indicted in the same federal case as respondent. (Stip. 3)

As a salesman, respondent's job duties included purchasing scrap metal. The charges against respondent were that he engaged in a conspiracy to suppress and

restrain competition by rigging bids for the purchase of scrap metal in northeast Ohio. (Stip. 4, 5)

Ultimately, respondent entered into a plea agreement in which he pled guilty to the two federal felony offenses charged. (Stip 6) Respondent was sentenced to ten months in the custody of the United States Bureau of Prisons, with five months to be served in prison, and the remaining months to be served in home confinement with electronic monitoring. Respondent was ordered to pay a \$700,000 fine and a \$200 special assessment. The court also ordered one-year of supervised release. Respondent completed his period of incarceration and paid all fines and assessments ordered. Stip. 8, 10, 11)

On August 2, 2005 respondent's license to practice law was suspended pursuant to Gov. Bar R. V (5)(A)(4) due to his felony conviction. (Stip. 9)

At the hearing before a panel of the Board of Commissioners on Grievances and Discipline, all relevant facts and alleged Code violations were stipulated by the parties. The parties also stipulated that mitigating factors existed- absence of a prior disciplinary record, a cooperative attitude toward the proceedings, and imposition of other penalties or sanctions. The parties further stipulated that an appropriate sanction, based upon the evidence, was a two-year actual suspension from the practice of law. (See Agreed Stipulations)

Respondent requested that the date of this suspension be August 2, 2005, the date the interim felony suspension began. (Tr. at 122) Relator took no position on this issue, deferring to the panel for a recommendation. (Tr. at 117)

The panel recommended that a two-year actual suspension be ordered, but that respondent be given no credit for the interim felony suspension. (Report at 7) In

support of its recommendation, the panel found that several aggravating factors existed based on respondent's testimony at the hearing. (Report at 5-7) The panel found that respondent was not remorseful, did not accept responsibility for his actions, and made excuses for his conduct. The Board then adopted the panel's recommendations. (Report at 5-7)

LAW AND ARGUMENT

THE EVIDENCE SUPPORTS THE BOARD'S RECOMMENDATION THAT RESPONDENT'S SUSPENSION NOT BE RETROACTIVE.

Respondent's sole objection is that the Board erred in not recommending that his suspension be retroactive. Respondent argues that case law supports his position. However, in the majority of the cases cited by respondent, significant mitigating evidence was present, including contrition, remorse, and acceptance of responsibility by the subject attorney. For example, in *Disciplinary Counsel v. Blaszak*, 104 Ohio St.3d 330, 2004-Ohio-6593, the court noted respondent's contrition was part of the "overwhelming evidence of mitigation" presented. In *Cuyahoga Cty. Bar Assn. v. Garfield*, 109 Ohio St.3d 103, 2006-Ohio-1935, the court noted that the mitigating factors identified by the Board including respondent's acceptance of responsibility for his actions. In *Akron Bar Assn. v. Peters*, 94 Ohio St.3d 215, 2002-Ohio-639, the court referred to the panel's conclusion that the respondent had expressed "true remorse". In *Disciplinary Counsel v. Lash*, 68 Ohio St.3d 12, 1993-Ohio-157, respondent admitted and took full responsibility for his misconduct.

In this case, the Board found that respondent did not accept responsibility for his actions, made excuses for his conduct, and neither the panel nor Board believed respondent's "statements of innocence" or that he did not know that his actions were illegal. (Report at 5-6)

When asked by a panel member to explain any feelings of culpability with respect to his involvement in the bid rigging schemes, respondent replied:

I obviously was involved in it. It obviously was improper. In many cases, I was brought into something that maybe had I had better insight and knowledge and maybe thought it out further, I would have seen that it was improper.

And yet, on the other hand, I was brought into something that had been in place, these relationships had been in place. And at the time, I guess never having made that foray necessarily into this type of business before, I never participated with Bay Metal and Parkwood in creating this understanding.

I guess I want to make sure that you understand that. I was not part of this. I never was in a meeting where I'd say "Well, you know, we're not going to buy" You know, this was an understanding. I - - This was something that was there.

And I, on one hand, kind of feel like the tail of a dog that got dragged along. On the other hand, I'm certainly 48 years old and a grown man. And although at the age of 31 I don't know that I knew better, I certainly think at the age of 48 I would look in a bit different light, especially in the light of having a little more business history now behind me.

But I - - I certainly feel that I wasn't the individual of the company at all who created anything like this or in the industry who created - - created this. I just kind of did what I was told to do and never really thought too much about the rights and wrongs of what I was doing. (Tr. at 100-101)

The foregoing is an example of testimony from which the panel and the Board could easily conclude that respondent was not remorseful, and that he did not accept responsibility for his actions. The Court has recognized that the panel is in the best position to evaluate a respondent's testimony:

The panel observed the witnesses first-hand and thus possessed an enviable vantage point in assessing the credibility and weight of their testimony. For this reason, we ordinarily defer to a panel's credibility determinations in our independent review of professional discipline cases unless the record weighs heavily against those findings. *Cincinnati Bar Assn. vs. Statzer*, 101 Ohio St.3d 14, 2003-Ohio-6649

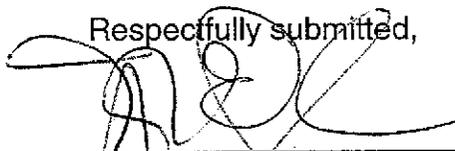
Further, the Court has held that "It is of no consequence that the board's findings of fact are in contravention of respondent's or any other witness' testimony. Where the

evidence is in conflict, the trier of facts may determine what should be accepted as the truth and what should be rejected as false." *Disciplinary Counsel v. Zingarelli*, 89 Ohio St. 3d 210, 2000-Ohio-140.

CONCLUSION

Neither the panel nor the Board is required to accept any recommendation of the parties in a disciplinary case. (B.C.G.D. Proc. Reg. 3(D)). Here, the panel and the Board reviewed all of the facts, and the Board accepted the panel's conclusions as to the credibility and demeanor of the respondent, resulting in the recommendation that respondent's suspension not be made retroactive. Of course, the ultimate determination regarding respondent's sanction and whether it should be retroactive lies with the Court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing answer brief was served via U.S. Mail, postage prepaid, upon respondent's counsel, Richard Koblentz, Esq., Koblentz and Koblentz, The Illuminating Building, 55 Public Square, Suite 1170, Cleveland, Ohio, 44113, and upon Jonathan W. Marshall, Secretary, Board of Commissioners on Grievances and Discipline, 65 South Front Street, 5th Floor, Columbus, Ohio 43215 this 31st day of January, 2007.



Carol A. Costa
Counsel for Relator

conduct detailed in Gov. Bar R. IV or Section 6(a) of Gov. Bar R. V and cite the disciplinary rule allegedly violated by the Respondent. The panel and Board shall not be limited to the citation to the disciplinary rule(s) in finding violations based on all the evidence.

(B) The Relator in the complaint shall set forth the Respondent's attorney registration number and his last known address where the Board shall serve the complaint.

(Effective 10-8-90)

Section 2. Pleadings and Motions.

(A) Within the period of time permitted for an answer to the complaint, Respondent may file any motion appropriate under Rule 12 of the Ohio Rules of Civil Procedure, supported by a brief and affidavits if necessary. A brief and affidavits, if appropriate, in opposition to such motion may be filed within twenty days after service of such motion. No oral hearing will be granted, and rulings of the Board will be made by the Chairman of the Board or any member designated by the Secretary of the Board. All motions shall be made in accordance with this rule.

(B) The chairman or a member of the panel shall rule on all motions subsequent to the appointment of a panel.

(C) For good cause, the Chairman of the Board, or, after appointment of a panel, the chairman or member of the panel may grant extensions of time for the filing of any pleading, motion, brief or affidavit, either before or after the time permitted for filing.

(D) Every pleading after the complaint shall show proof of service.

(Effective 10-8-90)

Section 3. Rules of Procedure.

(A) The Board and hearing panels shall follow the Ohio Rules of Civil Procedure wherever practicable unless a specific provision of Gov. Bar R. V provides otherwise.

(B) Depositions taken in Gov. Bar R. V proceedings shall be filed with the Secretary of the Board as Rule 32 of the Ohio Rules of Civil Procedure prescribes.

(C) If Relator and Respondent stipulate to facts, the chairman or member of the panel may either cancel a hearing and deem the matter submitted in writing or order that a hearing be held with all counsel and the Respondent present.

(D) Notwithstanding the agreement of Relator and Respondent on a recommended sanction for Respondent, the hearing panel and the Board are not bound by the joint recommendation and retain sole power and discretion to make a final recommendation to the Ohio Supreme Court on the appropriate sanction.

(Effective 10-8-90; amended, eff 6-1-00)

Section 4. Manner of Service.

Whenever provision is made for the service of any notice, order, report, or other paper or copy upon any complainant, relator, respondent, petitioner, or other party, in connection with any proceeding under these rules, service may be made

upon counsel of record for such complainant, relator, respondent, petitioner, or other party, either personally or by certified mail.

(Effective 7-1-92)

Section 5. Quorum of Panel or Board.

A majority of the members of the Board of Commissioners, or a panel thereof, shall constitute a quorum for all purposes, and the action of a majority of those present comprising the quorum shall be the action of the Board of Commissioners or a panel of the Board; except for the granting of a motion for default pursuant to section 6(F) of Gov. Bar R. V, or a dismissal of the complaint at the conclusion of the hearing pursuant to section 6(H) of Gov. Bar R. V, which shall require the unanimous action of a hearing panel.

(Effective 7-1-92)

Section 6. Manner of Service on Clerk; Record of Such Service a Public Record.

All notices shall be served by the Secretary of the Board upon the Clerk of the Supreme Court by leaving at the office of the Clerk a true and attested copy of the notice and any accompanying document and by sending to the respondent, by certified mail, postage prepaid, return receipt requested, a like, true, and attested copy, with an endorsement thereon of service, upon the Clerk of the Supreme Court, addressed to the respondent at the respondent's last known address. The receipt indicating the certified mail number shall be attached to and made a part of the return of service of such notice by the Secretary. The panel or Board or court before which there is pending any proceeding in which notice has been given as provided in this section may order a continuance as is necessary to afford the respondent reasonable opportunity to appear and defend. The Clerk of the Supreme Court shall keep a record of the day and hour of service upon the Clerk of notice and any accompanying document, which shall be a public record in the office of the Clerk.

(Effective 7-1-92)

Section 7. Power to Issue Subpoenas, Foreign Subpoenas

(A) Subpoenas

In investigations and proceedings under this rule, upon application by Disciplinary Counsel, the Secretary, or chair of a Certified Grievance Committee authorized to sign a certificate under Section 4(I)(7) of Gov. Bar R. V, the Special Investigator, respondent, relator, chair of the hearing panel of the Board, and its Secretary shall have the authority to cause testimony to be taken under oath before the Special Investigator, Disciplinary Counsel, a Certified Grievance Committee, or a hearing panel of the Board. All subpoenas shall be signed and issued by the chair of the hearing panel, the chair or vice-chair of the Board, or its Secretary and served as provided by the Ohio Rules of Civil Procedure. A motion to quash a subpoena issued under this section shall be filed with the Secretary of the Board and ruled

tary, or chair of the Certified Grievance Committee, that the counsel are authorized to represent the relator in the action and have accepted the responsibility of prosecuting the complaint to conclusion. The certification shall constitute the authorization of the counsel to represent the relator in the action as fully and completely as if designated and appointed by order of the Supreme Court with all the privileges and immunities of an officer of the Supreme Court. The complaint also may be signed by the grievant.

(8) *Complaint Filed by Disciplinary Counsel.* Six copies of all complaints shall be filed with the Secretary of the Board. Complaints filed by the Disciplinary Counsel shall be filed in the name of the Disciplinary Counsel as relator.

(9) *Service.* Upon the filing of a complaint with the Secretary of the Board, the relator shall forward a copy of the complaint to the Disciplinary Counsel, the Certified Grievance Committee of the Ohio State Bar Association, the local bar association, and any Certified Grievance Committee serving the county or counties in which the respondent resides and maintains an office and for the county from which the complaint arose.

SECTION 5. Interim Suspension from the Practice of Law for a Felony Conviction or Default under a Child Support Order.

(A)(1) *Interim Suspension.* A justice, judge, or an attorney admitted to the practice of law in Ohio shall be subject to an interim suspension under either of the following circumstances:

(a) The justice, judge, or attorney is convicted in Ohio of a felony or of an equivalent offense under the laws of any other state or federal jurisdiction;

(b) A final and enforceable determination has been made pursuant to Chapter 3123, of the Revised Code that the justice, judge, or attorney is in default under a child support order.

(2) A certified copy of the judgment entry of conviction of a justice, judge, or an attorney of a felony offense shall be transmitted by the judge entering the judgment to the Secretary of the Board and to the Disciplinary Counsel or the president, secretary, or chair of the geographically appropriate Certified Grievance Committee. A certified copy of the court or child support enforcement agency determination that a justice, judge, or attorney is in default under a child support order shall be transmitted as provided in division (B) of section 4705.021 of the Revised Code.

(3) Upon receipt from any source of a certified copy of the judgment entry of conviction or of the determination of default under a child support order, the Secretary promptly shall submit the entry or determination to the Supreme Court. The entry shall be submitted whether the conviction resulted from a plea of guilty or nolo contendere, from a

verdict after trial, or otherwise and regardless of the pendency of an appeal.

(4) The Supreme Court may enter an order as it considers appropriate, including an order immediately suspending the justice, judge, or attorney from the practice of law pending further proceedings pursuant to these rules.

(B) *Conclusive Evidence.* A certified copy of a judgment entry of conviction of an offense or of a determination of default under a child support order shall be conclusive evidence of the commission of that offense or of the default in any disciplinary proceedings instituted against a justice, judge, or an attorney based upon the conviction or default.

(C) *Time for Hearing.* Any disciplinary proceeding instituted against a justice, judge, or an attorney based on a conviction of an offense or on default under a child support order shall not be brought to hearing until all appeals from the conviction or proceedings directly related to the default determination are concluded.

(D)(1) *Reinstatement.* A justice, judge, or an attorney suspended under this rule or Rule II of the Supreme Court Rules for the Government of the Judiciary of Ohio shall be reinstated by the Supreme Court upon the filing with and submission to the Supreme Court by the Secretary of any of the following:

(a) A certified copy of a judgment entry reversing the conviction of the offense;

(b) A certified copy of a judgment entry reversing the determination of default under a child support order;

(c) A notice from a court or child support enforcement agency that the justice, judge, or attorney is no longer in default under a child support order or is subject to a withholding or deduction notice or a new or modified child support order to collect current support or any arrearage due under the child support order that was in default and is complying with that notice or order.

(2) Reinstatement shall not terminate any pending disciplinary proceeding.

(E) *Duty of Clerk on Entering Order.* Upon the entry of an order suspending or reinstating a justice, judge, or an attorney pursuant to this section, the Clerk of the Supreme Court shall mail certified copies of the order as provided in Section 8(D)(1) of this rule.

SECTION 5a. Interim Remedial Suspension.

(A)(1) *Motion; Response.* Upon receipt of substantial, credible evidence demonstrating that a Justice, judge, or attorney has committed a violation of a Code of Judicial Conduct or Code of Professional Responsibility and poses a substantial threat of serious harm to the public, the Disciplinary Counsel or appropriate Certified Grievance Com-