

**THE BOARD OF PROFESSIONAL CONDUCT  
OF THE SUPREME COURT OF OHIO**

**In re:**

**Case No. 2014-104**

**Complaint against**

**Roger Stephen Kramer  
Attorney Reg. No. 0019210**

**Findings of Fact,  
Conclusions of Law, and  
Recommendation of the  
Board of Professional Conduct  
of the Supreme Court of Ohio**

**Respondent**

**Disciplinary Counsel**

**Relator**

**OVERVIEW**

{¶1} This matter was heard on August 25 and 26, 2015 in Cleveland before a panel consisting of David Hardymon, Robert Fitzgerald, and McKenzie K. Davis, chair. None of the panel members resides in the district from which the complaint arose or served as a member of the probable cause panel that reviewed the complaint pursuant to former Gov. Bar R. V, Section 6.

{¶2} Respondent appeared at the hearing, represented by Mary Cibella. Scott Drexel appeared on behalf of Relator.

{¶3} On December 15, 2014, Relator filed a complaint against Respondent alleging violations of Prof. Cond. R. 8.4(c) [conduct involving dishonesty, fraud, deceit, or misrepresentation] and Prof. Cond. R. 8.4(d) [conduct prejudicial to the administration of justice]. The alleged conduct that necessitated the complaint, generally, was Respondent's timekeeping practice and subsequent financial benefit while a hearing officer at the Cuyahoga County Board of Revision.

{¶4} On January 30, 2015, Respondent filed a motion to dismiss and request for extension of time to file an answer.

{¶5} On February 13, 2015, Relator filed a response in opposition to Respondent's motion to dismiss.

{¶6} The panel granted the request for additional time, but denied the motion to dismiss.

{¶7} The basis for Respondent's motion to dismiss was Respondent's belief that, because another certified grievance committee, specifically the Cleveland Metropolitan Bar Association ("CMBA"), had dismissed a grievance against Respondent, it precluded another disciplinary entity from filing a complaint. However, the grievant in the CMBA matter was the inspector general of Cuyahoga County. The grievant in Relator's matter was anonymous. Thus, it is likely there are two different grievants. Additionally, while Relator's matter arose out of the same set of facts, the matter submitted to Relator included additional facts and additional timeframes not considered by the CMBA. Additionally, nothing in the rules prevents another relator, here the Disciplinary Counsel, from proceeding with a new complaint.

{¶8} On August 3, 2015, Respondent filed a motion to compel production of documents and other tangible things and a motion to continue the hearing. The panel chair conducted a pretrial on these issues. Relator was able to produce those documents shortly after and avoided a continued hearing. Thus, the motion to compel was moot and the motion to continue was denied.

{¶9} On August 21, 2015, Respondent filed an "Emergency Motion for Summary Judgment, or In the Alternative Motion in Limine" (the Friday prior to the Tuesday/Wednesday scheduled hearing). The panel chair requested Relator to respond to the motions by noon on August 24, 2015 and indicated that a ruling would be given at the hearing. The basis of the motion was related to some discovery requests and late production of responses to those requests. However, Respondent also claimed violation of a "Garrity Warning." *Garrity* Warning is the generic phrase for the ruling in the U.S. Supreme Court case *Garrity v. State of N.J.*, 385 U.S. 493

(1967). The court in *Garrity* held that all governmental employees have the right to be free of compulsory self-incrimination in a subsequent criminal matter. Respondent asserted that any statements made to the investigative authority (Cuyahoga County Inspector General) could not be used against him in a disciplinary proceeding.

{¶10} The panel denied all the motions. The standard for a motion for summary judgment, no dispute as to any genuine material fact and the movant is entitled to judgment as a matter of law, was clearly not met, as set forth by this report.

{¶11} Additionally, the panel was not persuaded to extend the benefits of the *Garrity* Warning to a noncriminal, attorney disciplinary matter. The attorney disciplinary system in Ohio differs greatly from the criminal justice system. Our rules, which require Respondent to testify and answer questions of the panel and thus inconsistent with the Fifth Amendment privileges, suggest statements made that are protected in a criminal matter do not enjoy similar protection in the Ohio disciplinary system.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

{¶12} Respondent was admitted into the practice of law in the state of Ohio on May 6, 1977 and is subject to the Rules of Professional Conduct and the Rules for the Government of the Bar.

{¶13} Respondent was employed at the Cuyahoga County Prosecutor's office for 24 years. Respondent then was employed by the Ashtabula County Prosecutor's office for a couple of years after that. Respondent also ran a solo private practice while employed at both prosecutors' offices.

{¶14} Respondent was appointed to the Cuyahoga County Board of Revision by the Cuyahoga County Council in May 2011. The Cuyahoga County Personnel Policies and

Procedures Manual was provided to Respondent when he began his employment. Hearing Tr. 18. Respondent signed documentation indicating that he had received and understood the employee manual. *Id.* The manual requires all employees to accurately record the time they begin work and the time they end work for the day. Respondent used the county's online system, MyHR, to enter and record his work times.

{¶15} Cuyahoga County allows for employees to utilize different type of schedules. Respondent's position on the board of revision indicated that he was a "flexible schedule employee." Generally, a flexible schedule employee was required to work eight hours a day, but that those eight hours could begin earlier than 8:30 a.m. or end later than 5:00 p.m.

{¶16} As an employee at the Board of Revision, Respondent was also eligible for "exchange time." Generally, exchange time is hours an employee could accumulate that exceeded the 40 hours per week that one can use to take off at a later time and continue to be paid for. However, there are certain limitations to earning exchange time. The limitations for exchange time listed in Section 6.08 of the Cuyahoga County Personnel Policies and Procedures Manual are:

- (a) There must be a compelling, extraordinary reason for the employee to stay beyond normal working hours, other than staying to finish up normal work assignments;
- (b) The employee must either be required to work the overtime or be granted prior authorization by his or her supervisor to work the additional hours; and
- (c) The required or authorized increment of additional time must be greater than one-half hour per day of required overtime.

{¶17} Cuyahoga County also calculated a full day as 8:30 a.m. to 4:30 p.m. as part of the eight-hour day, employees were given a one-hour paid lunch and two fifteen-minute breaks. Relator's Ex. 8. The employee manual specifically states that employees are expected to use the one-hour lunch and are not permitted to work through lunch, for the purposes of calculating an

eight-hour day. *Id.*

{¶18} Respondent's direct supervisor was, at the time he was hired, Martin Murphy. Murphy approved all of Respondent's time sheets. Roughly a year after Respondent's employment, his supervisor was replaced by Shelly Davis. Thus, Respondent submitted his time to Davis via MyHR, and Davis approved, knowing the department would soon be audited. Hearing Tr. 66.

{¶19} Shortly after Davis began, she informed the entire department that, moving forward, all employees work hours would be 8:30 a.m. to 4:30 p.m. Hearing Tr. 68. Employees were informed via email and hard copy memo of the change in the uniform work hours. Hearing Tr. 69. This change in uniform work hours effectively eliminated the flexible schedule option. Under her title, Davis was permitted to make this change in policy.

{¶20} Davis also requested the Cuyahoga County Inspector General to audit her entire department. Davis requested the audit because she believed her predecessor had been too lax in how employees kept their hours. Hearing Tr. 68. Davis was also concerned about theft of time. Hearing Tr. 114. Respondent's conduct contributed to her belief the department needed to be audited.

{¶21} The Inspector General's audit revealed two employees at the Cuyahoga County Board of Revision, one of whom was Respondent, were abusing time. Hearing Tr. 70. In addition to the information revealed in the audit, Relator's investigation revealed Respondent had entered more hours on his timesheets than hours he actually worked. Relator's Ex. 15.

{¶22} The Inspector General obtained Respondent's entrance and departure garage parking records from the Huntington Parking Garage. The Inspector General matched Respondent's times from the parking garage with the times on Respondent's timesheets. The

records revealed Respondent inaccurately recorded his time on 129 different occasions between January 1, 2012 and July 13, 2012.<sup>1</sup> Relator's Ex. 5. Of those 129 discrepancies, garage records indicate Respondent exited the parking garage after his departure time stated on his timesheet on 22 occasions. Thus, he worked longer hours than his timesheet suggested. However, garage records indicate Respondent exited the parking garage before his departure time stated on his timesheet on 107 occasions.

{¶23} The Inspector General, Nailah Byrd, contacted Respondent and requested a meeting. The meeting occurred on August 24, 2012 with Respondent, Inspector General Byrd and Rebecca Keck. Hearing Tr. 128. In the meeting, according to the testimony of Byrd and Keck, Respondent admitted to lying on his time sheets for the purposes of receiving exchange time. Hearing Tr. 133 (Byrd); Hearing Tr. 172 (Keck). Respondent admitted that he knew what he was doing was wrong, but that he knew he could get by with it. Hearing Tr. 134 (Byrd); Hearing Tr. 172 (Keck). Keck took notes during the meeting. Keck's notes reflect Respondent's admissions during the meeting. Relator's Ex. 7. The Inspector General's report indicates the contention that Respondent entered the inaccurate time sheets in order to earn exchange time and allow him to take time off from his employment and be paid for the time off. Relator's Ex. 5.

{¶24} Inspector General Byrd and Keck testified extensively on the details of the admission by Respondent in the August 24, 2012 meeting. Respondent, on the other hand, could not recall making the admission, and asserted if he had, it was because of the anxiety of the meeting. Hearing Tr. 55. Inspector General Byrd also testified as to the resources expended with the investigation, including the time and effort to research garage records and video surveillance.

{¶25} Immediately after the meeting, Respondent was relieved from his duties at the

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<sup>1</sup> The time difference exceeded the normal time it would take for an employee to get from the office to the car and vice versa.

Board of Revision, without pay, pending the completion of the Inspector General's investigation. Shortly after, Respondent was given the option of resigning or he would be terminated. Respondent resigned on September 12, 2012. Relator's Ex. 19.

{¶26} Relator's independent records indicate Respondent abused his time sheets on 196 different occasions between May 2011 to August 2012, with some obvious overlap between May to July from the Inspector General's report.<sup>2</sup> Relator's Ex. 15.

{¶27} Relator's investigation revealed Respondent was also claiming one hour of exchange time when Respondent worked eight hours, but worked through lunch. Respondent claimed this was appropriate because the county paid employees a one-hour lunch, thus if he worked through his lunch he was able to accrue an additional hour of exchange time. According to Respondent, eight hours of actual work equaled nine hours of compensation. This particular point was discussed at the hearing. Below is an excerpt to highlight Respondent's contention.

Panel Chair: And in my discussion briefly with your counsel while she was speaking with you it's your interpretation that if you work through lunch eight hours equals nine hours; is that correct?

Respondent: Correct.

Panel Chair: Because the county pays for the lunch and if you work through the lunch then you are obliged to accrue an additional hour, despite the fact you were there eight hours, correct?

Respondent: Correct.

Hearing Tr. 352.

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<sup>2</sup> The I.G.'s investigation revealed significant discrepancies in Respondent's time sheets. A subsequent investigation by Relator revealed additional discrepancies in the time sheets because it reviewed a larger time period and had additional information. The original grievance was filed by the I.G. with the Cleveland Metropolitan Bar Association. The CMBA dismissed the grievance. An anonymous person filed a grievance with Relator. Respondent filed a motion to dismiss, based on the idea that once CMBA dismissed the matter and the I.G. grievant did not appeal their decision, Respondent is protected from another certified grievance committee filing another action. As noted in ¶7, *supra*, the panel denied Respondent's motion on the grounds that Relator received a grievance from someone other than the I.G. and discovered facts not reviewed or considered by the CMBA.

{¶28} Respondent acknowledged the county employee manual specifically prohibited this practice. Hearing Tr. 353. However, Respondent believed that because his previous supervisor never objected to the practice, it was permitted. Hearing Tr. 303.

{¶29} Respondent provided a number of excuses to describe the various discrepancies. Shortly after Respondent voluntarily resigned, he claimed there was only a six-hour difference owed to the county. Hearing Tr. 61. Later in the hearing, Respondent claimed the county actually owed him payment for sixteen hours. Hearing Tr. 301. Respondent claimed he never read the employee manual. Hearing Tr. 23. Respondent claimed he never read the email and memo regarding the new hours and time requirements from Davis. Hearing Tr. 24. Respondent's previous supervisor never complained about the way he kept his time, so, he contends, the practice was appropriate. Hearing Tr. 303.

{¶30} Respondent also claimed he was never given the opportunity to correct his time-keeping. Hearing Tr. 60.

{¶31} Respondent also claimed that he sometimes ran during his lunch hour and that was why he often did not claim the additional hour of exchange time. Hearing Tr. 44.

{¶32} Respondent had very specific requirements for when he did and did not run during his lunch hour. Hearing Tr. 44-45. Respondent even produced the weather reports from Burke Airport, which is close to the county office building, to suggest the days he did and did not run. Respondent's Ex. G.

{¶33} The panel found Respondent's testimony at the hearing was not credible. The panel came to this conclusion based on Respondent's differing claims and from the compelling testimony of Inspector General Nailah Byrd and Rebecca Keck. Additionally, Respondent's conduct amounted to taking county resources without completing the work. Therefore, the panel concludes

Respondent violated Prof. Cond. R. 8.4(c) by knowingly falsifying employee time records and Prof. Cond. R. 8.4(d) by ignoring the county rules and regulations and falsifying documentation that necessitated the use of significant county resources.

### AGGRAVATION, MITIGATION, AND SANCTION

{¶34} The guidelines governing mitigation and aggravation in attorney disciplinary cases are found in Gov. Bar R. V, Section 13, which lists those factors that may be considered in recommending either a more or less severe sanction than is recommended by either party.

{¶35} The panel found the following aggravating factors that should be considered in recommending a more severe sanction:

- *Dishonest or selfish motive.* Respondent willingly exploited the system in order to accrue exchange time that would allow him to take time off while being paid for it. Respondent denied there was intent; however, the panel found his testimony on this point not credible.
- *A pattern of misconduct.* Respondent willingly misrepresented the number of hours worked on over 120 occasions.
- *Multiple offenses.* Respondent willingly misrepresented the number of hours worked on over 120 occasions.
- *Refusal to acknowledge wrongful nature of conduct.* While Respondent acknowledged his timekeeping was sloppy, he never acknowledged any wrongdoing. Respondent changed his story on whether he owed the county money for hours not worked to a claim that the county actually owed him money. Ultimately, Respondent's story changed again and again to fit the defense of this matter and never to what actually occurred and was admitted to the Inspector General. The panel never felt Respondent understood why he was in the predicament. Respondent filed a motion for summary judgment and requested a motion for directed verdict and motion dismiss at the conclusion of Relator's case. Those motions also suggest Respondent never believed he did anything wrong.

{¶36} The panel found the following mitigating factors that should be considered in recommending a less severe sanction:

- *Absence of a prior disciplinary record.* Respondent has never been previously disciplined.
- *Character or reputation.* Respondent submitted 13 letters from various colleagues testifying to his good character. Anne Gerald, a former colleague at the Board of Revision, Bruce Mandel, a friend, and Judge Stuart Friedman of

the Cuyahoga County Court of Common Pleas also testified to Respondent's good character at the hearing.

- *Imposition of other penalties or sanctions.* Respondent was forced to resign his position at the Cuyahoga County Board of Revision.

{¶37} Relator recommended Respondent be suspended from the practice of law for one year. Respondent, on the other hand, recommended a sanction of “nothing more than a six month stayed suspension.” Hearing Tr. 398.

{¶38} As justification for their recommended sanction, Relator cites *Disciplinary Counsel v. McNeal*, 131 Ohio St.3d 224, 2012-Ohio-785. In *McNeal*, the respondent was a former lieutenant colonel in the United States Air Force Reserve Judge Advocate General Corps, who resigned from the Air Force because an investigation revealed he submitted false pay forms (totaling \$6,518) and used his military Lexis-Nexis account for personal reasons and for his private practice. McNeal failed to cooperate in the investigation. The Board found McNeal violated Prof. Cond. R. 8.4(c), Prof. Cond. R. 8.4(d), Prof. Cond. R. 8.4(h), Prof. Cond. R. 8.1(b), and Gov. Bar R. V, Section 4(G). The only aggravating and mitigating factors found were a failure to cooperate and no prior discipline. The Court held one-year suspension was the appropriate sanction.

{¶39} Relator also cited *Disciplinary Counsel v. Carroll*, 106 Ohio St.3d 84, 2005-Ohio-3805. In *Carroll*, the respondent was the executive director of the Ohio Barber Board. On 11 occasions, Carroll submitted timesheets that were inaccurate. Carroll claimed compensatory time for working through lunch and claimed other compensatory time not permitted by the state. In addition, Carroll submitted timesheets indicating he had worked all day, when in fact, he took part of the day to work at his private law office. The Ohio Inspector General conducted an investigation and concluded that Carroll had inaccurately reported 90 hours owed to the state. The matter was forwarded to the Franklin County Prosecutor. Carroll pled no contest and made complete restitution to the state. The Court found Carroll violated DR 1-102(A)(4) and DR 1-102(A)(6).

The Court also found significant mitigating factors and no aggravating factors. The Court held a six-month stayed suspension was the appropriate sanction.

{¶40} Respondent did not cite any case law for his recommended sanction. Respondent attempted to differentiate the present matter with both *McNeal* and *Carroll*, focusing on Respondent's claimed lack of intent to deceive the county. However, Respondent's argument that he lacked culpable intent is premised entirely on his claim that he was unaware of the rules governing the time-keeping practices of county employees. This contention, in turn, is premised on (1) his claim that he did not read the Policy and Procedure Manual by which he was bound, despite his having signed an acknowledgement to the contrary; and (2) his admission that he intentionally did not read specific written directives from his supervisor prohibiting the manner in which he prepared his timesheets and claimed exchange time. Both these contentions are refuted by the admissions of wrongdoing that he made to the Inspector General. That aside, Respondent would now have this panel reward his purposeful ignorance of the rules by meting out a lesser sanction. The panel does not follow or accept the perplexing logic of this argument.

{¶41} The primary purpose of the disciplinary sanction is not to punish the offender, but to protect the public. *Disciplinary Counsel v. O'Neil*, 103 Ohio St.3d 204, 2004-Ohio-4704. Furthermore, the Court has consistently stated each case presents unique facts and circumstances and all relevant factors should be considered in determining the appropriate sanction. *Disciplinary Counsel v. Streeter*, 138 Ohio St.3d 513, 2014-Ohio-1051, *Disciplinary Counsel v. Oberholtzer*, 136 Ohio St.3d 314, 2013-Ohio-3706, *Disciplinary Counsel v. Doellman*, 127 Ohio St.3d 411, 2010-Ohio-5990.

{¶42} The panel recognizes a couple of key distinguishing factors from *McNeal*. *McNeal* violated five rules of professional conduct and did not participate in the disciplinary process.

Respondent in the present matter, was charged with and found to have violated only two rules of professional conduct. Also, Respondent participated in the disciplinary process. Therefore, *McNeal* provides little guidance.

{¶43} The *Carroll* matter, on the other hand, does provide the panel guidance. While there was no allegation that Respondent used the time he took to work in his private practice and was never prosecuted, there remains a number of similarities. The facts of both matters are particularly similar. Respondent violated the corresponding Rules of Professional Conduct that Carroll did. However, the aggravating factors, particularly Respondent's failure to acknowledge wrongful nature of his conduct dictate a more severe sanction than in *Carroll*.

{¶44} Given the purpose of the disciplinary process is to protect the public, the panel believes the appropriate sanction is one-year suspension from the practice of law, all stayed.

#### **BOARD RECOMMENDATION**

Pursuant to Gov. Bar R. V, Section 12, the Board of Professional Conduct of the Supreme Court of Ohio considered this matter on December 11, 2015. The Board adopted the findings of fact, conclusions of law, and recommendation of the panel and recommends that Respondent, Roger Stephen Kramer, be suspended from the practice of law in Ohio for one year, with the suspension stayed in its entirety, and ordered to pay the costs of these proceedings.

**Pursuant to the order of the Board of Professional Conduct of the Supreme Court of Ohio, I hereby certify the foregoing findings of fact, conclusions of law, and recommendation as those of the Board.**



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RICHARD A. DOVE, Director