

IN THE SUPREME COURT OF OHIO

Roger Stephen Kramer
24079 Laureldale Road
Shaker Heights, Ohio 44122

:

CASE NO. 2015-2000

:

Respondent,

:

:

:

Disciplinary Counsel
250 Civic Center Drive, Suite 325
Columbus, Ohio 43215-7411

:

**RELATOR'S OBJECTION TO
THE BOARD OF PROFESSIONAL
CONDUCT'S RECOMMENDATION**

:

Relator.

:

**RELATOR'S OBJECTION TO THE BOARD OF PROFESSIONAL CONDUCT'S
RECOMMENDATION**

Scott J. Drexel (0091467)
Disciplinary Counsel

Mary L. Cibella (0019011)

Office of Disciplinary Counsel
250 Civic Center Dr., Suite 325
Columbus, Ohio 43215
(614) 461-0256
(614) 461-7205 (f)
Scott.drexel@sc.ohio.gov

614 West Superior Avenue, Suite 1300
Cleveland, Ohio 44113
(216) 344-9220
(216) 664-6999 (f)
mlcibella@worldnetoh.com

Counsel for Relator.

Counsel for Respondent.

Roger Stephen Kramer (0019210)

Respondent.

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INTRODUCTION

Relator objects to the Board of Professional Conduct's recommendation that respondent be suspended from the practice of law for one year, all stayed, and respectfully requests that this Court impose an actual suspension of one year.

FACTS

Although the facts are cogently set forth in the Board's Findings of Fact, Conclusions of Law, and Recommendation ("Report"), attached as Appendix A, relator presents the following summary.

In May 2011, the Cuyahoga County Council appointed respondent, a lawyer with 26 years' experience as a prosecutor, to the Cuyahoga County Board of Revision ("BOR"), where he served as a hearing officer until his resignation on September 14, 2012. During respondent's 15-month tenure at the BOR, respondent was required to accurately record the time he began and

finished work for the day. Report at ¶14. Respondent used the county's online system, MyHR, to enter and record his start and end times. *Id.*

The Cuyahoga County Personnel and Policies Manual, which respondent acknowledged receiving upon commencement of his employment with the BOR, allowed for respondent to receive "exchange time," which meant that an employee could accumulate one hour of time for every hour the employee worked over the required 40 hours. *Id.* at ¶15. Similar to "comp time," exchange time could be used as an additional form of paid leave. *Id.* As listed in Section 6.08 of the Personnel and Policies Manual, exchange time was subject to the following limitations:

- (a) There must be 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.

Id. at ¶ 16.

The County calculated a full work day as 8:30 am to 4:30 pm as part of the eight-hour day, which included an hour of paid lunch and two paid 15-minute breaks. *Id.* at ¶ 17, Rel. Ex. 8. The 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.* Respondent was considered a "flexible schedule employee," meaning that he could satisfy his eight-hour work day by beginning before 8:30 am or by working past 5:00 pm. *Id.* at ¶ 15.

Since the beginning of his employment at the BOR, respondent submitted his timesheet via MyHR, which required supervisor approval. Report at ¶ 18. Initially, respondent's time card was approved by Martin Murphy; however, in or around May 2012, Shelly Davis replaced

Murphy, and she then began approving respondent's timecards, despite her suspicion that respondent was abusing time. Tr. p. 72-73.

Concerned that some employees were falsifying their time records, Davis, in the summer of 2012, informed the entire department via email and a hard-copy memo that, moving forward, all employees were required to work from 8:30 am to 4:30 pm., thus eliminating the "flexible" schedule option that some employees, including respondent, had used. Report at ¶ 19. Davis also requested an audit of her entire department by the Cuyahoga County Inspector General, Nailah Byrd. *Id.* at ¶ 20. The Inspector General's audit concluded that respondent was abusing time by consistently entering more hours on his timesheet than actually worked. *Id.* at ¶ 21. The Inspector General arrived at this conclusion after examining the parking garage records in conjunction with respondent's timesheets. *Id.* at ¶ 22. All parties agreed that the garage records were accurate.

In her report, the Inspector General identified 129 occasions between January 1, 2012 and July 13, 2012 in which respondent falsified his timesheets—107 of which reflected respondent entering the parking garage after the arrival time that respondent entered on his timesheet, and 22 of which reflected respondent leaving the parking garage before the departure time respondent entered on his timesheet. Rel. Ex. 5, p. 3.¹ Relator's investigation, which covered a longer time period than the Inspector General's report—from May 11, 2011 through July 13, 2012—uncovered 196 occasions in which respondent falsified his timesheets. *Id.* at ¶ 26.

¹ The board's report, at ¶ 22, incorrectly states that on the 22 occasions, the garage records reflect that respondent exited the parking garage after his departure time stated on his timesheet, incorrectly concluding that respondent "worked more hours than his timesheet suggested." The Inspector General's report correctly states that on those 22 occasions, respondent exited the garage before the quit time reflected on his timesheet. Rel. Ex. 5, p.3.

The following chart, which was taken from the Inspector General’s Report, illustrates the depth of the discrepancies between the time respondent entered the parking garage and the time he recorded on his timesheet:

Date	Garage Time In	MyHR Timesheet Time In
8/6/12	8:22 am	7:30 am
8/7/12	9:01 am	7:30 am
8/8/12	8:53 am	7:30 am
8/9/12	8:26 am	7:30 am
8/10/12	9:03 am	7:30 am
8/13/12	8:57 am	7:30 am
8/14/12	8:58 am	7:30 am
8/15/12	8:57 am	7:30 am
8/16/12	8:23 am	7:30 am

Rel. Ex. 5, p. 6.²

On August 24, 2012, the Inspector General and her assistant, Rebecca Keck, requested a meeting with respondent, during which the respondent freely “admitted to lying on his time sheets for the purposes of receiving exchange time.” *Id.* at ¶ 23. Respondent further “admitted that he knew what he was doing was wrong, but that he knew he could get by with it.” *Id.*

² In order to confirm the accuracy of the garage records, the Inspector General cross-checked its findings against the security camera footage. The chart reflects dates beyond the July 13, 2012 end date of the Inspector General’s investigation; however, the chart confirms that respondent’s deception continued until his suspension without pay.

Respondent's outright admission took Byrd, and Keck, by surprise, as evidenced by Byrd's testimony:

I remember this one specifically. And that's why I referred to the kicking of Rebecca under the table, because from street level defendants to witnesses to everything, I've never so quickly had someone admit to everything... And I was thrown off as to where to go because he so readily admitted that he knew what he was doing, he knew what he was doing was wrong and he had thought of creative ways to pay back the County for the money.

Tr. p. 158.

Keck's hand-written notes that she took during the meeting reflect respondent's admissions, as does the Inspector General's report. Report at ¶23; Rel. Ex. 5, p. 8. The board characterized Byrd and Keck's testimony during the disciplinary hearing as "compelling." *Id.* at ¶ 33.

At the hearing, respondent testified that he could not recall making the admissions to Byrd and Keck, but if he did, it was because of the anxiety he was experiencing during the meeting. *Id.* at ¶ 24. "I was a nervous wreck." Tr. p. 304. Contrary to respondent's self-serving assertions, Keck testified that respondent was "subdued" during the interview.

He was very subdued. And when it finally came out as to what we were interviewing him for and he admitted I remember he took office [sic] glasses and put them on the table. I don't know why I remember that but I do remember that. And from that point on it was a very conversational—I mean, it wasn't—I mean, there were some interviews where I had been in where it was very confrontational and they are denying everything. But with Mr. Kramer, after that point, it was very—just like you and I are talking. Very straightforward.

Tr. p. 188-189. The panel characterized respondent's testimony at the hearing as "not credible." Report at ¶ 33.

After the meeting with Byrd and Keck, respondent was immediately relieved of his duties without pay. Respondent was then given the option to resign or he would be fired. Report at ¶ 25. Respondent resigned on September 14, 2012. *Id.*

OBJECTIONS

RESPONDENT'S MISCONDUCT WARRANTS A ONE-YEAR SUSPENSION FROM THE PRACTICE OF LAW.

This Court has long held that “when an attorney violates DR 1-102(A)(4), the attorney will be actually suspended from the practice of law for a period of time.” *Disciplinary Counsel v. Fowerbaugh* (1995), 74 Ohio St.3d 187, 190, 1995-Ohio-261, 658 N.E.2d 237. In the case at bar, respondent violated Prof. Cond. R. 8.4(c), the successor to DR 1-102(A)(4), by engaging in a conscious, systematic, and fraudulent scheme to cheat Cuyahoga County by misrepresenting the time he actually worked, thereby ostensibly earning over 100 hours of “exchange” time, which he later used as paid leave. And although this Court has tempered its sanctions in cases involving fraud or dishonesty where there are significant mitigating factors, no such factors exist in this case.³ The board correctly found that respondent also violated Prof. Cond. R. 8.4(d)—conduct prejudicial to the administration of justice—by ignoring the county rules and regulations and falsifying documentation that necessitated the use of significant county resources.” Report at ¶ 33. In addition to the misconduct, the board found as aggravating factors that respondent:

- Acted with a dishonest or selfish motive;
- Engaged in a pattern of misconduct;
- Committed multiple offenses; and,
- Refused to acknowledge the wrongful nature of his misconduct.

Report at ¶ 35.

Although relator takes no exception to the board’s findings of fact and conclusions of law, its recommended sanction is contrary to this Court’s precedent. Respondent’s actions,

³ In mitigation, the board found that respondent had no previous discipline, positive character evidence, and that his resignation from the BOR constituted the imposition of other penalties or sanctions. Report at ¶ 36.

standing alone, warrant an actual suspension. And when this Court considers the aggravating factors, in conjunction with the board's finding that respondent's testimony at the hearing was not credible, there is simply no basis for a fully-stayed suspension. Respondent's misconduct warrants a one-year suspension from the practice of law.

In arriving at its decision to stay the entire one-year suspension, the board relied most heavily upon *Disciplinary Counsel v. Carroll*, 106 Ohio St.3d 84, 2005-Ohio-3805, 831 N.E.2d 1000. In *Carroll*, this Court imposed a six-month stayed suspension upon Attorney Greg Carroll after it was determined that he submitted fraudulent timesheets while serving as the executive director of the barber board. *Id.* at ¶ 4. In *Carroll*, the Inspector General's report found that on 11 separate occasions over a six-month period, Carroll submitted inaccurate timesheets claiming to have worked through his lunch hour to earn comp time and worked full days despite having spent part of those days working at his private law practice. *Id.* at ¶ 4, 5. In total, Carroll inaccurately reported 90 hours of time. *Id.* at ¶ 5.

Although factually similar, there are several compelling factors that distinguish *Carroll* from the case at bar. First, in *Carroll*, the Court specifically found that Carroll did not act with a dishonest or selfish motive. *Id.* at ¶ 6. "His record-keeping was deficient, but he was not attempting to receive pay for work that he did not perform, according to the board." *Id.* Second, Carroll immediately resigned his position as the executive director of the barber board, repaid the \$5,115 in restitution to the state of Ohio, and pled no contest to a second-degree misdemeanor relating to the "reckless" manner in which he recorded and submitted his timesheets while serving as a public official. *Id.* at ¶ 6. Third, and perhaps most compelling, the Court found that Carroll "showed genuine remorse and explained his actions without offering excuses to justify his actions." *Id.* Finally, there were no aggravating factors in *Carroll*.

The case at bar, on the other hand, contains a dearth of mitigation and overwhelming aggravation evidence, thus differentiating *Carroll* and requiring the imposition of an actual suspension. Unlike Carroll, respondent acted with a dishonest and selfish motive, prompting the board to find that “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.” Report at ¶ 35.

Unlike Carroll, respondent never acknowledged his misconduct, prompting the board to find that:

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.

Id.

Unlike Carroll, respondent avoided criminal prosecution and made no effort to repay the county for his theft. In fact, at the disciplinary hearing, Carroll claimed the county owed him 16.5 hours of time he claimed to earned but never used. Tr. p. 301.

Unlike Carroll, who submitted 11 inaccurate timesheets over a six-month period, respondent falsified his entries on nearly 200 different occasions, spanning 15 months.

Carroll understood the magnitude of his misconduct. And his post-misconduct behavior provided the Court with a basis to stay his suspension. “* * * [R]espondent’s cooperation with the investigators, his forthright and prompt effort to remedy any harm caused by his errors, and the absence of any dishonest or selfish motive on his part all counsel against his actual suspension from the practice of law.” *Carroll* at ¶ 14. Despite the absence of any aggravating factors and Carroll’s strong mitigation, two of the Justices dissented, opting instead to suspend Carroll for six months. *Id.* at ¶ 16.

In the case at bar, respondent's post-misconduct behavior strongly suggests that he will remain a threat to the public. Rather than admit wrongdoing, respondent attempted to mislead the board by concocting stories in an effort to justify his unethical behavior, lending credence to the age-old adage, "The cover-up is worse than the crime." The board found four aggravating factors and could have easily found two additional ones—failure to make restitution and the submission of false statements during the disciplinary process. See. Gov. Bar R. V(13)(B)(5) & (9). Respondent's misconduct, coupled with these aggravating factors, warrants an actual suspension from the practice of law.

In its report, the board noted relator's reliance on *Disciplinary Counsel v. McNeal*, 131 Ohio St.3d 224, 2012-Ohio-785, 963 N.E.2d 815; however, the board concluded that *McNeal* "provides little guidance," stating that the lawyer in *McNeal* failed to cooperate in the disciplinary process and that he committed five rule violations compared to respondent's two. Report at ¶ 42. But *McNeal*, which involved a lieutenant-colonel in the United States Air Force Reserve Judge Advocate General Corp. who falsified paystubs amounting to \$6,518.54 in pay for hours he had not worked and also used his military Lexis-Nexis account for his private law practice, is quite instructive.

In *McNeal*, the Court distinguished *Carroll*, stating that McNeal's misconduct was more serious than the misconduct in *Carroll*, but only because McNeal failed to cooperate in the disciplinary process, which led to two additional disciplinary charges. *Id.* at ¶ 9. Based upon his failure to cooperate, which was the only aggravating factor, the Court suspended McNeal for one year. *Id.* at ¶10.

In the case at bar, respondent's "participation" in the disciplinary process should not be confused with cooperation. The board refused to give respondent credit for "full and free

disclosure to the board or a cooperative attitude toward the proceedings,” under Gov. Bar. R. V(13)(B)(4). Instead, it merely noted that respondent “participated” in the proceedings. Report at ¶ 42. In a sense, respondent’s “participation” was more of an aggravating factor than McNeal’s complete lack of cooperation. Whereas McNeal offered no defense, respondent “changed his story again and again to fit the defense of this matter...” *Id.* at ¶ 35. Respondent’s “participation” consisted of him challenging relator’s case from the moment it opened its investigation, to filing a motion for summary judgment, a motion for a directed verdict, and a motion to dismiss—all of which prompted the board to conclude that, “Those motions also suggest respondent never believed he did anything wrong.” Report at ¶ 35. In addition, respondent’s “participation” consisted of him fabricating versions of events and providing false testimony to the board. Respondent’s “participation” exposed him as a lawyer who is willing to distort the truth in an effort to avoid misconduct.

Each day respondent entered the office, he made a conscious decision to commit fraud. On almost 200 separate occasions—during a 15-month span—respondent intentionally falsified his timesheets, racking up over 100 hours of unearned exchange time that respondent later used as paid leave. And respondent knew exactly what he was doing, which is why he immediately confessed to the fraud when confronted by the Inspector General.

At the disciplinary hearing, respondent admitted that he had no idea that he was the subject of the Inspector General’s investigation into the abuse of time. In fact, respondent testified that the first time he learned of the Inspector General’s investigation was when he walked into the August 24, 2012 meeting with Byrd and her assistant, Rebecca Keck. Tr. p. 53. When respondent appeared at the meeting, Byrd asked respondent if he knew why he was there, to which respondent replied, “yes.” *Id.* at p. 133. At the disciplinary hearing, Byrd testified:

I said okay. I said to him well, do you know why you are here today. And he said yes. I said oh, well tell me why you're here today. And he said because of what I've been doing. And I said well, what you mean because of what you've been doing. And he said because I've been lying on my timesheet. And I said okay. And at this point—and I remember this. I remember kicking Rebecca under the table because I could not believe that he was telling me this. And I said okay, and why were you lying on your timesheet. And he said because I could. And I said well, what does that mean. He said it was easy to do and easy to get away with. And I said okay. I said well, just to review, what do you mean by lying on your timesheet. And said I was saying that I was at work when I wasn't at work. And I said well, where were you when you were saying you were at work. And he said I was at home. And I said okay.

Tr. pp. 133-134.

When initially confronted, respondent admitted to engaging in the fraudulent conduct. Yet when it came time to face disciplinary charges, the board found that respondent changed his story “again and again.” Report at ¶ 35. Rather than admit wrongdoing, respondent concocted several incredible stories in an effort to avoid discipline.

Initially, respondent claimed that, based upon his calculations, he owed the county only six hours of time. Rel. Ex. 19. But respondent's calculation was based upon his own flawed logic. Respondent claimed to have consistently worked through his paid lunch hour, thereby earning an extra hour of time. Under respondent's self-serving interpretation, if he worked through his paid lunch hour, he was entitled to claim nine hours of work time even though he was only in the office for eight hours. Even if this Court were to accept respondent's manufactured interpretation and calculation, it was still deceptive. Regardless of whether he worked through lunch or not, respondent still falsified his timecard on an almost daily basis by claiming to have arrived at work much earlier than he actually did.

The following exchange illustrates respondent's dishonesty:

Relator: Whether you worked through lunch or not there was a significant discrepancy between the time you actually arrived at work and the time that you recorded on your timesheet that you arrived at work, is that correct?

Respondent: Yes.

Relator: And you intentionally did that, did you not? That's a yes or no.

Respondent: I don't know if I could answer it yes or no. I would say unwittingly yes.

* * *

Relator: But you would acknowledge that you made a choice to enter a time on your timecard that did not actually correspond to the time that you arrived, correct?

Respondent: Yes.

Relator: And there was nothing on your timecards from which you could determine that the reason that you were claiming additional time or exchange time was because you had worked through lunch, correct?

Respondent: Correct.

Tr. pp. 311-312.

Incredibly, respondent attempted to convince the panel that because no one questioned his false entries, he assumed the practice was appropriate.

Respondent: * * * But when nobody criticized me, nobody corrected me and they had the records of my hours—

Panel: What does that mean? I mean, I guess I'm really confused when you say if nobody said it was wrong it must be okay. And I'm troubled by that.

Respondent: I'm not saying it's okay. I'm not saying—I'm saying that nobody brought it to my attention that I should be doing it otherwise.

* * *

Panel: But it's your testimony that because nobody said anything to you about taking 136 hours it was okay. It is okay, actually. I mean you're even saying it now, it's okay?

Respondent: I think it is okay. * * *

Tr. pp. 354-355.

Respondent stole over 100 hours of time from the county. That translates to over \$3,000.⁴ Yet respondent—a lawyer with over 30 years’ experience—wants this Court to believe that he didn’t know it was wrong because no one told him it was wrong. The board specifically found that “Respondent believed that because his previous supervisor never objected to the practice, it was permitted.” Report at ¶ 28. Interestingly, the Inspector General audited the entire BOR—some 55 employees, yet respondent and one non-lawyer employee were the only two people who were abusing the system. Tr. p. 70.

Had respondent legitimately accrued the exchange time, he would have simply noted on his timesheet that he was earning exchange time by working through this lunch hour. He never did. Tr. p. 41. And the reason he never noted that he was working through lunch was because he rarely worked through lunch. Shelly Davis testified that respondent exercised “almost daily” during the lunch hour, and that she was never aware of respondent working through lunch. *Id.* at p. 77. And although respondent insinuated that his previous supervisor, Martin Murphy, was aware that he was working through lunch, Murphy was conspicuously absent from the disciplinary hearing and did not testify. Tr. p. 54.

Respondent’s explanation further lacks merit because, under the county rules and regulations, respondent had to obtain approval from his supervisor to earn exchange time. Report at ¶ 16. At the hearing, the uncontroverted evidence was that respondent never sought approval from his supervisors. Tr. pp. 92; 302; 354. Respondent knew exactly what he was doing, which is why—by his own admission—he “disregarded” his supervisor’s instructions regarding work hours and flex time. Tr. p. 341. When one of the panel members suggested that respondent kept himself “willfully ignorant” of his supervisor’s mandates regarding time and

⁴ Respondent earned \$30.99 per hour. Consequently, \$30.99 x 100 hours equals \$3,099. (See Rel. Ex. 2)

work, respondent agreed with the characterization. *Id.* at p. 340. Respondent knew the rules. He just chose to ignore them.

At the hearing, respondent falsely stated, “But again, I certainly didn’t do it with the intent of cheating the county or getting credit for time that I worked or that I didn’t work. That wasn’t my intention at all.” *Id.* at p. 355. Respondent’s testimony was blatantly false and completely contradicted by his previous admissions to Byrd and Keck.

As stated previously, respondent immediately confessed when originally confronted by the Inspector General. If there had been even a shred of truth to respondent’s claim that he had been accruing exchange time by working through his paid lunch, he would have immediately disclosed that to Byrd and Keck. But he didn’t:

Relator: During the course of your meeting with Mr. Kramer on August 24th did he ever say I’ve worked through lunch, I work during my breaks and that I really worked all this time that I claimed?

Byrd: No, no, no, no. He never said that. He said he was at home.

Tr. p. 136.

Now that respondent’s law license is at stake, he has shown a disturbing propensity to fabricate, despite overwhelming evidence of guilt. In fact, respondent’s latest version of events materialized during the disciplinary process. Ignoring his initial admission to the Inspector General, and his subsequent tale regarding the net difference of six hours, respondent testified at the hearing that the county actually owed him for 16.5 hours of time. Report at ¶ 35, Tr. p. 301. Respondent’s ever-changing story was not lost on the board. “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.” Report at ¶ 35. In other words, respondent lied to the board.

Respondent's testimony was beyond the pale. In fact, in order for this Court to adopt respondent's version of events, it would have to believe that:

- Nailah Byrd testified falsely during disciplinary hearing and misrepresented her findings in the Inspector General's September 4, 2012 report;
- Rebecca Keck testified falsely at the disciplinary hearing, misrepresented her findings in the Inspector General's September 4, 2012 report, and fabricated her contemporaneous hand-written notes from the August 24, 2012 meeting with respondent, in which she memorialized respondent's admissions (see Rel. Ex. 7);
- Shelly Davis testified falsely at the disciplinary hearing that respondent ran "almost daily" at lunch and that she was not aware that respondent worked through lunch.
- Respondent signed an acknowledgement that he received the county's Personnel Policies and Procedures Manual, but never read it (Tr. p. 26);
- Respondent never read Davis' June 8, 2012 memorandum from his immediate supervisor (Tr. p. 337); and,
- Respondent never read Davis' July 9, 2012 email (Tr. p. 337).

The more plausible theory is that respondent exploited the system to his benefit until he got caught. Then, in an effort to extricate himself from the disciplinary process, he fabricated several stories. Under similar circumstances, this Court has stay a suspension. "Unlike in *Hoague*, however, we decline to stay any part of Cleary's suspension in light of the board's finding that Cleary made false and deceptive statements to the panel in an attempt to exculpate herself." *Cleveland Bar Assn. v. Cleary*, 93 Ohio St.3d 191, 207, 2001-Ohio-1326, 754 N.E.2d 235. Although the board did not specifically find that respondent made "false and deceptive" statements, it characterized his testimony as "not credible." Report at ¶ 33 & 35. In light of the overwhelming documentary evidence (i.e., timesheets and garage records), coupled with respondent's admissions to Byrd and Keck, this Court can only conclude that respondent's testimony was false and deceptive, and aimed at exculpating himself from discipline.

Consequently, this Court should reject the board's recommendation of a fully stayed suspension and follow its precedent by imposing a one-year suspension from the practice of law.

CONCLUSION

"Respect for our profession is diminished with every deceitful act of a lawyer. We cannot expect citizens to trust that lawyers are honest if we have not yet sanctioned those who are not." *Fowerbaugh, supra*, at 190, 1995-Ohio-261, 658 N.E.2d 237. On an almost daily basis, respondent made the conscious decision to falsify his timesheets in an effort to cheat the county by accruing paid time for which he was not entitled. For 15 months, respondent succeeded. And although he initially admitted his transgressions when confronted by the Inspector General, respondent has since recanted, thus warranting a one-year suspension from the practice of law.

Respectfully submitted,

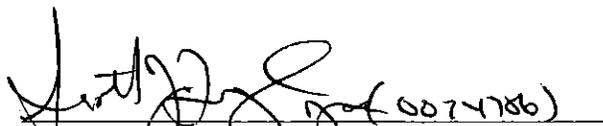


Scott J. Drexel (0091407) 0074720
Disciplinary Counsel

Counsel of Record
250 Civic Center Drive, Suite 325
Columbus, Ohio 43215-7411
614.461.0256
614.461.7205 – fax
Scott.Drexel@sc.ohio.gov

CERTIFICATE OF SERVICE

I hereby certify that copies of Relator's Objection to the Board of Professional Conduct's Recommendation has been served upon the Board of Professional Conduct, c/o Richard A. Dove, Director, via e-mail transmission (BOCfilings@sc.ohio.gov); and to respondent's counsel, Ms. Mary L. Cibella, via electronic mail transmission (mlcibella@worldnetoh.com) on this 19th day of January, 2016.



Scott J. Drexel (0091467)

**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**

Respondent

Disciplinary Counsel

Relator

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

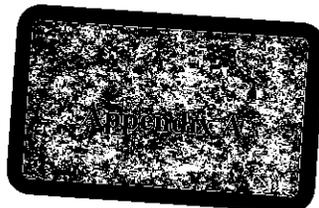
OVERVIEW

{¶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, 2012.¹ 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

¹ 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.² 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.

² 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.

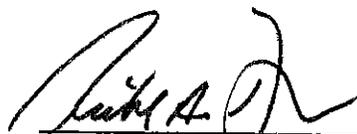
{¶43} The *Carroll* matter, on the other hand, does provide the panel guidance. While there was no allegation that Respondent used the time he took to work in his private practice and was never prosecuted, there remains a number of similarities. The facts of both matters are particularly similar. Respondent 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.



RICHARD A. BOVE, Director