

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL,	:	No. [] Disciplinary Docket No. []
Petitioner	:	
	:	No. 96 DB 2005
v.	:	
	:	Attorney Registration No. []
[ANONYMOUS]	:	
Respondent	:	([] County)

OPINION

I. HISTORY OF PROCEEDINGS

On June 21, 2005, the Supreme Court of Pennsylvania issued an Order remanding to the Disciplinary Board for a hearing the matter of [Respondent] to determine the appropriate sanction, if any, to be imposed as reciprocal discipline pursuant to Rule 216, Pa.R.D.E. The basis for this Order was the Order of April 17, 2003 issued by the Judge Advocate General of the Navy which indefinitely suspended Respondent. On September 22, 2005, a Motion to Appoint Hearing Committee was filed by the Office of Disciplinary Counsel. Respondent filed an Answer to Motion to Appoint Hearing Committee on October 12, 2005.

A pre-hearing conference was held on December 14, 2005 before Hearing Committee Chair [], Esquire. A sanction hearing was held on January 18, 2006, before a District [] Hearing Committee chaired by Mr. [] with Members [], Esquire, and [], Esquire. A continued hearing was held on March 8, 2006. [], Esquire, represented Respondent at both hearings.

Following the submission of briefs by the parties, the Hearing Committee filed a Report on September 18, 2006 and recommended that no reciprocal discipline be imposed.

Office of Disciplinary Counsel filed a Brief on Exceptions and Request for Oral Argument on October 10, 2006.

Respondent filed a Brief Opposing Exceptions on October 30, 2006.

Oral argument was held on November 14, 2006 before a three member panel of the Disciplinary Board chaired by [], Esquire, with [], Esquire, and [], Esquire.

This matter was adjudicated by the Disciplinary Board at the meeting on November 15, 2006.

II. FINDINGS OF FACT

The Board makes the following findings of fact:

1. Petitioner, whose principal office is located at Suite 1400, 200 North Third Street, Harrisburg, Pennsylvania, is invested, pursuant to Pa.R.D.E. 217, with the power and duty to investigate all matters involving alleged misconduct of an attorney admitted to practice law in the Commonwealth of Pennsylvania and to prosecute all disciplinary proceedings brought in accordance with the various provisions of said Rules of Disciplinary Enforcement.

2. Respondent, [], was born in 1957 and was admitted to practice law in the Commonwealth of Pennsylvania in 1993. His office is located at []. Respondent is subject to the disciplinary jurisdiction of the Disciplinary Board of the Supreme Court.

3. Respondent has no prior history of discipline.

4. Respondent is a native of [A], and lived there with relatives until 1972 when he immigrated to the United States at the age of 15 years to join his mother, who had previously immigrated to this country and was living in New York. Respondent became a naturalized citizen on January 9, 1976.

5. Respondent joined the Marine Corps when he was 17 and went to night school for his high school diploma while attending boot camp.

6. Respondent began his 20 year career with the Marine Corps at Camp [] in [], where he served for two years. Respondent was subsequently nominated to attend the Naval Academy Prep School from which he graduated in 1977, and then attended the United States Naval Academy from which he graduated in 1981.

7. Respondent's 20 year military service involved deployments overseas and additional schooling throughout the country, and he eventually attained the rank of Major in 1993.

8. Respondent graduated from the [] School of Law in May of 1992. During law school he was a full time Marine Corps officer.

9. In or about July 1995 the Judge Advocate General of the Navy granted Respondent certification, which permitted Respondent, while acting in either a military or civilian capacity, to represent members of the Naval Service.

10. Respondent served at [] where he was the head of legal assistance, which provided legal support for military members and their dependants in a variety of civil matters. Respondent typically had six legal staff members in his department.

11. Respondent switched to criminal defense as a JAG senior defense counsel. Respondent defended military members who were faced with court martial proceedings.

12. By 1995 Respondent was the most experienced and decorated JAG in the Marine Corps.

13. In 1992, after Respondent's mother died, he returned to [A] to bury her. Thereafter Respondent made annual trips to [A] to visit his mother's grave. During one such trip Respondent visited the farm of [B], a childhood friend, who was trying to list the farm for sale in the United States and had asked for Respondent's assistance.

14. On January 8, 1997, Respondent, [B] and [C], another friend, met at the [B] Farm where they encountered one [D], a [A] national who had been harassing Ms. [B] and trespassing on the farm.

15. During the visit to the farm, Mr. [D] became confrontational, despite Respondent's efforts to resolve the longstanding issues between Ms. [B] and Mr. [D]. After physical contact wherein Respondent struck Mr. [D] several times in the mid-section, Mr. [D] walked over to the vehicle in which Ms. [B] was sitting, and then fell after backing away from the vehicle.

16. After a few moments, everyone noticed that Mr. [D] was not moving, was bleeding slightly, had swelling on his head and difficulty breathing. Respondent and Mr. [C] moved Mr. [D] out of the sun. Respondent tried to revive Mr. [D] with cool water and loosened his clothing. After determining that Mr. [D] required immediate medical attention, the group contacted a physician and went to the nearest hospital.

17. Mr. [D] died at the hospital. Respondent, Ms. [B], Mr. [C] and the doctor went to the police station to report the incident.

18. Respondent, Ms. [B] and Mr. [C] were charged with murder and conspiracy. The trial took place some months later, during a period of approximately six days during which all three defendants were tried simultaneously.

19. There were some irregularities in the proceeding which would result in a characterization of the proceedings as substantially deficient as compared with the constitutional procedural and substantive due process guarantees afforded citizens of the United States.

20. Ms. [B] and Mr. [C] were found not guilty on all charges.

21. Respondent was found guilty of manslaughter, a lesser included offense. He was sentenced to two years of imprisonment at hard labor.

22. In February 1999, Respondent returned to the United States after serving his sentence. He reported as soon as practical to the Marine Corps base at [], as he was on active status.

23. On June 3, 1999, due to the criminal conviction in [A], the military convened a Board of Inquiry. This was an administrative hearing to determine whether a military member should be retained or separated from the service.

24. Members of the Board of Inquiry were not attorneys or judges, but were selected to serve because of grade and experience. The rules of evidence did not apply during the proceeding.

25. The Board of Inquiry recommended that there was misconduct, improper leadership of Respondent's grade (Major), and that Respondent be separated from the Marine Corps on "other than honorable" grounds.

26. The Secretary of the Navy, who has overall and plenary jurisdiction over the matter, did not adopt the findings of the Board of Inquiry, and recommended that Respondent be retired at the next inferior grade, as a Captain.

27. On March 1, 2000, Respondent retired from the military with the rank of Captain, having full financial and military related honors and benefits attendant with this rank.

28. Respondent obtained employment as an associate attorney at the [] law firm of [] & [].

29. In June 2002 the JAG initiated disciplinary proceedings against Respondent. This occurred after Respondent had ceased being an active attorney under the supervision of the JAG and some two years after he was honorably discharged from the Marine Corps.

30. Although Respondent had legal representation, the JAG proceeding did not provide for a hearing or the ability to confront adverse witnesses. Respondent's representation was limited to written submissions.

31. Respondent was unable to respond to the opinions, findings or recommendation of the rules counsel and was unaware what records, documents or transcripts were provided for the JAG review.

32. By Memorandum dated April 17, 2003, the Judge Advocate General indefinitely suspended the certification of Respondent under Article 27(b) of the Uniform Code of Military Justice from representing members of the Naval Service, in either a military or civilian capacity, before Department of the Navy courts-martial, the Navy – Marine Corps Court of Criminal Appeals, Department of the Navy courts or boards of inquiry or other investigations conducted under the provisions of the JAG Manual, administrative discharge boards, or other proceedings where members are provided the opportunity to be represented by counsel under Article 27(b) of the Uniform Code of Military Justice, for violation of Rule 8.4, in that Respondent “commit[ted] misconduct by committing

a criminal act that reflects adversely on [his] fitness as an attorney.” The Judge Advocate General also indefinitely suspended Respondent's authorization to provide individual legal assistance in the Department of the Navy and prohibited Respondent from practicing law in any capacity, including providing legal advice of any type, in the Department of the Navy.

33. This Order of the JAG is subject to review at any time until the death of Respondent.

34. On October 8, 2004, Chief Disciplinary Counsel forwarded to the Supreme Court of Pennsylvania notice of Respondent's indefinite suspension.

35. By Order dated November 16, 2004, the Supreme Court, in accordance with Pa.R.D.E. 216, issued a Notice and Order directing Respondent to inform the Court of any claim he had that the imposition of the identical or comparable discipline in this Commonwealth would be unwarranted and the reasons therefore.

36. On December 14, 2004, Respondent filed with the Court a Response to Notice and Order, in which Respondent raised numerous challenges under Pa.R.D.E. 216(c)(1)-(3).

37. On January 13, 2005, ODC filed with the Court a Reply of Office of Disciplinary Counsel to Respondent's Response to Notice and Order.

38. On February 1, 2005, Respondent filed with the Court Respondent's Response to Reply of Office of Disciplinary Counsel.

39. On February 15, 2005, ODC filed with the Court a Reply of Office of Disciplinary Counsel to Respondent's Response to Reply of Office of Disciplinary Counsel.

40. On February 24, 2005, Respondent filed with the Court Respondent's Sur-Reply to Reply of Office of Disciplinary Counsel.

41. By Order dated March 15, 2005, the Court ordered the Prothonotary to schedule the matter for oral argument.

42. On April 7, 2005, Respondent filed with the Court Respondent's Brief Pursuant to Order Dated March 15, 2005.

43. On April 29, 2005, ODC filed with the Court a Brief of Office of Disciplinary Counsel in Support of Comparable Reciprocal Discipline.

44. On May 16, 2005, both parties appeared before the court and delivered oral argument.

45. By Order dated June 21, 2005, the Court remanded the matter to the Disciplinary Board to determine the appropriate discipline, if any, to be imposed upon Respondent pursuant to Rule 216, Pa.R.D.E., stating that "[t]his directive arises from the fact that the Pennsylvania Rules of Disciplinary Enforcement do not expressly provide for the imposition of indefinite suspension and, thus, the Court is reluctant to impose the same as reciprocal discipline in this matter."

III. CONCLUSIONS OF LAW

The following Rule of Disciplinary Enforcement sets the boundaries for this Board's consideration of the instant matter:

Pa.R.D.E. 216(c) – The Supreme Court may impose identical or comparable discipline unless Disciplinary Counsel or the respondent-attorney demonstrates, or the court finds that upon the face of the record upon which the discipline is predicated it clearly appears:

(1) that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process.

(2) there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Court could not consistently with its duty accept as final the conclusion on that subject;

(3) that the imposition of the same or comparable discipline would result in grave injustice, or be offensive to the public policy of this Commonwealth.

The Board concludes:

1. The Order of the Judge Advocate General dated April 17, 2003, which indefinitely suspended Respondent from practice before the Department of the Navy, is the operative Order relevant to the Board's consideration as to reciprocal discipline.

2. An indefinite suspension is not expressly recognized among the types of discipline available in Pennsylvania. Pa.R.D.E. 204.

3. The proceeding by the Judge Advocate General resulting in the indefinite suspension was not in accordance with the disciplinary proceedings of this Commonwealth, and was otherwise lacking in the opportunity for Respondent to be heard.

4. In accordance with Pa.R.D.E. 216(c)(1), no reciprocal discipline is appropriate in this case.

IV. DISCUSSION

Before this Board is the difficult and novel question of what discipline, if any, is to be imposed on Respondent as reciprocal discipline pursuant to Rule 216, Pa.R.D.E. This question reaches the Board after a convoluted history of proceedings. The impetus for Pennsylvania's disciplinary proceeding against Respondent was the Order of the Judge Advocate General dated April 17, 2003, whereby Respondent's certification to act as a JAG lawyer was indefinitely suspended due to his violation of Rule 8.4, in that he committed misconduct by committing a criminal act that reflected adversely on his fitness as an attorney. While this Order of the JAG is the operative event informing the Supreme Court's action, of necessity the Board must look to the events which gave rise to the proceeding before the JAG.

The facts as set forth above reveal that Respondent, a citizen of the United States and a Marine Corps officer, was convicted of manslaughter in [A] in 1997. Analysis of the [A] trial proceedings reveals that there were a number of irregularities which show the [A] system to be deficient as compared with the constitutional, procedural and substantive due process guarantees afforded all citizens of the United States. Be that as it may, Respondent was sentenced to two years of hard labor; served his sentence; and returned to the United States in 1999. Respondent reported to [] in [] as he was still an active duty United States Marine.

In June of 1999, a Board of Inquiry was convened by the military as a result of Respondent's [A] criminal conviction. This inquiry did not involve JAG and pertained to Respondent's fitness as an officer, not a lawyer. The Board of Inquiry recommended that Respondent be separated from the Marine Corps on "other than honorable grounds". However, the Secretary of the Navy, who maintained overall jurisdiction over the matter,

recommended that Respondent be retired at the next inferior grade, or as a captain. It is unclear how the matter arrived before the Secretary of the Navy or the reasons why the Secretary of the Navy did not agree with the recommendation of the Board of Inquiry. Again, this Board is aware only of the end result of Respondent's retirement as a captain with full benefits and honors attendant with that rank.

Respondent retired from the military on March 1, 2000 and subsequently obtained legal employment with the law firm of [] in []. In June of 2002, the JAG initiated disciplinary proceedings against Respondent as to his fitness as a lawyer in the military. There is no explanation in the record as to why JAG waited more than two years after Respondent's retirement from the military to conduct its proceeding. Respondent had legal representation, but did not have a right to a hearing or the right to confront adverse witnesses. Respondent's representation was limited to written submissions. Respondent and his counsel submitted numerous documents to the Rules Counsel in defense of the disciplinary action. The Rules Counsel reviewed these documents as well as the Board of Inquiry Report and documents from the criminal trial in [A]. Rules Counsel recommended to the Judge Advocate General that Respondent be indefinitely suspended. Respondent did not have an opportunity to respond to this recommendation. The Judge Advocate General ordered that Respondent be indefinitely suspended.

The precise wording of the Supreme Court Order of June 21, 2005 states:

ORDERED that this matter be remanded to the Disciplinary Board for a hearing to determine the appropriate sanction, if any, to be imposed upon [Respondent] as reciprocal discipline pursuant to Rule 216, Pa.R.D.E. This directive arises from the fact that the Pennsylvania Rules of Disciplinary Enforcement do not expressly provide for the

imposition of an indefinite suspension and, thus, the Court is reluctant to impose the same as reciprocal discipline in this matter.

Office of Disciplinary Counsel contends that the Court is merely directing the Board to apply a sanction. The Board's review of the Court's remand order does not lead us to the same conclusion. We are directed to determine the appropriate discipline, "if any", pursuant to Rule 216, Pa.R.D.E. The Court's remand order invokes Rule 216 in toto. It is impossible to read and interpret Rule 216 without reading and interpreting 216(c) and its three subsections. These subsections allow a respondent to challenge the order of discipline from the foreign jurisdiction. A respondent may show that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; a respondent may show that there was such an infirmity of proof establishing misconduct as to give rise to the clear conviction that the Court could not consistently with its duty accept as final the conclusion on that subject; a respondent may show that the imposition of the same or comparable discipline would result in grave injustice, or be offensive to the public policy of this Commonwealth.

The Board concludes that Rule 216(c)(1) is applicable to the instant matter. The proceeding before the JAG had procedural due process but was lacking in substantive due process. Respondent had no opportunity to be heard or to challenge the evidence brought against him. He was unable to respond to the Rules Counsel's recommendation for an indefinite suspension. The JAG made its determination on only written submissions. This is substantially less than what a respondent-attorney is entitled to in Pennsylvania.

Our system is specifically designed to give a respondent the opportunity, at every step in the proceedings, to fully respond to the charges brought against him or her. This means not only the chance to answer the charges contained in a petition for discipline,

but to testify, present mitigating evidence, present character witnesses and cross examine disciplinary counsel's witnesses. There is opportunity to take exception to the Hearing Committee's recommendation and for oral argument before the Board, as well as the opportunity to request oral argument before the Supreme Court. The resultant JAG order of indefinite suspension was determined without an equivalent process. Consequently, the Board is reluctant to fully rely on the indefinite suspension order as a benchmark to impose sanction on Respondent in our jurisdiction.

The Board recommends unanimously, after a review of the record, that no reciprocal discipline be imposed on Respondent.

DETERMINATION

The Disciplinary Board of the Supreme Court of Pennsylvania determines that no reciprocal discipline be imposed.

Respectfully submitted,

THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

By: _____
Marc S. Raspanti, Board Member

Date: March 2, 2007

Board Member Jefferies did not participate in the adjudication.