

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. BD-2022-060

IN RE: KRIS C. FOSTER, ANNE K. KACZMAREK AND JOHN C. VERNER.

RESERVATION AND REPORT

Bar counsel filed a three-count petition for discipline against respondents Kris C. Foster, Anne K. Kaczmarek, and John Verner for their individual roles as assistant attorneys general in the prosecution of State chemist Sonja Farak, who was charged with, and subsequently pleaded guilty to, multiple counts each of evidence tampering, larceny of a controlled substance from a dispensary, and possession of a Class B controlled substance. The petition for discipline alleged numerous violations of the Massachusetts Rules of Professional Conduct, arising primarily from the failure to disclose potentially exculpatory evidence regarding the timing and scope of Farak's drug use and evidence tampering.

On count one, the Special Hearing Officer (SHO) appointed by the board concluded that Kaczmarek violated Mass. R. Prof. C. 1.1, 1.3, 3.4 (a), 3.4 (c), 3.8 (d), and 8.4 (d) by failing to disclose potentially exculpatory evidence known to her to the district attorneys' offices responsible for prosecuting defendants impacted by Farak's misconduct. Concluding that Verner was entitled to rely on Kaczmarek to discharge competently her duty to disclose, the SHO found that Verner did not commit such violations himself for failing to disclose exculpatory evidence. The SHO concluded, however, that Verner violated Mass. R. Prof. C. 1.3 and 5.1 (b) by failing to adequately supervise Kaczmarek to ensure that she disclosed potentially exculpatory evidence to the district attorneys.

On count two, the SHO concluded that Kaczmarek, but not Verner, committed several additional rule violations by failing to disclose evidence in response to discovery requests, failing to direct a nonlawyer under her supervision to do so, and failing to take remedial action. On count three, the SHO concluded that Foster committed multiple violations of Mass. R. Prof. C. 1.1, 1.2 (a), and 1.3 by failing to adequately prepare to respond to subpoenas and appear at hearings regarding the production of Farak-related evidence, by failing to ensure that the attorney general's office reviewed the Farak file to identify privileged documents as requested by Judge Kinder, and in drafting a letter that misled Judge Kinder to believe that the entirety of the file was reviewed and that all documents had been produced.¹ The SHO concluded further that, by misleading Judge Kinder, Foster prejudiced the administration of justice and engaged in conduct that adversely reflected her fitness to practice law, and thus violated Mass. R. Prof C. 8.4 (d) and 8.4 (h). The SHO concluded additionally that, by failing to undertake review of the Farak file and alert Foster to the existence of undisclosed documents, Kaczmarek violated Mass. R. Prof C. 1.1, 1.3 and 3.4 (c).

After considering certain factors in mitigation and aggravation, the SHO recommended that Kaczmarek be suspended from the practice of law for two years, and that Foster be suspended from the practice of law for one year and one day. Notably, the SHO considered Verner's reliance on Kaczmarek's statement to him that certain documents had been disclosed as a mitigating factor and recommended a public reprimand for Verner. Bar counsel and Foster appealed to the board.

¹ The SHO rejected Foster's argument that, in these circumstances, Mass. R. Prof. C. 5.2(b) relieved her of responsibility because she was acting in accordance with her supervisor's instructions.

The board accepted the SHO's findings of fact and most of his conclusions of law.² The board, however, concluded that the SHO erred in considering (or not considering) certain evidence in mitigation and/or aggravation for each respondent. With respect to Kaczmarek, the board concluded that the SHO should have considered as an aggravating factor that multiple victims of her malfeasance were vulnerable, as the SHO had found with Foster. With respect to Foster, the board determined that it was error for the SHO to consider uncharged conduct in aggravation, where Foster was not provided notice that such conduct would be considered. With respect to Verner, the board concluded that the SHO erroneously considered Verner's reliance on Kaczmarek as a mitigating factor because it was inconsistent with the finding that Verner's reliance on Kaczmarek was unreasonable, and that he failed to appropriately follow-up. The board noted that "the Supreme Judicial Court has never recognized this defense (reliance on others) as a special mitigating factor." Also, as to Verner, the board determined that the SHO failed to consider several aggravating factors, including his experience, the extent of harm, and the notoriety of the case and its effect on the public's confidence in the criminal justice system. The board voted to disbar Kaczmarek, to suspend Foster for one year and one day, and to suspend Verner for three months.³ Thereafter, the board filed an Information in this court.

After a hearing, and upon consideration of the written materials submitted, I am persuaded that this is a matter of public importance that raises significant issues of broad impact, including, inter alia, the extent to which a supervising attorney may rely on the representations of

² The board did not adopt the SHO's conclusion that Foster violated Mass. R. Prof. C. 1.1, 1.2 (a), and 1.3 in drafting the letter to Judge Kinder because, as bar counsel acknowledged, Foster was not charged with violating those rules on that occasion.

³ One member of the board dissented from the recommended sanction for Verner on the basis that it was "unduly lenient."

a subordinate lawyer for purposes of Mass. R. Prof. C. 1.3 and 5.1 (b), the circumstances in which that reliance, even if not permitted by the rules, may serve as mitigation, and the extent to which a subordinate lawyer's reliance on a supervising lawyer's directions may serve as a defense under Mass. R. Prof. C. 5.2 (b) or as mitigation. Because I conclude that this matter is best decided by the full court, I exercise my discretion to reserve and report this case. The record before the full court shall include all the papers filed in the county court in this case, the docket sheet for BD-2022-060, and this Reservation and Report.

By the Court,

/s/ David A. Lowy
David A. Lowy
Associate Justice

Dated: November 29, 2022