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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

FRANCES S. CHILDERS,

Respondent.
_____/

Case No. 76,126

TFB File No. 90-00363-02

INITIAL BRIEF

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PRELIMINARY STATEMENT

On February 21, 1991, Respondent, through her attorney, waived a probable cause hearing on the complaint she misappropriated $950.00 in funds belonging to the law firm of Selber and Selber, P.A., for whom she was working.

On or about June 7, 1990, a formal Complaint and Request for Admissions were filed with the Supreme Court and served upon Respondent. Answers to the Complaint and Request for Admissions were filed by Respondent in a timely fashion.

After the appointment of a Referee to hear this matter, a final hearing was held on October 29, 1990.

As a result of the final hearing, the Referee entered his report wherein he found Respondent guilty of violating Rule 3-4.3, of the Rules of Discipline of The Florida Bar; Rules 4-1.15(a), 4-8.4(b), and 4-8.4(c), of the Rules of Professional Conduct of The Florida Bar.

The Referee recommended that Respondent be suspended for a period of ninety (90) days and payment of costs.

After consideration by the Board of Governors, a Petition for Review of the Referee's Report was filed on April 1, 1991 and this appeal was effected.

STATEMENT OF FACTS

In the summer of 1986, after graduating from law school, Respondent began working for the law firm of Selber and Selber in Jacksonville, as an associate attorney (TR-77).

In August 1989, while representing one of the firm's clients in an action for levy, Respondent forwarded to the Duval County Sheriff's Department a law firm operating account check for $1,000.00 representing a deposit required as part of the action. On or about September 11, 1989, Respondent received a refund check from the Duval County Sheriff's Department in the amount of $950.00 (TR-108). The check was made out to Respondent personally, it represented funds belonging to the law firm as a refund of the deposit tendered to the Sheriff's Department (TR-108). Upon receipt of the refund check, Respondent personally endorsed it and deposited it into one of her personal accounts that she had set up for her daughter's wedding expenses (TR-109). After depositing the refunded deposit into her personal account, Respondent instructed the law firm's bookkeeper to enter a credit on the client's ledger sheet for the $950.00 refund (TR-111). As of September 11, 1989, the client had not reimbursed to the firm any of the $1,000.00 deposit sent to the Duval County Sheriff's Department. In preparing a statement to the law firm's client for whom the levy was to have been performed, the bookkeeper was given authorization by Respondent to show a credit for the refund on the client's behalf even though no deposit of the

funds had been made to the law firm (TR-111). Subsequently, while preparing the client's statement in this matter, the firm's bookkeeper discovered that the deposit check had cleared the Sheriff's account but had not been deposited with the law firm. The bookkeeper advised one of the firm's partners of her findings. Respondent was confronted by two of the partners of her law firm, one of whom was Leonard Selber, and she admitted to having taken the $950.00 refund (TR-122). Respondent immediately reimbursed to the law firm the $950.00.

On or about October 1989, Respondent's employment with the law firm was terminated (TR-78). Subsequent to her termination, in early October 1989, Respondent applied for a position with HRS as an assistant district legal counsel (TR-90). When Respondent applied for the job with HRS, she never informed them about the circumstances surrounding her termination from the Selber firm (TR-123). Respondent testified that she felt like HRS should have been informed about this matter (TR-123). The Respondent was hired by HRS and began work on or about January 25, 1990 (TR-93). Respondent had worked for HRS approximately two weeks before she informed her supervisor at HRS about the Selber incident (TR-94).

SUMMARY OF ARGUMENT

The acts of Respondent constituted a knowing and willful conversation of her employer's funds that falls within the statute definition of criminal theft. The nature of Respondent's misconduct and her deception with not only her past but present employer exhibits a pattern of deceit that dictates a stronger discipline than that recommended by the Referee. The Florida Bar feels that the discipline should be enhanced to a three-year, rehabilitative period of suspension.

ARGUMENT

The facts in this matter are uncontroverted. Respondent has been found guilty of misappropriating funds rightfully belonging to her employer, a criminal act that adversely reflects on her honesty and fitness as a lawyer.

As set forth in the pleadings and the record, it was shown that Respondent knowingly endorsed a refund check for her law firm that had been mistakenly made out in her name. This check was deposited directly into a separate savings account Respondent had set up to pay for the wedding of her daughter.

When initially confronted by her law firm's bookkeeper about the refund money, Respondent lied about the transaction and instructed the bookkeeper to give a credit to the firm's client in a knowing attempt to hide her misappropriation.

Upon being directly confronted by a partner of her law firm, Respondent admitted the misconduct and made restitution in the full amount of the refund.

Respondent was allowed to remain with her employer for approximately one month while looking for subsequent employment. Respondent applied for a position with Florida's Department of Health and Rehabilitative Services (HRS). Respondent failed to mention the reason for her discharge on her application and during her interview. HRS was only notified of her discipline problem when it became apparent that she might be suspended for her misconduct.

In his report, the Referee found Respondent guilty of each violation cited in the complaint. Respondent was found guilty of (1) having committed an act which is unlawful or contrary to honesty and justice (Rule 3-4.3); (2) failing to hold in trust funds of a third person in her possession in connection with a representation (Rule 4-1.15(a)); (3) committing a criminal act adversely reflecting on her honesty, trustworthiness or fitness as a lawyer (Rule 4-8.4(b)),; and (4) engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

There is no denying that the actions of Respondent constituted a misappropriation of funds not belonging to her. The point on appeal is whether the discipline recommended by the Referee was appropriate.

As characterized in The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1979), the misuse of a client's funds has been labeled by this Court as one of the most serious offenses a lawyer can commit. In Breed, the attorneys practicing in Florida were placed on notice that this Court would not be reluctant to disbar an attorney for this type of offense even where there was no injury to the client.

In the matter of The Florida Bar v. Gillin, 484 So.2d 1218 (Fla. 1986), this Court addressed an instance where the member of a law firm had diverted firm funds behind a partner's back. Citing mitigating circumstances, the Court suspended Mr. Gillin for a period of six months.

In the case of The Florida Bar v. Farver, 506 So.2d 1031 (Fla. 1987), a partner intentionally deprived the law firm he

was associated with of fees. In this matter, a tendered consent judgment of sixty days suspension was rejected by the Court and referred to a Referee. After finding Mr. Farver's actions were illegal conduct contrary to honesty, justice and good morals and involved fraud and deceit, the Referee recommended a one-year suspension which was affirmed by the Court.

In the instant matter, Respondent has been found guilty of the same misconduct and rule violations for which this Court ordered a one-year suspension in the case of The Florida Bar v. Farver, Id.

In The Florida Bar v. Stalnaker, 485 So.2d 815 (Fla. 1986) an associate attorney was found guilty of diverting funds belonging to his law firm. The recommended discipline by the Referee was for a twelve (12) month suspension. The final judgment in Stalnaker was for a 90 day suspension based on mitigation showing the associate believed he had one partner's permission and there was no deliberate attempt to steal.

Unlike Stalnaker, in the case before the Bar there is no such mitigation. There was no mistake by Respondent and there was no showing of any belief on her part that she had a partner's permission to take possession of the funds.

This Court has held previously that upon a finding of misuse or misappropriation there is a presumption that disbarment is the appropriate punishment The Florida Bar v. Scheller, 537 So.2d 992 (Fla. 1989). The Court went on to

hold that this presumption can be rebutted by various acts of mitigation. See Schiller.

The Referee herein cited certain mitigation in his report as related to Respondent's misconduct. The mitigating factors found by the Referee were the existence of no prior disciplinary history, personal or emotional problems, cooperative attitude toward the Bar proceedings, interim rehabilitation and remorse.

The Bar takes no exception to the fact that Respondent had no prior disciplinary record.

Respondent presented testimony from an expert witness that one year after the misconduct she attempted to seek therapy in an attempt to understand why she acted in the manner she did when she took her firm's money. While the expert witness testified that Respondent was under a lot of stress there was no evidence that this stress was the reason for the misconduct. It was also agreed that this factor was not an excuse for the misconduct.

There was also testimony that a lot of Respondent's problems were attributed to her workload and lack of assertiveness toward her partners. Both these situations deal directly with the choice of work by Respondent and are common to this profession.

While the pressure of Respondent's job and having to deal with the upcoming wedding of her daughter were attendant stressors, there has been no testimony such problems manifested themselves as an emotional illness. Neither can this stress be

likened to the emotional problems related to substance abuse or addiction.

Respondent has cooperated with The Bar and has shown remorse for her actions. Her interim rehabilitation has come largely after the spector of suspension loomed as a likely result of these proceedings.

In aggravation, the most compelling aspect of Respondent's conduct is the pattern of concealment that continued even after she was confronted with having taken the funds.

Initially, Respondent took a refund check for money belonging to her employer. She had admitted that she had never received such a check before and such a fact was unusual. Respondent deposited these funds into a special savings account set up specifically for her daughter's wedding. When initially confronted by the firm's bookkeeper regarding the funds, Respondent deliberately misled the bookkeeper as to the placement of the funds. Rather than being truthful to her employers, the only problem that Respondent saw herself confronted with was that she could not think of a way to get the funds back to the firm without being caught.

After being asked to leave her employment, Respondent applied to HRS for a position on their legal staff and after being interviewed, was hired. At no time did Respondent reveal to her perspective employer the purpose of seeking new employment or the fact that there was an outstanding disciplinary matter with The Florida Bar that could effect her ability to work for HRS. It is clearly apparent that the key

to Respondent's interim rehabilitation has been confrontation and not a spirit of truthfulness and openness.

As found by the Referee, the appropriate sections of Florida's Standards for Imposing Lawyer Sanctions support the imposition of suspension or disbarment. See 4.11, 4.12, and 5.11(f), Florida's Standards for Imposing Lawyer Sanctions.

In the recent case of The Florida Bar v. Farbstein, 15 FLW 5623 (Dec. 7, 1990) this Court therein agreed with the Referee that Farbstein's cooperation with The Bar, his remorse and the effect of his drug addiction constitute mitigating factors. Despite the presence of these circumstances, the Court rejected the Referee's recommendation of a ninety-day suspension and found a three year suspension was warranted. In rejecting the recommended discipline, the Court cited to The Florida Bar v. Tunsil, 503 So.2d 1230, 1231 (Fla. 1986) wherein it recognized:

> The mitigating factors simply can neither erase the grievous nature of Respondent's misconduct in stealing clients' funds, nor diminish it to the extent of warranting the same punishment which has been meted out for much less serious offenses...Despite the presence of mitigating circumstances in this case, we simply cannot agree to such a lenient discipline. We note that in other misappropriation cases involving mitigating factors, we have not been so understanding. See The Florida Bar v. Roth, 471 So.2d 39 (Fla. 1985) (lawyer who misappropriated funds suspended for three years); The Florida Bar v. Morris, 415 So.2d 1274 (Fla. 1982) (lawyer who used trust funds for personal purposes suspended for two years); The Florida Bar v. Anderson, 395 So.2d 551 (Fla. 1981) (lawyer who misappropriated trust funds, failed to keep adequate trust account records and issued worthless checks suspended for two years).

The Florida Bar feels that the discipline recommended by the Referee herein is inappropriate in view of the findings against Respondent and would ask that Respondent be suspended for a period of three years.

CONCLUSION

Based upon the findings of guilt and the aggravating circumstances, the proper discipline in this matter should be a period of rehabilitative suspension for three years.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief regarding TFB File No. 90-00363-02 has been forwarded by certified mail# P 981-963-094, return receipt requested, to JOHN A. WEISS, Counsel for Respondent, at his record bar address of Post Office Box 1167, Tallahassee, Florida 32302-1167, on this 24th of April 1991.

JAMES N. WATSON, JR.
Bar Counsel