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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

LORETTA B. ANDERSON,

Respondent.

_____/

Case No: 77,269

TFB No: 91-10,887 (13A)

ANSWERING BRIEF

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SYMBOLS AND REFERENCES

In this Brief, the Appellee, Loretta B. Anderson, will be referred to as the "Respondent." The Appellant, The Florida Bar, will be referred to as "The Florida Bar" or "The Bar". "TR" will refer to the transcript of the Final Hearing held on June 25, 1991. "R" will refer to the record. "RR" will refer to the Report of Referee.

STATEMENT OF THE CASE AND FACTS

Respondent was employed as the Executive Assistant at the Tampa Housing Authority. One of her duties was to administer Resident Assisted Enterprises, a program to assist residents in becoming entrepreneurs. (TR 23, L. 4-7). On about October 2, 1989, Respondent forged signatures on two (2) Tampa Housing Authority checks and converted the money. (TR 36, L.6-7). Respondent sent the converted money to American Express as payment on her personal credit card debt. (RR 1; Complainant's Exhibit 4).

One of those checks was used to pay American Express on about December 29, 1989. (TR p.25, L.3-6; Complainant's Exhibit 5). On approximately November 16, 1989, Respondent converted to her own use, $1,600.00 worth of American Express Money Orders purchased by the Housing Authority and made payable to Williams and Warren for work on a consulting project. (TR p.37, L.17-18).

Those money orders were also used by Respondent for payment on her American Express account. Respondent had no authorization to use the money for her own purposes. (Complainant's Exhibit 6). The total amount converted to Respondent's own use was $4,500.00. (RR 2). When Respondent ceased to work with the Housing Authority, she turned her records over to a fellow employee. Turning over the records prompted her to make a partial reimbursement to the Housing Authority. (TR 38, L.20 - TR 39, L.4). The partial reimbursement of $3,500.00 was paid on or about March 6, 1990. (TR p.39, L.16-17). On June 7, 1990, Respondent was charged with Uttering a Forged Check and with Grand Theft. (Complainant's Exhibit 1). On

July 20, 1990, Respondent entered a plea of nolo contendere to three (3) counts of Grand Theft, a Third Degree felony. She received a withhold of adjudication, and was placed on probation for three (3) years. (Complainant's Exhibit 3; RR 2) She was also ordered to pay restitution and to pay court costs. (RR 2; Complainant's Exhibit 3).

The Final Hearing in the instant case was held on June 25, 1991. Respondent testified regarding the circumstances surrounding the thefts. She related that she was depressed at the time of the felonious conduct, and subsequently was admitted to Tampa General Hospital's psychiatric unit in February, 1990. (TR 26, p.8-12). She described the Tampa Housing Authority as the pit of corruption, and suggested working there was depressing. (TR 22, L.6). Additionally, Respondent noted that her superiors had advised that unexpended Housing Authority funds needed to be used so there would not be a reduced allocation for the next year's budget. (TR p.23, L.21-24).

The Honorable John S. Andrews, Referee, found Respondent guilty of violating the following Rules Regulating The Florida Bar: Rule 3-4.3 (unlawful acts); Rule 4-8.4(b) (commission of criminal acts); and Rule 4-8.4(c) (conduct involving dishonesty or fraud). He recommended a three (3) year suspension (RR 2).

As mitigation, the Referee noted that Respondent is 48 years old, has been a member of The Florida Bar for fifteen (15) years without

being disciplined or convicted, and that she is remorseful. (RR 4). He also found she had repaid $3,500.00 prior to criminal charges being filed. (RR 4). The Referee noted as mitigating that Respondent did not steal money entrusted to her in her role as an attorney. (RR 4).

The Referee report in the instant case was served on August 8, 1991, and was considered at the Board of Governors meeting ending September 13, 1991. The Florida Bar filed a Petition to Review on September 23, 1991.

SUMMARY OF THE ARGUMENT

ISSUE: THE ISSUE IS WHETHER OR NOT THE REPORT OF THE REFEREE SHOULD BE DISTURBED IN THE INSTANT CASE.

Prior to the time that I argue Respondent Anderson's position with reference to the sustaining of the Referee's recommendation, I would like to distinguish Respondent's facts from the cases cited by The Florida Bar in support of its position. The Florida Bar v. Bennett, 276 So.2d 481 (Fla. 1973), stood for the proposition that some may consider it unfortunate that attorneys can seldom cast off completely the mantle they enjoy in the profession and simply act with simple business acumen and not be held responsible under the high standards of our profession. It is not often, if ever, that this is the case. In a sense, "an attorney is an attorney, is an attorney" much as the military officer remains an "officer and a gentleman" at all times ... the requirement of remaining above suspicion, as Caesar's wife, it is a fact of life for attorneys. They must be on guard and act accordingly to avoid tarnishing the professional image or damaging the public which may rely upon their professional standard. This is the exact reason why the Referee's findings should be sustained, because Respondent Anderson is responsible as an attorney and did violate the Cannons and, therefore, like in Bennett, supra, Bennett was merely suspended from the practice of law for the period of one year whereas Respondent Anderson in the instant case is suspended from the

practice of law for a period of three years, of which we have argument.

The Florida Bar cites in its proposition for the overturn of this Referee's decision, The Florida Bar v. Margadonna, 511 So.2d 985 (Fla. 1987), this is distinguishable from the instant case in that Respondent Anderson will not have a record as she has not been adjudicated guilty. However, in the case of Margadonna, supra, on October 24, 1984 the Respondent was adjudicated guilty as charged to Count I of the information. Respondent was sentenced to serve three (3) years in prison and this is distinguishable in this case due to there has been no felony conviction.

The Florida Bar v. Bunch, 195 So.2d 558 (Fla. 1967), W.E. Bunch had made full restitution for $55,000.00 in public funds and did go to court and like the instant case with adjudication withheld. The distinguishing feature is that Bunch converted $4,500.00 from the Bar Association and that money had not been paid. Respondent Anderson has made restitution. In Bunch, supra, there was harm to members of the Palm Beach Bar Association wherein the instant case no harm came to any individual or association.

In The Florida Bar v. Gillin, 484 So.2d 1218 (Fla. 1986), the Referee found that Gillen intended to steal $20,000.00 from the law firm he was employed by. The punishment in this case was Gillen's suspension from the practice of law for six months. The Referee

did not recommend a longer suspension of disbarment because of the mitigating factors that the Referee found; (1) which are certainly applicable here as no party suffered any real damage, as a result of repsondent's misdeeds; (2) this was the first time since his admission to the Bar that Gillen had been referred to the Bar for a disciplinary matter; (3) he had been active in church and civic activities; (4) he had been active in local Bar functions including, ironically, the Grievance Committee. With the exception of (4) all of the findings which were sustained by the Supreme Court in Gillen, supra, are certainly applicable to Respondent Anderson in the instant case.

In The Florida Bar v. Bussey, 529 So.2d 1112 (Fla. 1988), Bussey misappropriated monies in the amount of $2,385,395.12. A summary judgment was entered against Bussey and others by the United States District Court for the Middle District of Florida and judgment was affirmed by the Eleventh Circuit of Appeals, Honorable B. Pierson (11th DCA 1984). The Court in that case held the Respondent, along with several other associates, engaged in complicated transactions with a bank that they had established. The court in Bussey did not find it necessary to discuss the details but agreed that the transaction was a sham. It is obvious that it was a concerted planned effort without any showing that the Respondent Bussey was suffering any personal crisis or was having any psychiatric counselling as was Respondent Anderson in the instant case.

In The Florida Bar v. Shanzer, 572 So.2d 1382 (Fla. 1991),

> "the Referee recommended disbarment after finding three aggravating circumstances: (1) dishonest and/or selfish motives; (2) a pattern of conduct, and (3) multiple offenses. Respondent argued before the Referee and reiterated before this Court that his emotional problems during the nine months which spanned hius defalcations, as well as his full cooperation with the Bar, his remorse, rehabilitation, and the payment and the payment of restitution mitigated his conduct and called for discipline less than disbarment."

Certainly Shanzer, supra, is distinguishable from Respondent Anderson when this was her first and only time at the Bar and it involved two transactions where they had placed the money into her hands purposefully, surreptitiously and illegally so as to be able to retain the allocation of the Housing Authority.

What is the appropriate discipline for the Respondent or for any attorney who is entrusted with money from a governmental agency for the sole purpose of having the money out of the budget so that the allocation of the next year's budget would not be reduced? Respondent breached her fiduciary the same as attorneys who misappropriate monies from their client's trust funds. We simply state that there is ample precedent to sustain the Referee's findings notwithstanding the client has erred and there is no question that she has been criminally charged. It is also obvious that she was and is remorseful and attempted and had made most of the restitution prior to the time of the audit of the Housing Authority. The Referee's findings should be confirmed. See Florida Bar v. Breed, 378 So.2d 83 (Fla. 1979).

> "... the willful misappropriation of client's funds should be the Bar's equivalent to a capital offense. There should be no excuses. In Breed we considered the mitigating factors presented and suspended Breed for only two (2) years requiring proof of rehabilitation. ... We give notice however, to the legal profession of this state and henceforth, we shall not be reluctant to disbar an attorney for this type of offense even though no client is injured. "

Quoting from The Florida Bar v. Tunsel, 503 So.2d 1230 (Fla. 1986), the court held: "We recognize however, the appropriateness of concern and the circumstances surrounding the incident including cooperation and restitution." See The Florida Bar v. Pincket, 398 So.2d 802 (Fla. 1981). Therefore, we concur with both the Referee and the Bar that disbarment is not appropriate in this particular case.

We cannot however, agree with the Referee's recommendation of a mere three months suspension. The mitigating factors simply can neither erase the grievous nature of Respondent's misconduct in stealing clients' funds nor diminish to extend a warranty of the same punishment which has been meted out for much less serious offenses.

For example, in The Florida v. Pigge, 490 So.2d 1260 (Fla. 1986), a lawyer was suspended for sixty (60) days for the possession of small quantities of cocaine and marijuana. Although we do not condone such conduct, we receive a significant distinction between this conduct which does not injure clients, abuse of the fiduciary relationship, and conduct which does and therefore goes to the very heart of the confidence which must be maintained in the legal

profession. In the instant case here, there was no fiduciary relationship with a client and the Housing Authority was not injured in that Respondent Anderson had paid $3,500.00 restitution prior to the time of the discovery of the incident. Therefore, it would be a denial of equal protection under the law to treat a lawyer who is in a non-practicing status different from those who are practicing law. There are several other cases that I would like to call to this court's attention, to see: The Florida Bar v. Roth, 471 So.2d 129 (Fla. 1985), a lawyer who had misappropriated funds was suspended for three (3) years; The Florida Bar v. Morris, 415 So.2d. 1274 (Fla. 1982), a lawyer who used trust funds for personal purposes was suspended for two (2) years; The Florida Bar v. Anderson, 395 So.2d. 551 (Fla. 1981), a lawyer who misappropriated trust funds failed to keep adequate trust accounts records, recommendation was suspension for two (2) years.

The argument simply is that there are sufficient cases in Florida so as to sustain the findings of the Referee. No one seeks to condone the act of Respondent Anderson, however, it is obvious that this respondent and former U.S. prosecuting attorney who has had severe depression and was undergoing psychiatric treatment, and is still be counselled, should be given the opportunity to practice law again when this is her first and only breach of the Florida Cannons of Ethics. To rule otherwise would be denying her equal protection under the law.

See The Florida Bar v. Breed, supra; The Florida Bar v. Pigge, supra; The Florida Bar v. Roth, supra; The Florida Bar v. Morris,

supra; The Florida Bar v. Anderson, supra; The Florida Bar v. Tunsel, supra.

The issue is whether or not the Referee should be sustained in the instant case. Each attorney disciplinary case must be assessed individually, and in determining the punishment the Supreme Court should consider the punishment imposed on other attorneys with similar misconduct. See The Florida Bar v. Breed, supra. We concede Respondent's conduct is not exemplary nor do we condone the fact of her misuse. We simply state that there is ample precedent to sustain the Referee's findings notwithstanding the Respondent has erred and there is no question that she has been criminally charged, but adjudication was withheld.

We recognize here the appropriateness of concern and the circumstances surrounding the incident including the Respondent making restitution. See The Florida Bar v. Pincket, supra. We again reiterate that the misuse of a client's funds is one of the most serious offenses a lawyer can commit and we would not be reluctant to disbar this attorney for this type of offense even when there is restitution. The Florida Bar v. Breed, supra. We emphasize that we are not in any way retreating from our statement in brief, but we believe that it is appropriate in determining discipline to be imposed to take into consideration circumstances surrounding the incident including cooperation and restitution. It is obvious that the Referee found both cooperation and restitution. We agree as the Court held in The Florida Bar v. Schiller, 537 So.2d 992 (Fla. 1989), on February 2, 1989, the misuse of client's

funds in one of the most serious offenses that a lawyer can commit. The Court cited The Florida Bar v. Newman, 513 So.2d 656 (Fla. 1987); The Florida Bar v. Breed, supra. Upon a finding of misuse of misappropriation there is a presumption that disbarment is appropriate punishment. This perception however can be rebutted by various acts of mitigation such as cooperation and restitution. See again The Florida Bar v. Picknet, supra. Just as in Schiller, supra, by the time of the final hearing Respondent Anderson had replaced the money that she had misappropriated. In that case there was no indication that the misappropriation directly damaged any client. In this instant case the Respondent has made complete restitution and further, as the Referee found in Schiller, supra, it found that Mrs. Anderson/Respondent, was genuinely remorseful and appeared to be a good candidate for rehabilitation. The only distinguishing factor in this case was that because of the nature of the case, Mrs. Anderson/Respondent appeared before a court where she entered her plea of nolo contendere. Again, citing The Florida Bar v. Tunsel, supra. We do not attempt to condone what the Respondent did. However, for a former U.S. prosecutor to appear in open court, notwithstanding adjudication withheld, the total psychological impact has had its effect on her life. We simply ask the court in light of the cases cited to sustain the Referee's findings since there are adequate mitigating and extenuating circumstances as well as ample law for the Court to do so.

I, in no way, intend to make light of what the Respondent Anderson did. However, this former U.S. prosecutor has had to go into open

court and was the Court was kind enough to withhold adjudication. The Respondent is currently in psychiatric and psychological counselling. Because of her prior good conduct, that this was one incident, and had it not been for the fact that this money was placed in her hands not in an equitable fashion, but in a fashion that was an attempt to defraud the federal government, she rationalized that no matter how wrong, I simply think that there are adequate mitigating and extenuating circumstances to sustain the Referee's opinion below.

CONCLUSION

In conclusion, Justice Eldridge in his dissent, has stated in The Florida Bar v. Farver, 506 So.2d 1031 (Fla. 1987), suffice it to say that absent extenuating circumstances there should be no place in The Florida Bar for lawyers who steal from whomsoever. However, we argued that the Referee found adequate extenuating and mitigating circumstances not yo disbar Respondent Anderson and we ask the court to sustain the Referee's findings, Respondent Anderson erred, it was her first error, she was remorseful and has been fully cooperative.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Answering Brief has been delivered by Overnight Delivery, Federal Express, Airbill No. 1512474456 to Sid J. White, Clerk, Supreme Court of Florida, 500 S. Duval Street, Tallahassee, FL 32399-1927, and a copy to Thomas E. Deberg, Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport, Marriott Hotel, Tampa, Florida 33607, on this the 13th day of Dec., 1991.

DELANO S. STEWART