The Supreme Court of South Carolina

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N O T I C E

IN THE MATTER OF DENNIS C. GILCHRIST, PETITIONER

On July 15, 2002, Petitioner was definitely suspended from the practice of law for eighteen months. In the Matter of Gilchrist, 350 S.C. 452, 567 S.E.2d 250 (2002). He has now filed a petition to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than September 17, 2004.

Columbia, South Carolina

July 19, 2004

The Supreme Court of South Carolina

In the Matter of Teresa T. Bazaral, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on April 7, 1986, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the South Carolina Supreme Court, dated June 10, 2004, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, she shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Teresa T. Bazaral shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/Jean H. Toal C.J.

s/James E. Moore J.

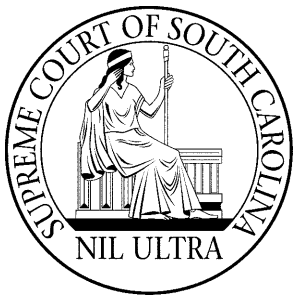
s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

July 21, 2004



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 30

July 26, 2004

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Ray D. Lathan, Respondent.

Opinion No. 25842
Submitted June 10, 2004 - Filed July 20, 2004

DEFINITE SUSPENSION

Henry B. Richardson, Jr., of Columbia, for the Office of Disciplinary Counsel.

Elizabeth Van Doren Gray, of Sowell, Gray, Stepp & Laffitte, LLC, of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to a definite suspension from the practice of law for a period of not less than four nor more than twelve months. We accept the agreement and definitely suspend respondent from the practice of law in this state for a six month period, retroactive to his interim suspension. The facts, as set forth in the agreement, are as follows.

FACTS

Respondent was admitted to practice law in South Carolina on September 1, 1970. He is a partner in the law firm of Lathan and

Barbare (Firm) with his partner Ronald F. Barbare (Partner). Respondent and partner are the only two attorneys employed by the Firm.

The Firm's primary practice is the closing of real estate transactions. The Firm handles approximately 1400 to 1600 real estate closings per year.

On or about November 19, 2003, respondent and his partner pled guilty before the United States District Court for the District of South Carolina to one count of violation 18 U.S.C. § 1010, a felony. The information to which respondent pled guilty provided that he falsely certified that he had received cash from borrowers in amounts reported on HUD-1 Settlement Statements he prepared and submitted to the United States Department of Housing and Urban Development when respondent did not receive the cash.

Because of cooperation with federal authorities into matters related to the information and to other investigations, the United States Attorney made a motion for downward departure. Both respondent and his partner received favorable recommendations in the pre-sentencing report submitted by the United States Probation Department. Both respondent and his partner were sentenced to pay a fine of $5,000 as final disposition of their pleas; both have paid those fines.

Firm's General Procedure for Closing Real Estate Transactions

The Firm's paralegal was the principal point of contact between the Firm and the seller. The paralegal reviewed the lender's instructions and the contract of sale and prepared closing documents and a balance sheet showing incoming funds and disbursements. Changes to the transaction were conveyed by the seller to the paralegal who would then make pen and ink changes on the Firm's in-house balance sheet reflecting the changes directed by the seller.

Another Firm employee then prepared checks for disbursement in accordance with the balance sheet, including any pen

and ink changes prepared by the paralegal. Thereafter, the paralegal prepared a class report showing the disbursements made out of the Firm's trust account in connection with each transaction.

Respondent or his partner reviewed the various closing documents, attended the closing with the seller and borrower, and gave instructions to the Firm staff for the conclusion of transactions. Respondent or his partner attended and supervised all closings.

Generally, there were no direct communications between the Firm and the borrowers prior to closing. In general, neither respondent nor his partner had any communications with the seller concerning an individual transaction prior to closing.

Cromer Company Transactions

Respondent and his partner served as closing attorneys in a number of real estate transactions where the Cromer Company was the seller of mobile home and land packages. The principal owner of the Cromer Company was A. Eugene Cromer (Cromer). Melissa Caldwell (Caldwell) was an employee of the Cromer Company and was often the principal point of contact between the Cromer Company and the Firm.

On one occasion, respondent closed loans for the Cromer Company where the HUD-1 Settlement Statement reflected that certain sums of money on line 303 "cash from borrower" had been paid by borrowers at closing when the balance sheet (in-house schedule of incoming funds and disbursements) and the Firm's class report (trust account ledger) showed no money had been received into the Firm's trust account. On this occasion, no money was received by the Firm from borrowers.

Respondent represents that Cromer or a representative of his company advised the Firm staff, probably to the paralegal, that this amount had been paid by borrowers directly to the Cromer Company. Thereafter, the paralegal made pen and ink changes to the balance sheet to reflect that no "cash from borrowers" was received at closing and

reduced the "cash to seller" on line 603 of the HUD-1 statement by the amount of the "cash from borrower" shown on line 303.[1] However, the HUD-1 form submitted to the lenders were not amended and continued to show an amount of "cash from borrower" on line 303 and no notation of "POC" (a standard abbreviation for "paid outside of closing"). The HUD-1 form contained the standard statement signed by respondent to the effect "the HUD-1 Settlement Statement which I have prepared is a true and accurate account of this transaction. I have caused the funds to be disbursed in accordance with this statement."

On another occasion, respondent served as the closing attorney for a transaction between the Cromer Company as seller and Ms. Z as buyer. On line 303, the HUD-1 statement showed "cash from borrower" to be $5,211.50. However, on instructions from the seller, pen and ink changes were made to the balance sheet, deleting the amount of "cash from borrower" on line 303 and reducing "cash to seller" on line 603 by a like amount. No corresponding change was made to the HUD-1 form which was sent to the lender and no "POC" notation was made on line 303. The Firm's class report did not show "cash from borrower" deposited into the Firm's trust account and, instead, showed the amount of the "cash to seller" reduced by the amount the HUD-1 form showed as "cash to borrower." This caused a variance in the information given the lender in the HUD-1 form and the actual disbursements from the Firm's trust account. The HUD-1 form contained the standard attorney certification as set forth above.

On two other occasions, respondent closed transactions wherein the Firm's class report showed the line 303 "cash from borrower" was paid at closing by a check drawn on the Cromer Company account rather than by cash or a check from the borrowers. This fact was not disclosed to the lender. Respondent represents that a representative of the Cromer Company told a Firm employee that the "cash from borrowers" in these two transactions had been paid directly by borrowers to the Cromer Company.

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[1] In the lending business, this technique is referred to as "shorting the seller."

Respondent is now informed and believes that the representations from the Cromer Company that the amount "due from borrower" on these last three occasions had been paid directly by borrowers to the Cromer Company were false, that there was (at least in most instances) no money paid from the borrowers as represented on line 303 of the HUD-1 form and that Cromer's misrepresentations were in furtherance of his scheme to sell mobile home and land packages to borrowers without the borrowers having to contribute any money to the transactions. As a result, it now appears that the representations made by respondent concerning the information on lines 303 and 603 of the HUD-1 statements were incorrect. The inaccurate report had the tendency to cause lenders to believe that borrowers had invested money in the transactions when, in fact, the borrowers had not, and caused the price of the package to be inflated by the amounts shown on line 303 of the HUD-1 form.

Cromer and Caldwell were indicted in the United States District Court in connection with one or more transactions closed by the Firm where the Cromer Company was the seller. An allegation in Cromer's indictment states Cromer made false statements concerning down payments (information on line 202 of HUD-1 forms) and "cash from borrowers" (information on line 303 of HUD-1 forms). Cromer pled guilty to one count of mail and wire fraud in connection with these transactions and was sentenced to eighteen months in prison. In his plea agreement, Cromer admitted he had derived between $5,000,000 and $10,000,000 in benefits from his scheme.

ODC does not contend that either respondent or his partner were aware of Cromer and Caldwell's criminal activities or of the amount of the money involved. Instead, ODC contends respondent's failure to either amend line 303 and line 603 to reflect "no cash from borrower" received by the Firm or to place the notation "POC" by the line 303 data made it possible for Cromer to engage in the criminal activity stated in the Cromer indictment.

In approximately twelve transactions in which the Cromer Company was the seller and the Firm served as closing agent, borrowers made claims or, in some cases, initiated litigation, against the Firm. The Firm and/or respondent and his partner and their insurance carrier paid $2,500 per case to settle the claims.

Stegall Entities Transactions

For many years, the Firm handled numerous real estate transactions for several entities owned and managed by Donald L. Stegall (Stegall). Respondent served as closing attorney in approximately fourteen transactions where Stegall entities were the sellers of mobile home and land packages.

In each of these fourteen transactions, the HUD-1 statements and Firm balance sheets were prepared by the Firm's paralegal based on information from contracts of sale, information in the lender's loan closing instructions, and/or instructions from Stegall employees, usually Teresa Ashmore (Ashmore). In each of the transactions, both line 303 on the HUD-1 statement and the balance sheet would initially reflect amounts of money to be paid by the borrower at closing. Prior to closing, Ashmore would instruct the paralegal to make changes, primarily reducing the amount of "cash from borrower" to zero and making corresponding reductions in "cash to seller" on line 603 and, in other cases, directing other changes in disbursements to Stegall entities to cause the disbursements to balance.

The changes made by the paralegal at Ashmore's directions were not reflected on the HUD-1 forms which were sent to the lenders. In each of these transactions, the HUD-1 statement contained a certification signed by respondent, as settlement agent, to the effect "the HUD-1 Settlement Statement which I have prepared is a true and accurate account of this transaction. I have caused the funds to be disbursed in accordance with this statement." None of the fourteen settlement statements contained the notation "POC" beside line 303 "cash from borrower" even though this amount was not received by the Firm. Accordingly, there was a variance in the information furnished

to the lenders on the HUD-1 statements and the actual disbursements made out of the Firm's trust account in connections with these transactions. Accordingly, there was a variance in the information furnished to the lenders on the HUD-1 statements and the actual disbursements made out of the Firm's trust account in connection with these transactions.

In six of the Stegall closings, addendums to the HUD-1 statements were prepared by the Firm's staff and executed by the parties. The effect of the addendums was to reduce to writing the changes which had been directed by Stegall employees, usually Ashmore, and made to the balance sheet by the paralegal. The addendums were not sent to the lenders.

In one Stegall transaction, respondent closed loans for Borrowers Y and Z. Because the transaction was insured by the Federal Housing Administration (FHA), an FHA Addendum was required. The borrowers and seller signed certifications on the FHA Addendum prepared by respondent stating that there had not been any reimbursement for cash down payments or closing costs not disclosed to the lender. Respondent signed the certification on the FHA required addendum that the HUD was " . . . a true and accurate account of the funds that were (i) received or (ii) paid outside of closing, and the funds received have been or will be disbursed by [respondent] as part of the settlement of this transaction."

The HUD-1 statement sent by respondent to the lender also contained the standard certification signed by respondent as the settlement agent. The HUD-1 statement sent to the lender showed $2,987.86 "cash from borrower," however no cash from the borrowers was received by respondent or the Firm in connection with the transaction and the amount actually paid to the seller was reduced by the amount "due from borrower." As a result, there was a variance in the information furnished the lender on the HUD-1 statement and the FHA required addendum and the actual disbursements made from the Firm's trust account and this, in turn, caused respondent's certifications

to be incorrect. Similar transactions occurred in other FHA insured loans closed by respondent where a Stegall entity was the seller.

Many of the transactions handled by the Firm for the Stegall entities were funded by Cendant Mortgage Corporation (Cendant). Jeffrey L. Greene (Greene) was Cendant's local representative and was the usual point of contact between the Firm and Cendant. Respondent was aware that Greene was also the principal point of contact between the Stegall entities and Cendant. Respondent knew Greene approved financing for borrowers of mobile home and land package sales made by Stegall entities.

On or about June 4, 2001, respondent closed a transaction where Greene was the borrower.[2] The transaction was not financed by Cendant. The transaction was modified, not only to cause Greene to be forgiven of "cash from borrower" as shown on line 303 of the HUD-1 statement in the amount of $18,147.43, but also to cause Greene to leave the transaction with a check drawn on the Firm's trust account as a "refund" in the amount of $3,000. This change was directed by a Stegall representative to the Firm's paralegal. The paralegal made pen and ink notations on the balance sheet to reflect these changes. An addendum to the HUD-1 statement was prepared to reflect these changes and was presented by respondent to the parties for their signatures at closing. The HUD-1 statement sent to the lender does not mention a "refund" to Greene and does not reflect the $18,147.83 "gift" from a Stegall entity to Greene negating the "cash from borrower" information on line 303. The addendum was not furnished to the lender.

In another transaction,[3] the HUD-1 statement sent to the lender shows "cash from borrower" in the amount of $2,038.12. There

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[2]This was one of the fourteen transactions mentioned above.

[3] This was one of the fourteen transactions mentioned above.

is no indication of a corresponding deposit in the Firm's trust account. The HUD-1 statement sent to the lender reflects a $43,750 deposit, but there is no record of a deposit in that amount to the Firm's trust account.

In connection with this transaction, the Firm's trust account reveals the deposit of loan proceeds of $76,830.40 and deposit of a check "from buyer" (drawn on a BB&T account) in the amount of $37,500. Respondent knew the Stegall entities banked with BB&T. There is a disbursement from respondent's trust account to a Stegall entity in the exact amount of $37,500 and a refund to Stegall individually of $1,389. Amounts due to the Stegall entity are reduced on the balance sheet to reflect the foregoing and to cause the balance sheet and the corresponding disbursements from the trust account to be in balance. The HUD-1 statement sent to the lender was not amended to correspond to the actual disbursements made out of the Firm's trust account at the direction and/or approval of respondent. The HUD-1 statement contains no mention of either the $37,500 (either coming into or going out of the Firm's trust account) or Stegall, individually, receiving a refund or even being involved in the transaction.

At some point, respondent became concerned whether borrowers were making the "cash from borrower" payments directly to the Stegall entities. According, respondent began requiring presentation of a cashier's check for the "cash for borrowers" at the closing. In approximately thirteen transactions, the cashier's checks were prepared by BB&T and delivered by Stegall employees to respondent's staff. Respondent is now informed and believes the Stegall entities furnished most, if not all, of the money to purchase the cashier's checks, but this was not known by respondent until it came to light during discovery in the Cendant case. See infra.

Greene was indicted. He pled guilty in the United States District Court to one count of wire fraud and was sentenced to five years probation and restitution in connection with fraudulent dealings with Stegall and Ashmore to the detriment of Cendant and other lenders who purchased loans with inflated property values. In his plea

agreement, Greene admitted deriving between $1,500,000 and $2,500,000 from his scheme with Stegall and Ashmore.

With information available from criminal proceedings and related civil litigation after the closings, it now appears that the accommodations in the foregoing transactions by Stegall entities to Greene were in return for Greene inducing Cendant to make loans on inflated mobile home and/or land packages to borrowers who were buying from Stegall entities. Respondent was unaware of Stegall and Greene's arrangement concerning the Cendant loans.

Stegall and Ashmore were also indicted in the United States District Court in connection with defrauding lenders in conspiracy with Greene. Stegall pled guilty to one count of wire fraud and was sentenced to eighteen months in prison. In his plea agreement, Stegall admitted deriving $3,075,000 from the real estate transactions related to his plea. One or more of the transactions mentioned in the information to which Stegall pled guilty were closed by the Firm.

As a result of the foregoing, Cendant initiated litigation against the Firm. Cendant was paid $750,000 as settlement on behalf of the Firm. Five hundred and seventy five thousand dollars of this amount was paid by the Firm's insurance carrier and the remainder was paid by the Firm or respondent and his partner.

Additional Facts

ODC's investigation reveals respondent did not receive any special financial benefit from the closings investigated by ODC. All fees received are shown on the Firm's class report; the fees appear to be reasonable and customary for work of this type in Greenville.

ODC does not allege respondent deliberately sought to assist Cromer, Caldwell, Stegall, Ashmore, or Greene in criminal undertakings or had knowledge of their criminal intent. However, submitting HUD-1 Settlement Statements to lenders which were at variance with receipts and disbursements from the Firm's trust account

enabled these people to break the law. With the advantage of hindsight and discovery of criminal activity, respondent now recognizes there were "red flags" which should have alerted him that the Cromer Company and the Stegall entities were seeking to mislead lenders, particularly in closing transactions where Stegall entities effectively gave money to Greene who was originating loans from Cendant to borrowers purchasing mobile home and land packages from Stegall entities.

It now appears that in many of the mobile home and land package transactions respondent closed for the Cromer Company and the Stegall entities, borrowers paid no money into the transactions. Instead, these sellers were seeking to close the transactions without the borrowers contributing their own money as an inducement for borrowers to close the transactions with their businesses. This information was not known to respondent until after the closing of all of these transactions. Respondent represents that he was unaware of the Stegall entities' duplicity concerning the use of cashier's checks in thirteen closings.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to client); Rule 1.2(e) (when lawyer knows client expects assistance not permitted by the Rules of Professional Conduct or other law, lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct); Rule 4.1(a) (in the course of representing a client, lawyer shall not knowingly make a false statement of material fact or law to a third person); Rule 4.1(b) (in the course of representing a client, lawyer not fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6); Rule 5.1(a) (partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct); Rule 5.3(b)

(with respect to a nonlawyer employee, lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with professional obligations of the lawyer); Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct); Rule 8.4(b) (lawyer shall not commit criminal act that reflects adversely on lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects); Rule 8.4(d) (lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (lawyer shall not engage in conduct that is prejudicial to administration of justice). In addition, respondent admits his misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers), Rule 7(a)(4) (lawyer shall not be convicted of crime of moral turpitude or serious crime); and Rule 7(a)(5) (lawyer shall not engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

CONCLUSION

We accept the Agreement for Discipline by Consent and definitely suspend respondent from the practice of law for a six month period, retroactive to the date of his interim suspension. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

The Court is troubled by the recent number of real estate transactions which have been the subject of misleading, fraudulent, and/or criminal schemes. Inaccurate HUD-1 Settlement Statements and other closing documents contribute to these deceptive activities. Respondent's misconduct derives principally from his inaccurate representations on HUD-1 Settlement Statements. These misrepresentations have subjected respondent to both federal criminal penalties and the current disciplinary action by this Court.

In addition to completing HUD-1 Settlement Statements, attorneys prepare their own settlement statements. These documents, too, must also correctly reflect the underlying financial transaction by the parties in order for the buyer, seller, and others to have an accurate record of the transaction.

According to the parties in this matter, a large number of attorneys are not passing closing funds through their trust accounts and, at the same time, not identifying the funds as paid outside of closing on closing documents. Not only does this practice fail to accurately record the actual transaction for the buyer and seller, but it is misleading to lenders. In an attempt to eliminate this and other deceptive practices, we emphasize that costs and credits in connection with a real estate transaction must be shown on the settlement statement and that the settlement statement must reflect all amounts paid, by whom paid, and to whom paid. Any charges or amounts paid outside of the closing must be reflected as such on the settlement statement (i.e., "POC"). For all funds exchanged during the closing, the attorney must have a record of the method of payment by the parties to the transaction, as well as an accounting of all receipts and disbursements by the attorney. The attorney's records must accurately reflect the transaction as evidenced by the settlement statement unless there is written documentation signed by all parties to the transaction (including any lender) indicating that funds were disbursed otherwise. Failure to comply with these standards may subject attorneys to disciplinary action.

DEFINITE SUSPENSION.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Ronald F. Barbare, Respondent.

Opinion No. 25843
Submitted June 10, 2004 - Filed July 20, 2004

DEFINITE SUSPENSION

Henry B. Richardson, Jr., of Columbia, for the Office of Disciplinary Counsel.

Elizabeth Van Doren Gray, of Sowell, Gray, Stepp & Laffitte, LLC, of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to a definite suspension from the practice of law for a period of not less than four nor more than twelve months. We accept the agreement and definitely suspend respondent from the practice of law in this state for a six month period, retroactive to his interim suspension. The facts, as set forth in the agreement, are as follows.

FACTS

Respondent was admitted to practice law in South Carolina on November 5, 1976. He is a partner in the law firm of Lathan and Barbare (Firm) with his partner Ray D. Lathan (Partner). Respondent and partner are the only two attorneys employed by the Firm.

The Firm's primary practice is the closing of real estate transactions. The Firm handles approximately 1400 to 1600 real estate closings per year.

On or about November 19, 2003, respondent and his partner pled guilty before the United States District Court for the District of South Carolina to one count of violation 18 U.S.C. § 1010, a felony. The information to which respondent pled guilty provided that he falsely certified that he had received cash from borrowers in amounts reported on HUD-1 Settlement Statements he prepared and submitted to the United States Department of Housing and Urban Development when respondent did not receive the cash.

Because of cooperation with federal authorities into matters related to the information and to other investigations, the United States Attorney made a motion for downward departure. Both respondent and his partner received favorable recommendations in the pre-sentencing report submitted by the United States Probation Department. Both respondent and his partner were sentenced to pay a fine of $5,000 as final disposition of their pleas; both have paid those fines.

Firm's General Procedure for Closing Real Estate Transactions

The Firm's paralegal was the principal point of contact between the Firm and the seller. The paralegal reviewed the lender's instructions and the contract of sale and prepared closing documents and a balance sheet showing incoming funds and disbursements. Changes to the transaction were conveyed by the seller to the paralegal who would then make pen and ink changes on the Firm's in-house balance sheet reflecting the changes directed by the seller.

Another Firm employee then prepared checks for disbursement in accordance with the balance sheet, including any pen and ink changes prepared by the paralegal. Thereafter, the employee prepared a class report showing the disbursements made out of the Firm's trust account in connection with each transaction.

Respondent or his partner reviewed the various closing documents, attended the closing with the seller and borrower, and gave instructions to the Firm staff for the conclusion of transactions. Respondent or his partner attended and supervised all closings.

Generally, there were no direct communications between the Firm and the borrowers prior to closing. In general, neither respondent nor his partner had any communications with the seller concerning an individual transaction prior to closing.

Cromer Company Transactions

Respondent and his partner served as closing attorneys in a number of real estate transactions where the Cromer Company was the seller of mobile home and land packages. The principal owner of the Cromer Company was A. Eugene Cromer (Cromer). Melissa Caldwell (Caldwell) was an employee of the Cromer Company and was often the principal point of contact between the Cromer Company and the Firm.

On approximately four occasions, respondent closed loans for the Cromer Company where the HUD-1 Settlement Statements reflected that certain sums of money on line 303 "cash from borrower" had been paid by borrowers at closing when the balance sheet (in-house schedule of incoming funds and disbursements) and the Firm's class report (trust account ledger) showed no money had been received into the Firm's trust account. On these occasions, no money was received by the Firm from borrowers.

Respondent represents that Cromer or a representative of his company advised the Firm staff, probably the paralegal, that this

amount had been paid by borrowers directly to the Cromer Company. Thereafter, the paralegal made pen and ink changes to the balance sheet to reflect that no "cash from borrowers" was received at closing and reduced the "cash to seller" on line 603 of the HUD-1 statements by the amount of the "cash from borrower" shown on line 303.[1] However, the HUD-1 forms submitted to the lenders were not amended and continued to show an amount of "cash from borrower" on line 303 and no notation of "POC" (a standard abbreviation for "paid outside of closing"). The HUD-1 forms contained the standard statement signed by respondent to the effect "the HUD-1 Settlement Statement which I have prepared is a true and accurate account of this transaction. I have caused the funds to be disbursed in accordance with this statement." The HUD-1 forms were forwarded to the lenders as originally drafted, without the pen and ink changes noted on the balance sheets.

Respondent is now informed and believes that the representations from the Cromer Company that the amount "due from borrower" in these transactions occasions had been paid directly by borrowers to the Cromer Company were false, that there was (at least in most instances) no money paid from the borrowers as represented on line 303 of the HUD-1 forms and that Cromer's misrepresentations were in furtherance of his scheme to sell mobile home and land packages to borrowers without the borrowers having to contribute any money to the transactions. As a result, it now appears that the representations made by respondent concerning the information on lines 303 and 603 of the HUD-1 statements were incorrect. The inaccurate report had the tendency to cause lenders to believe that borrowers had invested money in the transactions when, in fact, the borrowers had not, and caused the price of the package to be inflated by the amounts shown on line 303 of the HUD-1 forms.

Cromer and Caldwell were indicted in the United States District Court in connection with one or more transactions closed by the Firm where the Cromer Company was the seller. An allegation in

[1] In the lending business, this technique is referred to as "shorting the seller."

Cromer's indictment states Cromer made false statements concerning down payments (information on line 202 of HUD-1 forms) and "cash from borrowers" (information on line 303 of HUD-1 forms). Cromer pled guilty to one count of mail and wire fraud in connection with these transactions and was sentenced to eighteen months in prison. In his plea agreement, Cromer admitted he had derived between $5,000,000 and $10,000,000 in benefits from his scheme.

ODC does not contend that either respondent or his partner were aware of Cromer and Caldwell's criminal activities or of the amount of the money involved. Instead, ODC contends respondent's failure to either amend line 303 and line 603 to reflect "no cash from borrower" received by the Firm or to place the notation "POC" by the line 303 data made it possible for Cromer to engage in the criminal activity stated in the Cromer indictment.

In approximately twelve transactions in which the Cromer Company was the seller and the Firm served as closing agent, borrowers made claims or, in some cases, initiated litigation, against the Firm. The Firm and/or respondent and his partner and their insurance carrier paid $2,500 per case to settle the claims.

Stegall Entities Transactions

For many years, the Firm handled numerous real estate transactions for several entities owned and managed by Donald L. Stegall (Stegall). Respondent served as closing attorney in approximately nineteen transactions where Stegall entities were the sellers of mobile home and land packages.

In each of these nineteen transactions, the HUD-1 statements and Firm balance sheets were prepared by the Firm's paralegal based on information from contracts of sale, information in the lender's loan closing instructions, and/or instructions from Stegall employees, usually Teresa Ashmore (Ashmore). In each of the transactions, both line 303 on the HUD-1 statement and the balance sheet would initially reflect amounts of money to be paid by the

borrower at closing. Prior to closing, Ashmore would instruct the paralegal to make changes, primarily reducing the amount of "cash from borrower" to zero and making corresponding reductions in "cash to seller" on line 603 and, in other cases, directing other changes in disbursements to Stegall entities to cause the disbursements to balance.

The changes made by the paralegal at Ashmore's directions were not reflected on the HUD-1 forms which were sent to the lenders. In each of these transactions, the HUD-1 statement contained a certification signed by respondent, as settlement agent, to the effect "the HUD-1 Settlement Statement which I have prepared is a true and accurate account of this transaction. I have caused the funds to be disbursed in accordance with this statement." None of the nineteen settlement statements contained the notation "POC" beside line 303 "cash from borrower" even though this amount was not received by the Firm. Accordingly, there was a variance in the information furnished to the lenders on the HUD-1 statements and the actual disbursements made out of the Firm's trust account in connection with these transactions.

In thirteen of the Stegall closings, addendums to the HUD-1 statements were prepared by the Firm's staff and executed by the parties. The effect of the addendums was to reduce to writing the changes which had been directed by Stegall employees, usually Ashmore, and made to the balance sheet by the paralegal. The addendums were not sent to the lenders.

In one Stegall transaction, respondent closed loans for Borrower F. Because the transaction was insured by the Federal Housing Administration (FHA), an FHA Addendum was required. The borrower and seller signed certifications on the FHA Addendum presented by respondent stating that there had not been any reimbursement for any cash down payment or closing costs not disclosed to the lender. Respondent signed the certification on the FHA required addendum that the HUD was " . . . a true and accurate account of the funds that were (i) received or (ii) paid outside of

closing, and the funds received have been or will be disbursed by [respondent] as part of the settlement of this transaction."

The HUD-1 statement sent by respondent to the lender also contained the standard certification signed by respondent as the settlement agent. The HUD-1 statement sent to the lender showed $6,955.67 "cash from borrower," however no cash from borrower was received by respondent or the Firm in connection with the transaction and the amount actually paid to the seller was reduced by the amount "due from borrower." As a result, there was a variance in the information furnished the lender on the HUD-1 statement and the FHA required addendum and the actual disbursements, made from the Firm's trust account and this, in turn, caused respondents' certifications to be incorrect.

Many of the transactions handled by the Firm for the Stegall entities were funded by Cendant Mortgage Corporation (Cendant). Jeffrey L. Greene (Greene) was Cendant's local representative and was the usual point of contact between the Firm and Cendant. Respondent was aware that Greene was also the principal point of contact between the Stegall entities and Cendant. Respondent knew Greene approved financing for borrowers of mobile home and land package sales made by Stegall entities.

On May 17, 2000, respondent closed a real estate transaction for Seller H to Buyer L involving real property at 13 Hillside Circle in Greenville. Respondent knew that Buyer L was a former employee of Stegall or a Stegall entity. The HUD-1 statement reflected the sales price as $55,000 and the "cash from borrower" being $55,531.12.

The same day, respondent closed another transaction where Buyer L sold the same property to Greene. This second transaction was funded by a lender other than Cendant. The HUD-1 statement in this transaction reflected a sales price of $80,000 and "cash from borrower (Greene) as $11,735.77. An addendum to the settlement statement,

signed by respondent, stated "cash to seller" was reduced by the exact amount of "cash from borrower."

According to the class report, the loan proceeds from the lender in the second transaction were the only funds received by respondent for both transactions. A Firm check in the amount of $55,531,12 - paid out of the second transaction - represented the "cash from borrower" due in the first transaction.

The above activities on May 17, 2000, are known as a "flip transaction" where proceeds from the second transaction are used to fund the initial transaction. For the HUD-1 statement in the first transaction to have been accurate, the "cash from borrower" should have been $0 and the $55,531.12 should have been shown under "amounts paid by or on behalf of borrower" under a line in the 200 column of the HUD form.

For the HUD-1 statement in the second transaction to have been accurate, the $55,531.12 and the $11,735.77 (the amount the seller gave Greene) should have been shown under "reduction in amount due seller" under a line in the 500 column of the HUD and the "cash to seller" reduced to $11,987.24 which was the amount disbursed to seller. On this HUD-1 form, the "cash from borrower" should have been shown as $0 because Greene paid no cash at the closing.

The flip transaction allowed Greene to acquire the property using only the proceeds from the loan notwithstanding the fact that the HUD-1 sent to the lender indicated Greene had contributed $11,735.77 to the transaction. In effect, the seller (original Buyer L) simply gave Greene $11,735.77.

All of the foregoing resulted in the information furnished to the lender in the second transaction to be at variance with the disbursements actually made from the Firm's trust account as reflected on the class report. In addition, the lender was not provided with a copy of the addendum to the settlement statement.

On January 5, 2001, respondent served as the closing attorney in a transaction whereby Greene purchased real property at 109 Pine Ridge Lane in Greenville from a Stegall entity. The transaction was financed by a lender other than Cendant.

The HUD-1 form reflects earnest money or a deposit of $6,616.03 on line 201 and "cash from borrower" of $5,954.13. Line 603 reflects "cash to seller" of $79,683.97. However, respondent had the parties sign an addendum showing "credit to buyer" of $13,300, and a corresponding reduction of the amount due seller, resulting in "cash due to buyer" of $7,345.87. The Firm's class report reflects that the only deposit into the Firm's trust account in connection with this transaction were the loan proceeds. The class report shows a refund to Greene of $7,345,87 (paid by a check in the amount of $6,345.87 and the withholding of a $1,000 judgment lien). Consequently, Greene, the buyer, (who is shown on the HUD-1 form as contributing $5,954.13 to the transaction) received $7,345.87. The HUD-1 form was submitted to the lender without being amended to conform to the balance sheet and actual disbursements. The addendum was not submitted to the lender.

On January 30, 2001, Greene purchased real property at 116 Blackbird Lane in Greenville. The mobile home was purchased from LUV Homes and the land from a Stegall entity. Respondent served as the closing attorney. A lender other than Cendant financed the transaction.

The HUD-1 furnished to the lender reflects "cash from borrower" on line 303 as $13,268.56 and "cash to seller" on line 603 as $84,700. The sales price of the lot is shown on the HUD-1 form.

However, LUV Homes and respondent signed an addendum that shows a credit to Greene as "funds from seller" of $25,031.44, reducing the "due seller" by a like amount, resulting in the "due to borrower" to be $11,762.44. A second addendum for the lot sale shows the sales price of the lot reduced by a release fee, payoff, and closing costs. The Firm's balance sheet and class report show a

disbursement to Greene of $11,762.44 and reflect that the only deposit was for the loan proceeds. The class report reflects a disbursement of $9,312.00 to Twin Lakes, a Stegall entity, notwithstanding the fact that this entity is not mentioned anywhere on the HUD-1 form. This amount was shown on the second addendum which accounted for the funds on the lot sale.

On January 2, 2001, respondent served as the closing attorney in a transaction whereby Sellers H and W sold property at 4008 Shady Grove in Honea Path to Buyer B. The HUD furnished to the lender, Cendant, shows $4,000 in earnest money on line 201, "cash from borrowers" of $960.55, and "cash to seller" of $11,261.53. However, the Firm's file contains two letters addressed to respondent. One of these letters, signed by Sellers H and W, states " . . . disburse all the net proceeds . . . to . . . Buyer B omitting our names." The second letter addressed to respondent is from Buyer B instructing respondent " . . . disburse the net proceeds in the approximate amount to [Greene] omitting my name." Respondent did not furnish either of these letters to Cendant. Contrary to the information on the HUD-1 furnished to Cendant as lender, the class report shows respondent did not receive the $960.55 from the borrower. The class report also shows a disbursement to Greene, notwithstanding the fact that Greene's name appears nowhere on the HUD-1 form and that he has no apparent relationship to the transaction.

At some point, respondent became concerned whether borrowers were making the "cash from borrower" payments directly to the Stegall entities. Accordingly, respondent began requiring presentation of a cashier's check for the "cash for borrowers" at closings. Respondent handled approximately five transactions in which he required cashier's checks. The cashier's checks were usually prepared by BB&T (where respondent knew the Stegall entities banked) and delivered by Stegall employees to respondent's staff. Respondent is now informed and believes the Stegall entities furnished the money to purchase the cashier's checks, but this was not known by respondent until it came to light during discovery in the Cendant case. See infra.

Greene was indicted. He pled guilty in the United States District Court to one count of wire fraud and was sentenced to five years probation and restitution in connection with fraudulent dealings with Stegall and Ashmore to the detriment of Cendant and other lenders who purchased loans with inflated property values. In his plea agreement, Greene admitted deriving between $1,500,000 and $2,500,000 from his scheme with Stegall and Ashmore.

With information available from criminal proceedings and related civil litigation after the closings, it now appears that the accommodations in the foregoing transactions by Stegall entities to Greene were in return for Greene inducing Cendant to make loans on inflated mobile home and/or land packages to borrowers who were buying from Stegall entities. Respondent was unaware of Stegall and Greene's arrangement concerning the Cendant loans.

Stegall and Ashmore were also indicted in the United States District Court in connection with defrauding lenders in conspiracy with Greene. Stegall pled guilty to one count of wire fraud and was sentenced to eighteen months in prison. In his plea agreement, Stegall admitted deriving $3,075,000 from the real estate transactions related to his plea. One or more of the transactions mentioned in the information to which Stegall pled guilty were closed by the Firm.

As a result of the foregoing, Cendant initiated litigation against the Firm. Cendant was paid $750,000 as settlement on behalf of the Firm. Five hundred and seventy five thousand dollars of this amount was paid by the Firm's insurance carrier and the remainder was paid by the Firm or respondent and his partner.

Additional Facts

ODC's investigation reveals respondent did not receive any special financial benefit from the closings investigated by ODC. All fees received are shown on the Firm's class report; the fees appear to be reasonable and customary for work of this type in Greenville.

ODC does not allege respondent deliberately sought to assist Cromer, Caldwell, Stegall, Ashmore, or Greene in criminal undertakings or had knowledge of their criminal intent. However, submitting HUD-1 Settlement Statements to lenders which were at variance with receipts and disbursements from the Firm's trust account enabled these people to break the law. With the advantage of hindsight and discovery of criminal activity, respondent now recognizes there were "red flags" which should have alerted him that the Cromer Company and the Stegall entities were seeking to mislead lenders, particularly in closing transactions where Stegall entities effectively gave money to Greene who was originating loans from Cendant to borrowers purchasing mobile home and land packages from Stegall entities.

It now appears that in many of the mobile home and land package transactions respondent closed for the Cromer Company and the Stegall entities, borrowers paid no money into the transactions. Instead, these sellers were seeking to close the transactions without the borrowers contributing their own money as an inducement for borrowers to close the transactions with their businesses. This information was not known to respondent until after the closing of all of these transactions.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to client); Rule 1.2(e) (when lawyer knows client expects assistance not permitted by the Rules of Professional Conduct or other law, lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct); Rule 4.1(a) (in the course of representing a client, lawyer shall not knowingly make a false statement of material fact or law to a third person); Rule 4.1(b) (in the course of representing a client, lawyer not fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by

a client, unless disclosure is prohibited by Rule 1.6); Rule 5.1(a) (partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct); Rule 5.3(b) (with respect to a nonlawyer employee, lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with professional obligations of the lawyer); Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct); Rule 8.4(b) (lawyer shall not commit criminal act that reflects adversely on lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects); Rule 8.4(d) (lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (lawyer shall not engage in conduct that is prejudicial to administration of justice). In addition, respondent admits his misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers), Rule 7(a)(4) (lawyer shall not be convicted of crime of moral turpitude or serious crime); and Rule 7(a)(5) (lawyer shall not engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

CONCLUSION

We accept the Agreement for Discipline by Consent and definitely suspend respondent from the practice of law for a six month period, retroactive to the date of his interim suspension. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

The Court is troubled by the recent number of real estate transactions which have been the subject of misleading, fraudulent, and/or criminal schemes. Inaccurate HUD-1 Settlement Statements and other closing documents contribute to these deceptive activities.

Respondent's misconduct derives principally from his inaccurate representations on HUD-1 Settlement Statements. These misrepresentations have subjected respondent to both federal criminal penalties and the current disciplinary action by this Court.

In addition to completing HUD-1 Settlement Statements, attorneys prepare their own settlement statements. These documents, too, must also correctly reflect the underlying financial transaction by the parties in order for the buyer, seller, and others to have an accurate record of the transaction.

According to the parties in this matter, a large number of attorneys are not passing closing funds through their trust accounts and, at the same time, not identifying the funds as paid outside of closing on closing documents. Not only does this practice fail to accurately record the actual transaction for the buyer and seller, but it is misleading to lenders. In an attempt to eliminate this and other deceptive practices, we emphasize that costs and credits in connection with a real estate transaction must be shown on the settlement statement and that the settlement statement must reflect all amounts paid, by whom paid, and to whom paid. Any charges or amounts paid outside of the closing must be reflected as such on the settlement statement (i.e., "POC"). For all funds exchanged during the closing, the attorney must have a record of the method of payment by the parties to the transaction, as well as an accounting of all receipts and disbursements by the attorney. The attorney's records must accurately reflect the transaction as evidenced by the settlement statement unless there is written documentation signed by all parties to the transaction (including any lender) indicating that funds were disbursed otherwise. Failure to comply with these standards may subject attorneys to disciplinary action.

DEFINITE SUSPENSION.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The Gaffney Ledger, Appellant,

v.

The South Carolina Ethics Commission, Respondent.

Appeal from Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 25844
Heard June 9, 2004 - Filed July 26, 2004

REVERSED

Jay Bender and Holly Palmer Beeson, of Baker, Ravenel & Bender, L.L.P., of Columbia, for appellant.

Cathy L. Hazelwood, of Columbia, for respondent.

JUSTICE MOORE: Appellant The Gaffney Ledger (Newspaper) was publicly reprimanded for violating the Ethics Reform Act. We reverse.

FACTS

On September 13, 2000, Boyd McLean filed a complaint with respondent State Ethics Commission (Commission) alleging Newspaper had

violated S.C. Code Ann. § 8-13-1354 (Supp. 2003) by publishing a political advertisement without identifying who had paid for it. The Commission subsequently informed McLean that his complaint failed to allege sufficient facts to constitute a violation of the ethics law.[1]

After dismissal of the complaint, Newspaper published an article written by its staff writer stating that the complaint had been "tossed out." McLean then filed this action with the Commission alleging Newspaper had violated the confidentiality requirements of the Ethics Reform Act. Newspaper was publicly reprimanded by the Commission. The circuit court affirmed.

ISSUE

Did Newspaper violate the confidentiality requirements of the Ethics Reform Act?

DISCUSSION

Section 8-13-320 of the Act authorizes the Commission to "initiate or receive complaints and make investigations" of ethics violations involving public officials.[2] Under subsection (9)(c), if an alleged violation is found to be groundless, "the entire matter must be stricken from public record." Subsection 10(b) further provides:

> (b) If the commission or its executive director determines that the complaint does not allege facts sufficient to constitute a violation, the commission must dismiss the complaint and notify

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[1]Under § 8-13-1354, the party paying for a political advertisement is responsible for revealing the payor's identity. The Commission found Newspaper had not paid for the advertisement and therefore did not violate the statute.

[2]Lobbyists and persons attempting to illegally influence a public official are included under the Act. *See* Title 2, Chapter 17, and S.C. Code Ann. § 8-13-705 (Supp. 2003).

> the complainant and respondent. The entire matter must be stricken from public record unless the respondent, by written authorization, waives the confidentiality of the existence of the complaint and authorizes the release of information about the disposition of the complaint.[3]

(emphasis added). Following this section are other provisions in subsection (10) governing proceedings after an initial finding of probable cause. Subsection (10)(g) then provides:

> (g) All investigations, inquiries, hearings, and accompanying documents must remain confidential until final disposition of a matter unless the respondent waives the right to confidentiality. The wilful release of confidential information is a misdemeanor, and any person releasing such confidential information, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year.

(emphasis added).

The Commission found Newspaper violated § 8-13-320(10)(b) because Newspaper did not file a written waiver with the Commission before it published the article about dismissal of the complaint. The Commission concluded subsection (10)(g) did not apply because the complaint was dismissed at the "facts sufficient" stage of the proceedings. On appeal, Newspaper contends subsection (g) applies and therefore it did not violate the confidentiality requirement because it waited until "final disposition" of the complaint to reveal any information. We agree.

A close reading of subsection 10(b) indicates it applies only to the Commission's own record of the proceedings and not to public disclosure by a party. This subsection provides that upon dismissal of a complaint, the entire matter must be stricken "from public record" unless the respondent

[3] While this matter was still pending in circuit court, by amendment effective June 26, 2003, this section was amended to add the words "to the State Ethics Commission" after the phrase "written authorization."

waives confidentiality. Under this statute, when an ethics matter ends by dismissal, the Commission's record is purged and there is no public record of a complaint having been filed unless the respondent authorizes the release of information regarding its disposition. This procedure prevents disclosure to a third party through discovery of the Commission's files unless the respondent chooses to allow it.

There is no confidentiality requirement as to the parties, however, once the matter has been dismissed. Subsection 10(g), and not 10(b), controls a party's disclosure of an ethics matter. As provided in that subsection, all information remains confidential only until final disposition. Accordingly, once an ethics matter is finally resolved by dismissal of the complaint, a waiver of confidentiality is no longer necessary for disclosure. In this respect, a dismissal is treated the same as any other disposition.

We hold the Commission erred in finding Newspaper could not reveal the dismissal of the complaint absent a waiver of confidentiality.[4] In light of this disposition, we decline to address the constitutional issue raised by Newspaper. *See* Arnold v. Ass'n of Citadel Men, 337 S.C. 265, 523 S.E.2d 757 (1999) (this Court will decline to rule on a constitutional question unless the determination is essential to the disposition of a case).

REVERSED.

TOAL, C.J., WALLER, BURNETT and PLEICONES, JJ., concur.

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[4]The Commission also found Newspaper violated Reg. 52-704(A)(2) by failing to file a written waiver of confidentiality with the Commission. Although regulations have the force of law, they may not alter or add to the terms of a statute. U.S. Outdoor Advertising, Inc. v. South Carolina Dep't of Transp., 324 S.C. 1, 481 S.E.2d 112 (1997); Goodman v. City of Columbia, 318 S.C. 488, 458 S.E.2d 531(1995). To the extent this regulation expands the confidentiality requirement of § 8-13-320(10)(b), it is invalid.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of William Yon Rast, Jr., Respondent.

Opinion No. 25845
Heard May 25, 2004 - Filed July 26, 2004

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel, and Barbara M. Seymour, Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

William Yon Rast, Jr., of West Columbia, pro se.

PER CURIAM: This attorney disciplinary matter involves Respondent's failure to draft an order and his failure to respond to Disciplinary Counsel. We agree with the subpanel's recommendation and issue a public reprimand.

PROCEDURAL HISTORY

Respondent was served with Formal Charges on September 20, 2002. Respondent filed an Answer on October 21, 2002. A hearing was held before the subpanel on August 6, 2003. No exceptions were filed and the full panel adopted the report of the subpanel on January 21, 2004. The subpanel made

the following findings and recommendations:

I. Failure to Timely Prepare a Family Court Order

Respondent represented the complainant's husband in a divorce action. The judge instructed complainant's attorney to prepare a proposed order regarding distribution of the marital property. The order was filed and Respondent successfully appealed. A second hearing was held in June 2001, and complainant's attorney drafted a second proposed order. The judge signed the order and returned it to complainant's attorney, who failed to file the order in Lexington County.[1]

When complainant did not receive a copy of the order, she attempted to contact her attorney.[2] Unable to reach her attorney, complainant contacted the Clerk of Court, who informed her that no order had been filed. Complainant then contacted the presiding judge and spoke to the judge's secretary, Doe, who informed complainant that the order had been signed and returned to complainant's attorney. Doe tried unsuccessfully to reach complainant's attorney to clear up the problem.

Doe testified that, after consulting with the judge, she contacted Respondent's office to obtain a copy of the order. Respondent's secretary informed Doe that Respondent did not have a copy of the order. Doe again consulted with the judge, who instructed her to telephone Respondent and have him prepare another order. Respondent failed to submit a proposed order, and Doe telephoned Respondent's secretary again regarding the order. Respondent did not prepare an order.

Eventually, in November 2001, the judge prepared and filed an order of distribution. The judge's order stated, "The Court has diligently tried to contact counsel for both parties to correct this situation but both attorneys have repeatedly failed to return telephone calls or contact the Court in any

[1] Because the presiding judge was visiting from Aiken and had returned to Aiken at the time he signed the order, it appears he instructed complainant's attorney to file the order.

[2] The complainant's attorney was seriously ill and has since died.

way."

Respondent, appearing pro se, admitted at oral argument that Doe may have contacted his secretary regarding the order. However, Respondent stated that he had no recollection of the telephone calls. Respondent stated he was not aware he had been instructed to prepare an order and did not learn that the judge had prepared an order until after Respondent prepared his own order.[3]

The subpanel found there was clear and convincing evidence that Doe placed the phone calls to Respondent's office with instructions to prepare the order. The subpanel found that, even if Respondent did not actually receive word that he was to draft the order, Respondent was responsible for seeing that messages left with his secretary were relayed to him in a timely and accurate manner.

The subpanel found that Respondent's lack of diligence violated the following Rules of Professional Conduct found in Rule 407, SCACR: Rule 3.2 (Expediting Litigation); Rule 8.4(a) (Misconduct - Violation of the Rules of Professional Conduct); and Rule 8.4(e) (Misconduct - Prejudice to the Administration of Justice).[4]

II. Failure to Respond to Disciplinary Counsel

The parties stipulated that Respondent was notified of the complaint by letter from Disciplinary Counsel dated November 1, 2001. The letter requested a response within fifteen days. On December 5, 2001, after Respondent failed to respond, Disciplinary Counsel sent Respondent a letter pursuant to In the Matter of Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982). Disciplinary Counsel received no response from Respondent until January

[3] Respondent's proposed order is included as an exhibit and is dated March 2002. There is nothing in the record to show why Respondent prepared his own order.

[4] Disciplinary Counsel also alleged that Respondent violated Rule 3.4 (Fairness to Opposing Party and Counsel). However, the subpanel ruled that while Respondent did fail to prepare an order pursuant to the judge's instructions, Respondent's failure was not a willful disregard of his obligation.

29, 2002, after the full investigation was authorized. Respondent has fully cooperated following issuance of the Notice of Full Investigation.

Respondent explained at the hearing that he drafted a timely response to the grievance, but that his secretary did not transcribe or mail it in time. The subpanel again found that the responsibility for errors or delays caused by Respondent's secretary fell on Respondent, and that it was incumbent upon Respondent to see that his response was delivered within the time period requested by Disciplinary Counsel.

The subpanel found that Respondent's failure to respond to the initial letter of complaint and to the Treacy letter violated the following Rules of Professional Conduct found in Rule 407, SCACR: Rule 8.1(b) (Bar Admissions and Disciplinary Matters); and Rule 8.4(e) (Misconduct - Prejudice to the Administration of Justice).

II. Mitigating and Aggravating Circumstances

The subpanel noted the circumstances which put Respondent in the midst of disciplinary proceedings were initially caused by the delay and inaction of complainant's attorney. The subpanel noted that Respondent's failure to draft the order was minor, which would ordinarily only warrant a caution. However, the subpanel also noted that Respondent had a significant disciplinary history, which included a Private Reprimand in 1977, a Public Reprimand in 1990,[5] and a second Public Reprimand in 1999.[6] The subpanel found that Respondent's minor misconduct was exacerbated by his failure to timely respond to Disciplinary Counsel's inquiry. The subpanel considered Respondent's cooperation following the notice of full investigation, but also noted that Respondent failed to submit a proposed Panel Report as the subpanel requested.

The subpanel recommended that Respondent receive a Public

[5] In the Matter of Rast, 300 S.C. 423, 388 S.E.2d 776 (1990).

[6] In the Matter of Rast, 337 S.C. 588, 524 S.E.2d 619 (1999).

Reprimand and that he be ordered to pay the costs[7] of the proceeding.

CONCLUSION

The authority to discipline attorneys and the manner in which discipline is given rests entirely with the Supreme Court. In re Long, 346 S.C. 110, 551 S.E.2d 586 (2001). The Court may make its own findings of fact and conclusions of law, and is not bound by the panel's recommendation. In re Larkin, 336 S.C. 366, 520 S.E.2d 804 (1999). The Court must administer the sanction it deems appropriate after a thorough review of the record. Id.

After a thorough review of the record, we agree with the subpanel's recommendation that Respondent receive a public reprimand. The facts indicate that Respondent's actions regarding the failure to prepare a proposed order were initially caused by circumstances beyond his control, namely that the opposing attorney became ill and failed to file the order. Respondent's failure to file the order would ordinarily not rise to the level of a public reprimand. However, Respondent initially failed to respond to Disciplinary Counsel's inquiry, and he has failed to respond to or comply with Disciplinary Counsel in the past. Accordingly, we issue Respondent a Public Reprimand. Within thirty (30) days of the date of this opinion, Respondent must pay the costs associated with this proceeding. ($433.64).

PUBLIC REPRIMAND.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

[7] The total costs of the proceedings were $433.64.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Robert B. Kizer, Laura Cabiness, and the City of Charleston, a Municipal Corporation, Respondents,

v.

Mary B. Clark, William Wilder, Paul Hadley, III, Karen Bennett, Parris Williams, Leo Simonin and Gwendolyn Johnson, in their capacities as Commissioners of Election for the Proposed Town of James Island, Mary B. Clark, William Wilder, Parris Williams, W. William Woosley, and Joseph Qualey, in their capacities as the Mayor and Town Council of the Proposed Town of James Island, the Town of James Island, and James M. Miles, in his capacity as Secretary of State of the State of South Carolina, Defendants,

Of whom

Mary B. Clark, William Wilder, Paul Hadley, III, Karen Bennett, Parris Williams, Leo Simonin and Gwendolyn Johnson, in their capacities as Commissioners of Election for the Proposed Town of James Island and

Mary B. Clark, William Wilder, Parris Williams, W. William Woosley, and Joseph Qualey, in their capacities as the Mayor and Town Council of the Proposed Town of James Island, and the Town of James Island are Appellants.

Appeal from Charleston County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 25846
Heard March 2, 2004 - Filed July 26, 2004

AFFIRMED

A. Camden Lewis and Daryl G. Hawkins, of Lewis, Babcock & Hawkins, of Columbia; Trent M. Kernodle, David A. Root, Christine Companion Varnado, and Robert B. Varnado, all of Kernodle, Taylor & Root, of Charleston; and Michael M. Socha, of Charleston, for appellants.

Frances I. Cantwell and William B. Regan, of Regan and Cantwell, of Charleston; Susan J. Herdina, Assistant Corporation Counsel, of Charleston; Charlton DeSaussure, Jr., of Haynesworth Sinkler Boyd, P.A., of Charleston; and Timothy A. Domin, of Clawson & Staubes, of Charleston, for respondents Kizer, Cabiness, and City of Charleston.

Harold W. Jacobs and Paul Dominick, of Nexsen Pruet Jacobs Pollard & Robinson, of Charleston, for defendant James M. Miles.

Attorney General Henry Dargan McMaster, Deputy Attorney General Treva G. Ashworth, and Assistant Deputy Attorney General J. Emory Smith, all of Columbia, for *amicus curiae* State of South Carolina.

JUSTICE MOORE: Respondents (City) brought this action challenging the 2002 incorporation of the Town of James Island (Town). The trial court found that S.C. Code Ann. § 5-1-30(A)(4) (Supp. 2003), by which Town established the contiguity necessary for incorporation, was unconstitutional as special legislation. We affirm.

FACTS

Section 5-1-30 sets forth the requirements for incorporation as follows:

> **§ 5-1-30. Prerequisites to issuance of corporate certificate to proposed municipality.**
>
> (A) Before issuing a corporate certificate to a proposed municipality, the Secretary of State shall first determine:
>
> (1) that the area seeking to be incorporated has a population density of at least three hundred persons a square mile according to the latest official United States Census;
>
> (2) that no part of the area is within five miles of the boundary of an active incorporated municipality;

(3) that an approved service feasibility study for the proposed municipality has been filed with and approved by the Secretary of State; and

(4) that the area proposed to be incorporated is contiguous. Contiguity is not destroyed by an intervening marshland located in the tidal flow or an intervening publicly-owned waterway, whether or not the marshland located in the tidal flow or the publicly-owned waterway has been previously incorporated or annexed by another municipality. The incorporation of a marshland located in the tidal flow or a publicly-owned waterway does not preclude the marshland located in the tidal flow or the publicly-owned waterway from subsequently being used by any other municipality to establish contiguity for purposes of an incorporation if the distance from highland to highland of the area being incorporated is not greater than three-fourths of a mile.

(B) When an area seeking incorporation has petitioned pursuant to Chapter 17 the nearest incorporated municipality to be annexed to the municipality, and has been refused annexation by the municipality for six months, or when the population of the area seeking incorporation exceeds fifteen thousand persons, then the provision of the five-mile limitation of this section does not apply to the area.

(C) The five-mile limit does not apply when the boundaries of the area seeking incorporation are within five miles of the boundaries of two different incorporated municipalities in two separate counties other than the county within which the area seeking incorporation lies, and when the boundaries of the proposed municipality are more than five miles from the boundaries of the nearest incorporated municipality that lies within the same county within which the proposed municipality lies, and when the

> land area of the territory seeking incorporation exceeds one-fourth of the land area of the nearest incorporated municipality.
>
> (D) The population requirements do not apply to areas bordering on and being within two miles of the Atlantic Ocean and to all sea islands bounded on at least one side by the Atlantic Ocean, both of which have a minimum of one hundred fifty dwelling units and at least an average of one dwelling unit for each three acres of land within the area and for which petitions for incorporation contain the signatures of at least fifteen percent of the qualified electors of the respective areas seeking incorporation.
>
> (E) This section does not apply to those areas which have petitioned to the Secretary of State before June 25, 1975, or which may be under adjudication in the courts of this State. The five-mile limit does not apply to counties with a population according to the latest official United States Census of less than fifty-one thousand.

(emphasis added).

Subsection (A)(4) was enacted in response to lobbying by Town after our decision in Glaze v. Grooms, 324 S.C. 249, 478 S.E.2d 841 (1996). In Glaze, we addressed a challenge to Town's 1992 attempt at incorporation. The trial court found Town lacked the necessary contiguity. Town appealed claiming that contiguity is not destroyed by marshlands and creeks and therefore the incorporated highland areas of Town were contiguous. We agreed that marshlands and creeks do not destroy contiguity; however, these marshlands and creeks had previously been annexed by other municipalities and therefore could not be used to establish Town's contiguity. 324 S.C. at 253, 478 S.E.2d at 844.

After Glaze, the definition of contiguity in subsection (A)(4) was enacted and Town again sought incorporation. Because it is within five miles of City, under § 5-1-30(B) Town would have to request annexation by City before incorporating unless the proposed town had a population of at least 15,000. By establishing contiguity using marshland and waterways that had already been annexed by City, Town was able to amass a population of 15,000, allowing it to bypass a request for annexation before incorporating.

After the Secretary of State issued Town a certificate of incorporation, City brought this action challenging subsection (A)(4) as unconstitutional special legislation claiming James Island is the only geographic area in the State that needs the contiguity provision of subsection (A)(4) to amass a population of 15,000. The trial court found subsection (A)(4) "creates a classification among municipalities that is arbitrary" and concluded it is unconstitutional special legislation. The trial court enjoined Town's exercise of municipal functions.

Town appeals. The Attorney General has submitted an amicus brief in support of finding the legislation constitutional. The trial court's injunction has been stayed pending appeal.

ISSUE

Is § 5-1-30(A)(4) unconstitutional special legislation?

DISCUSSION

Our State Constitution specifically forbids the enactment of special legislation regarding the incorporation of municipalities. Article III, § 34, provides:

> The General Assembly of this State shall not enact local or special laws concerning any of the following subjects or for any of the following purposes, to wit:
>
> . . .
>
> II. To incorporate cities, towns or villages. . . .

Article VIII, § 8, similarly provides: "The General Assembly shall provide by general law the criteria and the procedures for the incorporation of new municipalities . . . . No local or special laws shall be enacted for these purposes." Article VIII, § 10, further provides: "No laws for a specific municipality shall be enacted, and no municipality shall be exempted from the laws applicable to municipalities. . . ."

A law is general when it applies uniformly to all persons or things within a proper class, and special when it applies to only one or more individuals or things belonging to that same class. McKiever v. City of Sumter, 137 S.C. 266, 135 S.E. 60 (1926). A law that is general in form but special in its operation violates the constitutional prohibition against special legislation. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1938). The fact that a law operates to affect only one person or one locale, however, does not necessarily make it special legislation. Kalk v. Thornton, 269 S.C. 521, 238 S.E.2d 210 (1977); Timmons v. South Carolina Tricentennial Comm'n, 254 S.C. 378, 175 S.E.2d 805 (1970).[1]

If the legislation does not apply uniformly, the essential inquiry is whether the legislation creates an unlawful classification. McKiever, *supra.* The mere fact that a statute creates a classification does not make it special legislation. Elliott v. Sligh, 233 S.C. 161, 103 S.E.2d 923 (1958); Duke Power Co. v. South Carolina Pub. Serv. Comm'n, 284 S.C. 81, 326 S.E.2d 395 (1985). The constitutional prohibition against special legislation operates similarly to our equal protection guarantee in that it prohibits an unreasonable classification. Thompson v. South Carolina Comm'n on Alcohol and Drug Abuse, 267 S.C. 463, 229 S.E.2d 781 (1976); *see also* Duke Power Co., *supra.* A classification is arbitrary, and therefore unconstitutional, if there is no reasonable hypothesis to support it. Elliott v. Sligh, *supra*.

On the other hand, the legislature may use a classification "if some intrinsic reason exists why the law should operate upon some and not upon

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[1]Further, the fact that a law was enacted as a result of lobbying does not transform it into special legislation. Kalk, 269 S.C. at 526, 238 S.E.2d at 213.

all, or should affect some differently from others." *Id*. at 165, 103 S.E.2d at 926. Where a special law will best meet the exigencies of a particular situation, it is not unconstitutional. Med. Soc. of South Carolina v. Med. Univ. of South Carolina, 334 S.C. 270, 513 S.E.2d 352 (1999). We will not overrule the legislature's judgment that a special law is necessary unless there has been a clear and palpable abuse of legislative discretion. *Id.*

1. What classification is created by subsection (A)(4)?

The parties stipulated that without the contiguity provision of (A)(4) allowing Town to use marshes and waterways previously annexed by City, Town could not reach the 15,000 population threshold. City and Town each presented expert testimony regarding the potential application of subsection (A)(4) in different geographic areas of the State. The main thrust of City's evidence was that James Island was the only geographic area that needed subsection (A)(4) to reach the 15,000 population threshold.

Town, on the other hand, presented evidence that at least three other unincorporated areas – outside Conway, Greer, and Summerville – could use subsection (A)(4) to create contiguity. Town's expert testified that City's evidence failed to take into account the fact that municipal incorporation depended not strictly upon geography but also upon "political will" which could influence whether the 15,000 population threshold would be needed for a politically desired configuration.

The trial court found subsection (A)(4) created a class consisting only of James Island because only James Island needed to use it to meet the 15,000 population threshold. We disagree. The application of subsection (A)(4) is not limited to unincorporated areas that need to reach the 15,000 population threshold. Subsection (A)(4) applies to any unincorporated area that is geographically configured so that it may establish contiguity using previously annexed marshland and waterways, regardless of whether the 15,000 population threshold is a factor in the incorporation.

The evidence is undisputed that at least three other unincorporated areas in the State are so configured and could use subsection (A)(4) to establish contiguity for incorporation. Accordingly, the class created by subsection (A)(4) is not limited to James Island.

2. Is the classification arbitrary?

In Thomas v. Macklen, *supra*, we considered a law concerning the selection of town council members that was applicable only to "resort communities." First, we noted that the definition of "resort communities" in the Act was in practical effect limited to Myrtle Beach. This fact alone, however, was not determinative. We went on to consider whether there was any reasonable hypothesis to support a class of "resort communities:"

> We are unable to perceive any rational difference of situation or condition to be found in what is called a "resort community" from that of any municipal corporation organized under the general law in relation to the selection of its town council. . . . [T]he practical effect of the operation of the law will introduce radical diversity into the governmental structure of our municipal corporations.

195 S.E. at 545.[2]

Here, in finding an arbitrary classification, the trial court focused on the fact that only tidal marshes and waterways, and not freshwater marshes, parks, or highways, could be used to create contiguity under

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[2]Similarly, we have found legislation based on population limits unconstitutional where there is no rational basis for treating government entities differently based on population numbers. *E.g.,* U.S. Fidelity & Guar. Co. v. City of Columbia, 252 S.C. 55, 165 S.E.2d 272 (1969) (license fee for city populations in excess of 90,000); Town of Forest Acres v. Town of Forest Lake, 226 S.C. 349, 85 S.E.2d 192 (1954) (annexation rules for county populations in excess of 85,000); State v. Ferri, 111 S.C. 219, 97 S.E. 512 (1918) (law prohibiting traffic in seed cotton applying only to counties containing cities of 50,000 or more).

subsection (A)(4). The broader question, however, is whether there is any rational basis to allow particularly defined geographic areas to incorporate using territory that lies within another's borders.

We find the classification arbitrary because there is no rational reason to allow only certain geographic areas to use territory belonging to a neighboring municipality to enable incorporation. Subsection (A)(4) creates an unconstitutional diversity in municipal incorporation laws, which are constitutionally required to be uniform, by allowing only certain areas to incorporate using territory belonging to another municipality. We hold this provision is unconstitutional special legislation.

AFFIRMED.

WALLER, J., Acting Justices Marc H. Westbrook and Roger L. Couch, concur. TOAL, C.J., concurring in a separate opinion.

Chief Justice Toal, concurring: I concur with the majority's result in every respect. I write separately only to note that this opinion is consistent with my dissent in *Ed Robinson Laundry and Dry Cleaning, Inc. v. South Carolina Dept. of Revenue*, 356 S.C. 120, 580 S.E.2d 97 (2003). In my dissent, I explained that, in my view, the 61 sales tax exemptions found in S.C. Code Ann. section 12-46-2120 (Supp. 2002) rendered the statute unconstitutional because there was no rational basis for the classifications, which treated similarly situated entities differently for sales tax purposes.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner/Respondent,

v.

Luke Traylor, Respondent/Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From York County
Gary E. Clary, Circuit Court Judge

Opinion No. 25847
Heard June 22, 2004 - Filed July 26, 2004

REVERSED

Katherine Carruth Link and South Carolina Office of Appellate Defense, of Columbia, for Respondent-Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Melody Brown, all of Columbia; and Solicitor Thomas Pope, of York, for Petitioner-Respondent.

JUSTICE WALLER: We granted cross-petitions for certiorari to review the Court of Appeals' opinion in State v. Traylor, Op. No. 2003-UP-036 (Ct. App. filed Jan. 14, 2003). We reverse.

FACTS

In the early morning hours of May 17, 2000, the York County home of Marcos Rivera, Alfredo Garcia, and Javier Cervantes was burglarized. The men awoke and found themselves being beaten, stabbed and robbed. After the attack, Detective Sarah Robbins of the York County Police Department was called to the scene.[1] Two of the men, Alfredo and Javier, described their attackers as three black males and one white male. Marcos remembered seeing only two black males and one white male. Javier recognized one of the black male assailants, ultimately determined to be Willie Hayes, as living in a nearby home. Hayes was arrested and identified Luke Traylor as one of his accomplices.[2]

Robbins testified that each of the victims identified the white male assailant as being tall and slim and wearing a cap. One of the victims believed the white male was sixteen or seventeen years old. None of the victims gave any specific description as to the white male's hair or eye color.[3]

Two days later, Javier, Marcos and Alfredo went to Robbins' office at the police department. Robbins put together three separate groups of photographs, each containing 5-6 photos of different individuals; each set contained one photo of an individual identified by Hayes. The photos of Traylor (as well as the other accomplices), were all photos which had been processed after their arrest for this crime. Unlike the photos of the other four individuals in the group containing Traylor's photo, his photo does not have a

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[1] Robbins was called because the men spoke only Spanish, a language in which she is fluent.

[2] Hayes also identified two other accomplices.

[3] Robbins testified victims did not specifically tell her a height of the white male, but that they somehow indicated an approximate height, and she wrote down 5'6"- 5"8."

sign beneath it showing an arrest date, and stating "Police Department- York, South Carolina."[4] Additionally, all of the photos shown to the victims have numerical markings on the side, indicating a height in inches.[5]

Robbins testified that during the photographic line-up, the victims sat behind her desk in a semi-circle, several feet apart. She testified each victim was separately handed a group of pictures, and asked whether he could identify an assailant. Each victim would then hand the group of photos back to her, and indicate which person, if any, he recognized. During this time, there was no conversation between the victims as to who had been identified.

Each of the photographs shown to the victims had a name on the back; however, Robbins stated the victims did not turn the photos over and look at the back of them. Further, although the victims had been told someone had been arrested, there is no indication they were aware of the identity or number of individuals arrested.

Marcos Rivera testified that he, Alfredo, and Javier were all sleeping in the same bedroom when he woke up and realized he had been cut on the side of his head. He saw a white male and two black males. The black male beside him had a knife. Marcos was holding the hand of the black male (who had stabbed him) when the white male, who was wearing a cap, came over and hit his hand with a stick. The black male then cut him again. Marcos said the white male was in the bedroom for a total of twenty to thirty minutes, and that he was able to see the white male for approximately ten minutes.[6] Marcos testified that the man who had cut him with a knife was the taller, black male, while the shorter black male had an afro-type hairdo. After leaving the hospital several hours later, Marcos went to the police station where he identified a photograph of the man with the afro hairdo.[7] Two days later, he went to Robbins' office and was shown three sets of photos; the only

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[4] According to Robbins, the sign attached to the camera pole had been broken and had been removed.

[5] Traylor's photo shows him to be approximately 70.5 inches tall, or about 5'10&1/2." Robbins testified that the victims indicated the white male was approximately 5'6"-5'8."

[6] After this point, the assailants told the victims to cover their heads.

[7] This was a photo of Willie Hayes, who initially implicated Traylor.

photo he could identify (other than the photo of Hayes whom he had previously identified) was that of the white male, Traylor. Marcos testified he did not notice any writing at the bottom of the photos, and he did not say anything to Javier or Alfredo about what he had seen in the pictures.

Alfredo testified that when he woke up, the lights were on and he was being beaten with a stick by a white male who was wearing a cap. He was able to see him for about a minute. He testified he initially also saw two black males. He later saw a third black male with a white shirt. After the assault, Alfredo was able to identify a photo of a black male with an afro-style hairdo and a black shirt. Two days later, Alfredo went to Robbins' office and picked a photo of Traylor as the white male assailant.[8] He testified he knew the young blond man in the photo was the assailant "because of his face, his thin face and body. And even though that night he wore a cap, I was able to recognize him." Alfredo testified that, during the line-up in Robbins' office, Marcos viewed the photos first, then Alfredo, then Javier; he testified he did not know whom Marcos had identified at the time he viewed the photos.

Javier testified he was sleeping on the sofa when he woke up and saw three men in the room: two black males and one white male. The lights were on and the white male, who was standing near him, had a cap on, a stick in his hand, and was hitting them with the stick. Javier was able to look at him for about five minutes. Although the white male was in the room for twenty or thirty minutes, he didn't see him the whole time as the man covered him with a bed cover. Javier recognized one of the black males, with an afro-style hairdo, as a man he had seen before. Javier then saw a third black male at the door with a white t-shirt. After the assault, Javier went with Robbins to show her the home where he had seen the black male with the afro hairdo. Two days later, he went with Marcos and Alfredo to Robbins' office, where they looked at the photographic line-up prepared by Robbins. Javier testified the photos were first viewed by Marcos, then Alfredo, then himself. He testified he did not know, when he received the photos, whose pictures

[8] He also picked out a photo of the black male who had cut Marcos with a knife, and another black male.

Marcos and Alfredo had picked from the line-up. Javier also identified the photo of Traylor as the white male assailant.[9] Javier did not notice any writing on the bottom of the photos when he viewed them.

Traylor moved to suppress the victims' identification on the basis that the pre-trial photo identification was tainted. Specifically, he alleged 1) the fact that the three victims were sitting together in Robbins' office when they made the identification had the "potential of tainting" the lineup, 2) the name of each defendant was visible on the back of the photographs, 3) Traylor's photograph was different than the other white males in his group because it did not have a date on the bottom, nor did it state "Police Department-York County," and 4) the fact that the photographs reflect the height of the individuals is impermissibly suggestive. The state conceded that, ideally, the victims should have been shown the lineups separately, but nonetheless maintained the procedure used was not impermissibly suggestive, and the identification was reliable. The trial court, after reviewing the totality of the circumstances, denied the motion to suppress.

Thereafter, the trial judge inquired as to how the state intended to handle the issue before the jury, due to the fact that the photo of Traylor was clearly a mug shot, revealed by the front and side poses, and the height indicators. The court ruled the only way the state would be permitted to introduce the photos before the jury was to redact them, so that the height lines would no longer be visible. However, counsel for Traylor interjected that if the photographs were redacted, then the jury would be shown photographs which were different than those shown to the victims; accordingly, counsel maintained that the cleaned up photos would actually prejudice Traylor more than the unredacted photos, such that the photos should not come into evidence at all. He then asserted that, if the photos used in the lineup were to be admitted at all, he would prefer the originals to the redacted version. After being given an opportunity to confer with Traylor, counsel concluded it was less prejudicial for the unredacted photos to be

[9] He also identified a photo of the black male who cut Marcus.

admitted than the redacted ones. Accordingly, the trial court admitted the unredacted mug shot photos before the jury.

On appeal, Traylor argued the photographic lineup was unduly suggestive and unreliable, and that the photos should not have been admitted. The Court of Appeals held the photographic lineup procedure used in this case was unduly suggestive, and the resulting identification was unreliable. Accordingly, it reversed and remanded.

ISSUES

1) Did the Court of Appeals err in holding the photographs lineup procedure used in this case was unduly suggestive and unreliable?

2) Did the trial court err in ruling the photos used in the lineup were admissible?

1. PHOTOGRAPHIC LINEUP PROCEDURE

A criminal defendant may be deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification. State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000). An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification. Id. The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an out-of-court identification. Neil v. Biggers, 409 U.S. 188 (1972). First, a court must ascertain whether the identification process was unduly suggestive. The court must next decide whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Moore, 343 S.C. at 288, 540 S.E.2d at 448. "The central question is whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive." State v. Stewart, 275 S.C. 447, 450, 272 S.E.2d 628, 629 (1980).

We find the line-up procedure utilized in this case was patently suggestive. To bring three victims into the same room, within several feet of one another, is blatantly unacceptable. There is simply no need for such a procedure, and we strongly admonish the state against utilization of simultaneous viewings in the future. However, notwithstanding the suggestiveness of the line-up in this case, we simply cannot conclude it gave rise to a substantial likelihood of irreparable misidentification.

Even assuming an identification procedure is suggestive, it need not be excluded so long as, under all the circumstances, the identification was reliable notwithstanding the suggestiveness. The inquiry must focus upon whether, under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification. State v. Moore, 343 S.C. at 287, 540 S.E.2d at 447-48, *citing* Jefferson v. State, 206 Ga.App. 544, 425 S.E.2d 915, 918 (1992). The following factors should be considered in evaluating the totality of the circumstances to determine the likelihood of a misidentification: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. State v. Cheeseboro, 346 S.C. 526, 541, 552 S.E.2d 300, 308 (2001), *cert. denied* 535 U.S. 933 (2002).

As noted previously, Robbins testified the victims were seated several feet apart from one another, and she individually handed them sets of 4-5 photos, which each would look at and hand back to her. There was no conversation between them while they were observing the photos, and they did not turn the photos over and look at the names on the back. Further, each of the victims testified as to the procedure utilized. Marcos testified that he did not notice any writing on the front of the photos,[10] and that he did not say anything to Alfredo or Javier as to what he saw in the photos. Alfredo testified that in looking at the photos in Robbins' office, Marcos looked at them first, then he did, then Javier did; he did not know who Marcos had

[10] As mentioned previously, none of the victims spoke English.

picked out of the pictures when he looked at the photos. Alfredo picked out the photos of Traylor, Hayes, and one of the other black males. Javier testified he did not know, when he received the photos, whose pictures Marcos and Alfredo had picked out. Javier also identified the photo of Traylor as the white male assailant, as well as a photo of Hayes as the assailant who had cut Marcus. Javier did not notice any writing on the bottom of the photos.

The victims testified they were able to view the white male assailant anywhere from one minute (Alfredo), five minutes (Javier), and ten minutes (Marcos), with the lights on. Although they did not give a hair or eye color (the assailant had a cap on), they told Robbins he was tall, slim, and young. Further, although they did not specifically describe his clothing (other than the cap), they testified before the jury that they had all seen his face. Clearly, this testimony demonstrates their attention was focused on his face. The next factor is the accuracy of their description. The victims all described the white male as being tall and slim, which is an accurate description of Traylor. Further, although Traylor has a fairly distinctive looking face due to the fact that it is quite long and slim, there is no specific distinguishing feature such as moles, mustache, bushy brows, deep-set eyes, or the like. The fourth factor is the witnesses' level of certainty; all three victims were quite certain of their identification in this case. And, finally, the identification of Traylor was made two days after the incident, clearly weighing in favor of its reliability.

In sum, although we cannot condone the manner in which the photographic line-up in this case was performed, there is simply not a substantial likelihood of irreparable misidentification, such that the trial court properly allowed the identification.[11] Accordingly, the Court of Appeals' holding on this issue is reversed.

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[11] Accord State v. Anderson, 517 So.2d 1231 (La.App. 1987) (although photographic identification by two victims simultaneously was highly suggestive, it did not taint subsequent physical identification); Commonwealth v. Moynahan, 381 N.E.2d 575 (Mass. 1978) (although it would have been preferable for victims to make their photographic selections independently, simultaneous viewing and selection did not require suppression of identification in light of

2. ADMISSIBILITY OF LINE-UP PHOTOS

Traylor also asserts the trial court committed reversible error in admitting the mug shots into evidence.

The introduction of a "mug-shot" of a defendant is reversible error unless: (1) the state has a demonstrable need to introduce the photograph, (2) the photograph shown to the jury does not suggest the defendant has a criminal record, and (3) the photograph is not introduced in such a way as to draw attention to its origin or implication. State v. Tate, 288 S.C. 104, 341 S.E.2d 380 (1986); State v. Robinson, 274 S.C. 198, 262 S.E.2d 729 (1980); State v. Denson, 269 S.C. 407, 237 S.E.2d 761 (1977).

We find no demonstrable need to introduce the photo lineup in this case. The State's assertion that it could not credibly show Traylor was in the house without the photo line-ups is untenable. Detective Robbins testified that Javier identified a man named Willie Hayes, whom he had seen before in the neighborhood, as one of the assailants. Hayes was arrested and identified Traylor as one of his accomplices. Hayes was called as a witness for the State, and testified Traylor was at the scene of the crime. Each of the victims testified at trial, and described the attack, as well as the assailants. The State could very easily have questioned the victims as to their observations of the white male assailant at the time of the crime, his tall thin frame and thin face, in order to support their in-court identifications without resort to the photo line-up. Accordingly, admission of the mug shots was error.

However, Detective Robbins testified before the jury that the photograph of Traylor which she showed to the victims during the line-up was taken upon his arrest. Further, counsel for Traylor specifically cross-examined Robbins regarding the fact that Traylor's photo did not have a date on the bottom because it had been taken shortly after his arrest on these charges. Accordingly, although we strongly admonish the state against

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favorable conditions under which robbers were viewed and the short amount of time that elapsed between robbery and photographic identification).

utilization of such photos except in the rarest of cases, we find no prejudice to Traylor as a result of the photographs in this case, such that his convictions are affirmed.[12] State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000), *cert. denied* 531 U.S. 1093 (2001) (error without prejudice does not warrant reversal).

CONCLUSION

We strongly admonish the state against the use of simultaneous line-up procedures; victims should be individually shown a line-up, and individual identifications made. Further, we fervently caution trial court judges against utilization of mug shot photos unless absolutely necessary. Under the precise facts of this case, however, we find the suggestive procedure did not irreparably taint the victims' identifications, and admission of the mug shot photo was not prejudicial to Traylor. Accordingly, the Court of Appeals' opinion is reversed.

REVERSED.

TOAL, C.J., MOORE, PLEICONES, JJ., and Acting Justice Aphrodite K. Konduros, concur.

[12] Although we have held admission of a mug-shot to be reversible error if the three criteria of State v. Denson, 269 S.C. 407, 237 S.E.2d 761 (1977) are not met, the rationale for this holding is that such photos are prejudicial because they imply a defendant's prior bad acts. Here, however, the photograph was explained in such a manner that it did not imply Traylor had committed prior bad acts.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Arthur Cecil McFarland, Respondent.

Opinion No. 25848
Heard May 26, 2004 - Filed July 26, 2004

PUBLIC REPRIMAND

Henry B. Richardson Jr., Disciplinary Counsel, and Barbara M. Seymour, Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Coming B. Gibbs, Jr., of Gibbs and Holmes, of Charleston, for Respondent.

PER CURIAM: In this attorney discipline matter, Arthur Cecil McFarland (Respondent) has taken exception to the recommendation from the subpanel of the Commission on Lawyer Conduct (subpanel)[1] that he be definitely suspended from the practice of law for a period of nine months, with conditions. We find that Respondent's conduct warrants a lesser sanction than the full panel recommended. Therefore, we impose a public reprimand, with the recommended conditions, effective as of the date of this opinion.

[1] The full panel adopted the subpanel's report and recommendation in its entirety.

FACTS

This disciplinary matter arises from Respondent's (1) neglect during the course of his representation of Gussie Minus (Client), (2) failure to abide by court orders, and (3) failure to cooperate with disciplinary counsel during the investigation.

A. The Minus Matter

In September 2000, Client hired Respondent to represent him in a Title VII suit against Client's former employer (Defendant). Respondent filed a complaint on behalf of Client but never had it verified. After some investigation, Respondent concluded that Client's claims lacked merit but never told Client and never sought to dismiss the lawsuit.

After Respondent failed to timely respond to Defendant's multiple discovery requests, Defendant filed a motion to compel. The trial court ordered Respondent to comply with the discovery requests, but he did not comply. The trial court issued two additional orders directing Respondent to comply with Defendant's discovery requests. Respondent again failed to respond until Defendant filed a motion for costs and fees.[2]

Defendant filed a motion for summary judgment and Respondent did not respond. Respondent told Client about the motion for summary judgment, but he did not tell Client that he had decided not to respond to it. The Magistrate issued a Report and Recommendation for summary judgment, citing as grounds Respondent's failure to file a verified complaint, failure to comply with discovery, and failure to respond to the motion for summary judgment. Respondent did not respond to the report, and summary judgment was granted. Despite Respondent's nine meetings with Client after summary

[2] The United States Magistrate rejected Respondent's arguments, holding that the arguments were not timely and that Respondent had waived his objection when he failed to voluntarily participate in the discovery process. Respondent was ordered to pay Defendant's costs and fees.

judgment was granted, Respondent never told Client that Client's case had been dismissed.

After some time, Client sent a certified letter to Respondent, requesting a copy of his file and enclosing a check for $100.00 for copying and shipping costs. Respondent ignored Client's request. When Client finally confronted Respondent in Respondent's office, Respondent gave him a copy of the file; however, the copy did not include the summary judgment order. Client finally learned that his case had been dismissed upon obtaining a copy of the file from the clerk of court.

B. Cooperation with Disciplinary Counsel's Investigation

Twice in May 2002, disciplinary counsel wrote Respondent to notify him of Client's grievance, yet Respondent failed to respond. In July 2002, the Office of Disciplinary Counsel sent Respondent a Notice of Full Investigation, which instructed Respondent to file a written response within thirty days. Again, Respondent failed to respond. On August 21, 2002, a SLED officer served Respondent with a Notice to Appear and Subpoena pursuant to Rule 19, Rules of Lawyer Disciplinary Enforcement, Rule 413, SCACR,[3] directing Respondent to appear in the Office of Disciplinary Counsel on September 4, 2002. Respondent failed to appear but contacted Disciplinary Counsel, who agreed to postpone the meeting. At the meeting, Respondent provided disciplinary counsel with subpoenaed documents and a sworn statement.

C. Findings of the Commission

The full panel found that Respondent violated the following South Carolina Rules of Professional Conduct, Rule 407, SCACR, during the course of his representation of Client: Rule 1.1 (competence); Rule 1.2 (scope of representation); Rule 1.3 (diligence); Rule 1.4 (communication); Rule 1.16 (declining or terminating representation); Rule 2.1 (advisor); Rule

[3] This rule provides that Disciplinary Counsel must give a lawyer 20-days notice of a statement under oath.

3.2 (expediting litigation); Rule 3.4 (c) and (d) (fairness to opposing party and counsel); Rule 8.1 (cooperation with disciplinary authority); and Rule 8.4 (e) (prejudice to the administration of justice).

LAW/ANALYSIS

This Court is not bound by the subpanel's recommendation; rather, after a thorough review of the record, this Court may impose the sanction it deems appropriate. In re Strickland, 354 S.C. 169, 172, 580 S.E.2d 126, 127 (2003). The authority to discipline attorneys rests entirely with this Court. In re Long, 346 S.C. 110, 551 S.E.2d 586 (2001).

A. Sanction

In response to the subpanel's recommendation, Respondent argues that the appropriate sanction is a public reprimand -- the sanction given by this Court in In the Matter of Charles, 347 S.C. 393, 556 S.E.2d 365 (2001). In that case, a real estate attorney's failure to complete work for, communicate with, and not earn fees paid by clients was found to violate the Rules of Professional Conduct. And although the respondent in that case had been sanctioned on three prior occasions, this Court ordered a lesser sanction because the respondent's client was not prejudiced by the respondent's neglect. This Court also has held "[w]hen the offense of neglect is coupled with failure to cooperate with the Bord [sic], public reprimands have been issued when the client was not greatly prejudiced." 556 S.E.2d at 398 (citing Matter of Acker, 308 S.C. 338, 341, 417 S.E.2d 862, 864 (1992)). Although Respondent's misconduct in the present case did not greatly prejudice Client's case, Client was, nevertheless, entitled to competent representation and candid consultation. We hold that the lack of prejudice to Client's case mitigates, but does not excuse, Respondent's misconduct.

B. Respondent's Experience and Character

When considering the appropriate sanction, the subpanel took notice of Respondent's exceptional experience and exemplary contribution to the Charleston community during his thirty years of practice. But the subpanel found that Respondent's experience and community involvement did not

mitigate his misconduct. In fact, in making its determination as to the appropriate sanction, the subpanel held Respondent to a higher standard.

While Respondent's misconduct is less understandable given his extensive experience, we do not find his experience to be a factor justifying a harsher sanction. Further, we disagree with the subpanel's conclusion that Respondent's character and contributions to society warrant a harsher sanction. If anything, Respondent's character mitigates the circumstances of his misconduct.

C. Respondent's Mental Condition

Dr. Emmett Lampkin testified before the subpanel that Respondent suffers from depressive dysthymic disorder, a condition that impairs Respondent's cognitive abilities and his ability to perform normal tasks and carry out sophisticated processes. Dr. Lampkin further testified that Respondent could adequately practice law given a combination of psychotherapy and medication.

We take notice that Respondent has independently sought and continued treatment for the depressive disorder of which Dr. Lampkin testified altered Respondent's judgment during the course of his representation of Client. We continue to encourage members of the bar such as Respondent to seek rehabilitation for the well-being of themselves and the public they serve.

D. Prior Discipline

This grievance marks the fourth time Respondent has been disciplined for professional misconduct. In 1996, he received a private reprimand[4] for failing to cooperate with disciplinary authorities.

In 1997, though Respondent was found to have not committed misconduct, he received a letter of caution, which directed him to be mindful

[4] A private reprimand and a confidential admonition are identical sanctions.

of Rule 8.1, SCRPC (bar admission and disciplinary matters), Rule 407, SCACR.

In 2001, Respondent received a confidential admonition concerning three different matters, including violations of Rules 1.1 (competence), 1.2 (scope of representation), 1.3 (diligence), 1.4 (communication), 3.2 (expediting litigation), 8.1 (bar admission and disciplinary matters), and 8.4 (misconduct) (a), (d), and (e) concerning three different matters.

CONCLUSION

We find that Respondent's misconduct warrants a public reprimand. Additionally, we require Respondent to (1) hire an attorney to review Respondent's management of his practice for a period of two years providing disciplinary counsel with quarterly reports as to his ability to practice law in accordance with the Rules of Professional Conduct; (2) continue his psychiatric treatments for a period of two years, providing disciplinary counsel with quarterly reports signed by the treating psychiatrist of his compliance with treatment; (3) refund all fees paid to him by Client within thirty days of the publication of this opinion; and (4) pay the costs of these disciplinary proceedings within thirty days of the publication of this opinion.

Finally, the record is unclear as to the total restitution owed to Client. Respondent shall effectuate within sixty days of the date of this opinion an agreement with Disciplinary Counsel to implement a payment plan to ensure the timely and prompt payment of restitution to Client.

PUBLIC REPRIMAND.

MOORE, A.C.J., WALLER, BURNETT, PLEICONES, JJ., and Acting Justice Doyet A. Early, III., concur.

The Supreme Court of South Carolina

In the Matter of Ray D. Lathan, Respondent.

ORDER

Respondent was suspended on July 20, 2004, for a period of six months, retroactive to December 4, 2003. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

JEAN H. TOAL, CHIEF JUSTICE

BY s/Daniel E. Shearouse
Clerk

Columbia, South Carolina

July 27, 2004

The Supreme Court of South Carolina

In the Matter of Ronald F. Barbare, Respondent.

ORDER

Respondent was suspended on July 20, 2004, for a period of six months, retroactive to December 4, 2003. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

JEAN H. TOAL, CHIEF JUSTICE

BY s/Daniel E. Shearouse
Clerk

Columbia, South Carolina

July 27, 2004

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Timothy R. Sponar, Respondent,

v.

South Carolina Department of Public Safety, Appellant.

Appeal From Charleston County
John M. Milling, Circuit Court Judge

Opinion No. 3847
Submitted May 12, 2004 – Filed July 19, 2004

REVERSED

C. Cliff Rollins, of Blythewood, and Frank L. Valenta, Jr., of Columbia, for Appellant.

Stephan Victor Futeral, of Mt. Pleasant, for Respondent.

HUFF, J.: Following his arrest for driving under the influence, Timothy R. Sponar refused to take a Datamaster test. Pursuant to this refusal, the Department of Public Safety (DPS) revoked Sponar's driver's license. Sponar requested an implied consent hearing, after

which a DPS Administrative Hearing Officer upheld the suspension. Sponar then appealed this decision to the circuit court, which reversed the suspension. DPS now appeals arguing the circuit court erred by (1) improperly applying the standard of review to reverse the hearing officer's decision and (2) considering Sponar's state of mind at the time he refused to take the Datamaster test. We reverse and reinstate the suspension.

FACTUAL/PROCEDURAL BACKGROUND

On August 7, 2000, Officer C. Googe of the Mount Pleasant Police Department observed a vehicle traveling at 78 miles per hour in a 55 mile per hour zone and initiated a traffic stop. During the stop, Officer Googe noticed the driver, Sponar, smelled of alcohol and had glassy, bloodshot eyes and slurred speech.

Accordingly, the officer asked Sponar to exit the vehicle and complete a number of field sobriety tests. As Sponar could not properly perform any of the tests, the officer placed him under arrest, advised him of his Miranda[1] rights, and transported him to the Mount Pleasant Police Department where he then turned Sponar over to Officer Whitcomb for administration of a Datamaster test.[2]

Upon arrival at the police station, Officer Googe turned Sponar over to Officer Whitcomb so that he could administer the Datamaster test to determine if Sponar's blood alcohol level was within the legal limit. Officer Whitcomb explained to Sponar his Miranda rights and then advised him of his implied consent rights, reading them verbatim from the advisement form provided by SLED and providing him with a copy.

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[1]Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).

[2]Officer Googe testified Respondent told him he had "a couple of drinks" at a place called Hanahan's. In addition, after the officer found a six-pack with only one beverage remaining, Sponar admitted to consuming the other five.

During a mandatory twenty-minute waiting period prior to administering the test, Sponar initiated conversation with the officer. Sponar repeatedly asked whether he should take the test or whether he should refuse, and asked the consequences of taking or refusing the test. Officer Whitcomb responded it was not his decision to make and that Respondent would have to decide on his own. Sponar asked whether he would still go to jail if he took the test, and the officer replied that it did not matter if he took the test or not, because he would be going to jail either way. Thereafter, Respondent refused to take the test.

Pursuant to this refusal, Officer Whitcomb completed a Notice of Suspension, and Sponar's driving privileges were suspended. Sponar requested an implied consent hearing and appealed the suspension of his driving privileges to DPS's Office of Administrative Hearings. Sponar argued at the hearing that Officer Whitcomb's statement – he would go to jail whether he took the test or not – had the effect of distorting his implied consent rights. He contended, because his implied consent rights were not properly given, the suspension should be reversed. On March 12, 2001, the administrative hearing officer issued an order sustaining the suspension. She noted the officer had read Sponar his rights verbatim, Sponar indicated he understood his rights, and it was only after that, while waiting during the observation period, that Sponar began questioning the officer about what would happen to him and Officer Whitcomb responded he would be taken to jail as part of their procedure whether he submitted to the test or not.

Respondent then appealed the hearing officer's ruling to the circuit court, which issued an order reversing the decision of the hearing officer. The circuit court judge noted, pursuant to S.C. Code Ann. § 1-23-380(a)(6), the court may reverse the decision of the administrative agency "if substantial rights of the Petitioner have been prejudiced for various reasons, including violations of constitutional or statutory provisions, errors of law, or arbitrariness or capriciousness." He determined, because § 56-5-2950(b)(1) of the South Carolina Code provides in pertinent part that if the alcohol level at the time of testing

is "five one-hundredths of one percent or less, it is conclusively presumed that the person was not under the influence of alcohol," there was no legal basis to support the officer's statement to Sponar that he "was to be jailed 'by law' regardless of his decision to submit to the breath test." S.C. Code Ann. § 56-5-2950(b)(1) (Supp. 2003). He reasoned that if Sponar fell within this provision, the officer would have lacked probable cause to detain him for driving under the influence. Accordingly, the circuit court judge found the officer's instructions were erroneous and unlawfully suggested Sponar's decision to submit to the breath test "would largely be in vain." DPS argues this ruling was in error. We agree.

STANDARD OF REVIEW

Appeals from administrative agencies are governed by the Administrative Procedures Act (APA). Byerly Hosp. v. South Carolina State Health & Human Servs. Fin. Comm'n, 319 S.C. 225, 229, 460 S.E.2d 383, 385 (1995). The standard the circuit court uses to review such decisions is provided by section 1-23-380(6):

> The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(A)(6) (Supp. 2003). In reviewing a final decision of an administrative agency, the circuit court essentially sits as an appellate court to review alleged errors committed by the agency. Kiawah Resort Assocs. v. South Carolina Tax Comm'n, 318 S.C. 502, 505, 458 S.E.2d 542, 544 (1995). An abuse of discretion occurs when a decision is controlled by an error of law or is without evidentiary support. Mictronics v. South Carolina Dep't of Revenue, 345 S.C. 506, 510, 548 S.E.2d 223, 225 (Ct. App. 2001).

LAW/ANALYSIS

DPS argues the circuit court improperly applied the standard of review under the APA in reversing the decision of the administrative hearing officer. We agree.

> The license to operate a motor vehicle upon the public highways of this state is not a property right, but is a mere privilege subject to reasonable regulations under the police power in the interest of the public safety and welfare. Such privilege is always subject to revocation or suspension for any cause relating to public safety. However, the privilege cannot be revoked arbitrarily or capriciously.

Summersell v. South Carolina Dep't of Pub. Safety, 334 S.C. 357, 366, 513 S.E.2d 619, 624 (Ct. App. 1999) (citations omitted), *vacated in part on other grounds*, 337 S.C. 19, 522 S.E.2d 144 (1999).

At the hearing before the circuit court, Sponar's attorney argued that Sponar was improperly given his implied consent rights such that he was coerced into not taking the breath test. He asserted, had Sponar taken the test and obtained a reading below .05%, the police would

have had no basis to continue his incarceration. Thus, he contended, because Sponar was told he was going to jail regardless of whether he submitted to the test, Sponar was coerced into not taking the test. The attorney for DPS countered that Sponar was not coerced in any way. He contended that some officers take the position that once an individual is arrested for DUI, that person is already under arrest and cannot be "un-arrest[ed]." Thus, this officer merely told Sponar the "truth" about the policy they followed.

In reversing the suspension, the circuit court determined there was no legal basis to support the officer's statement to Sponar that he "was to be jailed 'by law' regardless of his decision to submit to the breath test." It relied on our Supreme Court's opinion in Town of Mount Pleasant v. Shaw, 315 S.C. 111, 432 S.E.2d 450 (1993) in finding the implied consent instructions given to Sponar were erroneous. In that case, Shaw was arrested and charged with DUI. Prior to administration of a breath test, Shaw was informed that if he did not take the test, his privilege to drive in South Carolina would be suspended for a ninety-day period. Shaw took the test, registering a .25% blood alcohol reading. Shaw appealed his subsequent magistrate court conviction and the circuit court reversed holding the implied consent advisory did not adequately inform him of his option to refuse the test. The Supreme Court reversed the circuit court and reinstated Shaw's conviction. In doing so, the court noted a common sense reading of the advisory given to Shaw made clear the consequences of both taking the test and refusing to take the test. Id. at 113, 432 S.E.2d at 451. The court went on to adopt the following rule:

> [I]f the arrested person is reasonably informed of his rights, duties and obligations under our implied consent law and he is neither tricked nor misled into thinking he has no right to refuse the test to determine the alcohol content in his blood, urine or breath, the test will generally be held admissible.

Id. at 113, 432 S.E.2d at 451 (emphasis in original) (citation omitted).

Shortly after the Shaw decision, our Supreme Court addressed the sufficiency of an implied consent advisory following the suspension of the driver's license of an individual who refused a breathalyzer test after his arrest for DUI. In Percy v. South Carolina Dep't of Highways and Pub. Transp., 315 S.C. 383, 434 S.E.2d 264 (1993), Percy, who was licensed to drive in Ohio, was advised Ohio authorities would be advised of any South Carolina suspension for refusal to submit to a breath test. The arresting officer further advised Percy he was unaware of the consequences in Ohio of a refusal to take the test in South Carolina. Percy refused the breathalyzer, resulting in a ninety-day suspension in South Carolina and a one-year suspension in Ohio. Percy had his South Carolina suspension reversed by the circuit court, based on his assertion that the implied consent warning was insufficient in that it did not contain information that Ohio would honor the South Carolina suspension. Our Supreme Court reversed and reinstated Percy's suspension, stating "[t]he statute requires only that an accused be advised that his privilege to drive will be suspended for 90 days if he refuses the breathalyzer." Id. at 385, 434 S.E.2d at 265. Noting the court's recent recognition in Shaw that an implied consent advisory is sufficient if the defendant is reasonably informed of his rights and is neither tricked nor misled into thinking he has no right to refuse the test, the court determined it would be unreasonable to require law enforcement to advise out-of-state motorists of the consequences that refusal to take the test will have in their respective states. Accordingly, the court found Percy was adequately advised pursuant to the implied consent statute. Id. at 385, 434 S.E.2d at 265-66.

We find the officer's statement to Sponar that he would be going to jail regardless of his decision on whether to submit to the breath test did not inadequately advise Sponar pursuant to the implied consent statute. First, § 56-5-2950(b)(1) provides that one is conclusively presumed to not be under the influence of alcohol if his or her breath test registers .05% or lower. Such a result does not rule out the possibility that the individual is under the influence of some other intoxicant, or a combination of alcohol and another intoxicant. Indeed, an individual may fail field sobriety tests and/or exhibit other signs of

being under the influence of an intoxicant regardless of whether the individual does not have enough alcohol in his or her system to register as being under the influence of alcohol.

Second, the evidence of record shows the officers, as a matter of policy, often do not release an individual, regardless of whether the breath test results show an individual is conclusively presumed to not be under the influence of alcohol. Even if we assumed for the sake of argument that it is improper for authorities to continue to detain an individual after they have registered below a .05% on a breath test, this is irrelevant to an individual's decision on whether to submit to a breath test.[3] Officer Whitcomb's statement to Sponar in this regard was simply a truthful explanation of what would happen to him next, and it is irrelevant as to whether continued detention in such a situation would be lawful.

Finally, the statements made by Officer Whitcomb to Sponar did not "trick or mislead" Sponar into refusing the breath test. Such a statement indicated that his decision, either way, would be of no consequence to his subsequent immediate incarceration. Officer Whitcomb explicitly indicated to Sponar that his decision on whether to take the breath test would have no impact on whether he would be jailed. Indeed, the only statement made by the officer to Sponar that could reasonably be said to have affected Sponar's decision on whether or not to take the breath test was that his license would be suspended for a ninety-day period if he refused the test. The authorities are required by law to inform an individual of this consequence before they may administer such a test.[4] A common sense reading of the advisory

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[3]As noted by Sponar's attorney in argument before the circuit court, if the authorities continued to incarcerate an individual for DUI under such circumstances, that individual's recourse may be a civil action for false imprisonment or false arrest.

[4]See S.C. Code Ann. § 56-5-2950(a)(1) (Supp. 2003) ("No tests may be administered or samples obtained unless the person has been informed in writing that: (1) he does not have to take the test or give the samples, but that his privilege to drive must be suspended or denied for

given to Sponar made clear the consequences of both taking the test and refusing to take the test. He was reasonably informed of his rights, duties and obligations, and was not tricked or misled into thinking he had no right to refuse the test. Shaw, 315 S.C. at 113, 432 S.E.2d at 451. Neither was he tricked or misled into refusing the test.

Because we reverse the trial court's decision on this ground, DPS's remaining argument need not be addressed. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (appellate court need not address remaining issues when disposition of prior issue is dispositive).

Accordingly, the circuit court's decision is reversed and the suspension is reinstated.

REVERSED.

ANDERSON and KITTREDGE, JJ., concur.

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at least ninety days if he refuses to submit to the tests and that his refusal may be used against him in court.").

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Diane Steffenson, Appellant,

v.

David A. Olsen, Respondent.

Appeal From Greenwood County
Billy A. Tunstall, Jr., Family Court Judge

Opinion No. 3848
Heard May 12, 2004 – Filed July 19, 2004

AFFIRMED IN PART AND REVERSED IN PART

John M. Gulledge, of Troy, for Appellant.

C. Rauch Wise, of Greenwood, for Respondent.

STILWELL, J.: In this domestic relations action, we must decide whether the trial court erred in (1) interpreting a foreign court's award of retirement benefits to include only those benefits accrued at the time of the divorce and (2) offsetting the award of retirement benefits by the amount of overpaid child support. We affirm in part and reverse in part.

BACKGROUND

David Olsen (Husband) and Diane Steffenson (Wife) divorced in 1984 in Japan, where Husband was stationed while in the Air Force. They divorced under Japanese proceedings of conciliation. The Japanese order granted Wife custody of the parties' two children and required Husband to pay child support of $250 per month for each child, with support for each child terminating when that child reached 18. Additionally, the order provided:

> 4. [Husband] shall pay [Wife] the amount equal to 15% of the amount of retirement pay, which will be paid to [Husband] at his retirement.

Other than the allocation of retirement pay, the order did not provide for alimony or the distribution of marital property. Wife's attorney represented to the trial court that the Japanese family court does not award alimony, and Wife testified the Japanese family court instructed the parties to divide their real and personal property themselves.

Pursuant to military regulations, the Japanese court order was transmitted to an office that automatically deducted the child support payments from Husband's pay and forwarded them to Wife. The deductions and payments were automatically reduced when the oldest child reached 18, but the department failed to discontinue deductions or payments when the youngest child reached 18. The $250 monthly payments continued for an additional 25 months. As a result, Husband paid $6250 in child support after the youngest child reached majority.

Husband retired and began receiving retirement pay in 2000. Wife brought this action in South Carolina to enforce the Japanese court order after a dispute arose regarding payment of retirement benefits. In her complaint, Wife asserted the Japanese conciliation procedure requires parties to submit a divorce agreement to the court, which the court adopts and gives formal, judicial sanction equivalent to a divorce decree. In his responsive pleading,

Husband stated he was without sufficient information to form a belief regarding the nature of the conciliation procedure.

The court issued an initial order ruling the divorce decree was entitled to recognition and enforcement. Neither party appealed that order.

After a hearing on the merits, the court issued an order acknowledging the parties had reached an agreement that formed the Japanese court's order, but found the terms of the agreement ambiguous. Upon consideration of evidence outside the agreement including the testimony of the parties, the court concluded the parties agreed Wife would receive only 15 percent of Husband's retirement pay that "accumulated during the marriage." The court further found and concluded Husband was entitled to an offset equal to his child support overpayment.

DISCUSSION

I. Retirement Benefits

Wife argues the court erred in concluding the Japanese divorce decree entitles her to only 15 percent of Husband's retirement pay that had accrued as of the date of their divorce. We agree.

The trial court concluded the terms of the parties' agreement were "not clear or apparent," and thus considered extrinsic evidence in reaching its decision. We, however, conclude the provision in question clearly requires Husband to pay Wife 15 percent of his entire retirement benefits he receives upon retirement.

"Unambiguous marital agreements will be enforced in accordance with their terms, while ambiguous agreements will be examined in the same manner as other agreements in order to determine the intention of the parties." Lindsay v. Lindsay, 328 S.C. 329, 337, 491 S.E.2d 583, 587 (Ct. App. 1997). Whether an ambiguity exists must be determined from the language of the agreement. Id. If an agreement is clear and unambiguous, its terms should be applied according to their plain and ordinary meaning and

consideration of extrinsic evidence to alter that meaning is improper. C.A.N. Enters. Inc. v. South Carolina Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 377-78, 373 S.E.2d 584, 586 (1988); see also Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 471, 581 S.E.2d 496, 502 (Ct. App. 2003) ("The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument.").

The provision in question clearly requires Husband to pay Wife an amount equal to 15 percent of his retirement pay. Had the parties intended to limit the award to those benefits accrued during the marriage, they could have so provided, and it is not for the trial court or this court to change the terms the parties agreed upon. See Hardee v. Hardee, 355 S.C. 382, 387, 585 S.E.2d 501, 503 (2003) ("The judicial function of a court of law is to enforce a contract as made by the parties, and not to rewrite or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous."); Charles v. Canal Ins. Co., 238 S.C. 600, 608-09, 121 S.E.2d 200, 205 (1961) (holding where a contract's terms are clear, the court's function is to enforce the terms and not to substitute its own judgment for that of the parties).

Husband agrees the retirement award provision is facially clear but contends it contains a latent ambiguity that arose only when his obligation to make payments began upon his retirement. Because the document does not define "retirement pay" or "amount of retirement pay," Husband claims the ambiguity is whether "amount of retirement" refers to the retirement he would have been entitled to had he retired at the rank he held when the parties divorced or whether it was to be based on the rank he achieved by the end of his career. He also argues it is not clear whether Wife is entitled to a percentage of the gross pay or the net disposable income. Finally, Husband contends allowing Wife to receive 15 percent of his entire retirement benefits "would give [her] the windfall of an additional seventeen years of military service by [Husband]."

In essence, Husband's argument is not that a latent ambiguity is revealed upon application, but rather that he finds a literal application of the provision's terms unfair. However, the court's duty "is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." Jordan v. Sec. Group, Inc., 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993). Husband's argument is similar to an argument that the parties have undergone a change of circumstances. However, just as a change of circumstances within the parties' contemplation at the time of the decree does not provide a basis for modifying a support award, Husband cannot argue this agreement should be read differently because his retirement benefits are more than they would have been had he retired at the rank he held when the parties divorced. See Eubank v. Eubank, 347 S.C. 367, 374, 555 S.E.2d 413, 417 (Ct. App. 2001) (holding change of circumstances within the parties' contemplation at the time of decree not a ground for altering a support award). In fact, the award to Wife of only 15 percent of Husband's retirement pay suggests the parties did anticipate Husband would advance in rank and would be entitled to more retirement pay than that which he had accumulated when the parties divorced. See id. (holding a court should apply the contemplated change of circumstances rule by not only determining whether the parties contemplated the change but whether the decree actually reflects the expectation of the future occurrence).

II. Offset

Wife also contends the trial court erred in setting off the amount of Husband's retirement arrearage by the amount he overpaid in child support. We disagree.

The evidence at trial demonstrated Husband had no control over the monthly withholdings from his military pay. Notwithstanding the automatic nature of the monthly deductions from Husband's pay, Wife contends she had the right to assume the payments were voluntary monthly gifts from her former spouse. The trial court heard both Husband and Wife on this issue and determined the payments were not voluntarily made by Husband and were not intended or received as a gift. We perceive no basis for questioning

this assessment. Pountain v. Pountain, 332 S.C. 130, 135, 503 S.E.2d 757, 759-60 (Ct. App. 1998) ("Because this court is not afforded the opportunity for direct observation of the witnesses, we must accord great deference to the trial court's findings where matters of credibility are involved."). Indeed, considering Husband had no control over the payments, the family court acted well within its equitable power in crediting those involuntary payments toward the amount of retirement benefits owed Wife.

CONCLUSION

Wife is entitled to an amount equal to 15 percent of Husband's entire retirement pay to be offset by the amount he overpaid in child support.

AFFIRMED IN PART AND REVERSED IN PART.

HEARN, C.J., and CURETON, A.J., concur.