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NORTH CAROLINA

WAKE COUNTY



BEFORE THE DISCIPLINARY HEARING COMMISSION OF THE NORTH CAROLINA STATE BAR 04 DHC 41

The North Carolina State Bar, Plaintiff

v.

Deborah B. Koenig, Attorney, Defendant

Final Order of Discipline

This matter was heard on the 28th and 29th days of April, 2005, before a Hearing Committee of the Disciplinary Hearing Commission composed of the Chair, M. Ann Reed, and members Tommy W. Jarrett and Donald G. Willhoit, pursuant to North Carolina Administrative Code, Title 27, Chapter 1, Subchapter B, § .0114(h). The plaintiff was represented by David R. Johnson. The defendant was represented by M. Travis Payne. Based upon the pleadings, the stipulated facts, and the evidence introduced at the hearing, the hearing committee hereby enters the following

Findings of Fact

1. The Plaintiff, the North Carolina State Bar, is a body duly organized under the laws of North Carolina and is the proper party to bring this proceeding under the authority granted it in Chapter 84 of the General Statutes of North Carolina, and the rules and regulations of the North Carolina State Bar promulgated thereunder.

2. The Defendant, Deborah B. Koenig (hereinafter Defendant), was admitted to the North Carolina State Bar on August 14, 1984, and is, and was at all times referred to herein, an attorney at law licensed to practice in North Carolina, subject to the rules, regulations and Rules of Professional Conduct of the North Carolina State Bar and the laws of the State of North Carolina.

3. During all or a portion of the relevant periods referred to herein, Defendant was actively engaged in the practice of law in the city of Fayetteville, Cumberland County, North Carolina.

4. Beginning in the spring of 1995, Defendant contracted with the Sheriff of Cumberland County (hereafter "Sheriff") to provide legal services for the Cumberland County Sheriff's Office (hereafter "CCSO"). At some point after that, Defendant and the Sheriff entered into a continual series of written contracts for Defendant's services. The last written contract between Defendant and the Sheriff covered the year beginning July 1, 2000 and ending June 30, 2001.

5. The Sheriff was legally the highest authority within the CCSO on all matters concerning the Office, including personnel matters.

6. Pursuant to her contract with the Sheriff, Defendant was required to provide "such expert and technical legal services as required" by the Sheriff.

7. When first engaged by the Sheriff, the focus of Defendant's responsibilities was on training officers and responding to issues arising from the field. Over her tenure, the nature of Defendant's responsibilities broadened to handle a wider range of legal issues for the Sheriff and the CCSO as they arose. In addition to her training and field work, Defendant drafted and/or reviewed many of the internal policies and procedures of the CCSO for legal sufficiency and compliance, including the policy on sexual harassment and investigation of professional standards, commonly known as "internal affairs."

8. Defendant routinely submitted monthly invoices to the Sheriff for payment under the contract during her tenure. Defendant categorized the types of services she provided for the CCSO in those invoices and identified a percentage of time devoted to each category. In the last year of services, Defendant reported some significant percentage of time every month devoted to personnel issues on every invoice.

9. Sometime around Labor Day, 1999, Defendant was a victim of inappropriate physical contact of a sexual nature by the Chief of Detectives of the CCSO, Major Ray Davis, while the two of them were alone in a conference room in the office building.

10. Shortly after the incident, Defendant orally informed the Sheriff about her experience while one or both of them were exercising in the workout room of the CCSO. Defendant did not offer any legal advice or guidance to the Sheriff on how to respond or appropriately handle the incident at that time. Defendant then left the workout room.

11. The Sheriff informed his Chief Deputy of Defendant's report the next day and asked the Chief Deputy to speak to Davis. Although Davis denied any inappropriate conduct toward the Defendant to the Chief Deputy, he agreed to apologize. No formal investigation into the matter was initiated by either the Sheriff or the Chief Deputy.

12. Defendant did not make any formal oral or written request for investigation into the incident with either the Chief Deputy or the Sheriff. Defendant did not discuss the incident again directly to the Sheriff either orally or in writing, ask the Sheriff to take any action against Major Davis, or offer any legal advice or guidance to the Sheriff on how to appropriately handle the incident at any time.

13. Beginning in the summer and continuing through the fall of 2000, Defendant, while on the CCSO premises and performing her responsibilities as legal advisor for the Sheriff, was informed by at least two female deputies of their own experiences involving inappropriate conduct, both by physical contact and by oral comments of a sexual nature, by Major Davis. During this same time period, Defendant also indirectly learned through other sources in the CCSO, including an internal affairs investigator, of other inappropriate incidents by Major Davis with several other female officers and civilian personnel. The persons who made these disclosures to Defendant knew that Defendant was the legal advisor for the CCSO. Defendant did not inform the Sheriff of any of this information in any manner nor did she advise the Sheriff of any actions he should take to protect himself in his official capacity or the CCSO from any liability for the actions of Major Davis. Defendant did not suggest or request to the Sheriff or the head of internal affairs that any investigation should be undertaken.

14. In late November or early December 2000, Defendant was a participant in a meeting with an assistant County Attorney and the head of internal affairs for the CCSO concerning the necessity of disclosing internal affairs reports in the personnel files of officers of the CCSO. Defendant and the head of internal affairs had a heated discussion during the meeting.

At the end of the meeting, the assistant County Attorney informed the Defendant that he would review the issues and get back to her the following week.

15. On Tuesday or Wednesday of the following week, the assistant County Attorney had a telephone conference with Defendant on the matter involved in the earlier meeting. At the end of that conversation, Defendant revealed to the assistant County Attorney her concerns about the conduct of Major Davis. Defendant then met with the assistant County Attorney at a restaurant and told him what she knew about Major Davis and his conduct. The assistant County Attorney then met with one of the female deputies who was a victim of inappropriate conduct by Major Davis, Lt. Deborah Crain. Following these meetings, the assistant County Attorney met with the County Attorney and advised him of the concerns. They decided that the Sheriff needed to be informed of the seriousness of the matter and the need for an investigation.

16. The Sheriff was then informed of the seriousness of the matter and the need for an investigation by an outside attorney who the County Attorney had already consulted on the matter. Eventually, the Sheriff, with the concurrence of the County Attorney, decided to engage his personal attorney, Ronnie Mitchell, and his firm to conduct the investigation into the matter.

17. Before she had met with the assistant County Attorney, Defendant, without the knowledge or authority of the Sheriff or the County Attorney, discussed the incidents involving Major Davis and complained that the Sheriff had failed to act on her reports of these matters with State Senator Tony Rand, and Judges Ed Pone and Jim Ammons. None of these individuals had any supervisory authority over the Sheriff or the CCSO or any authority concerning personnel issues within the CCSO. None of these persons were in a position to give Defendant, the Sheriff, or the CCSO any legal advice.

18. On Friday, December 15, 2000, the Sheriff asked one of the victims, Delores Nichols, to attend an interview on Monday, December 18, 2000 as part of the investigation into Major Davis' conduct. At the time of the request, Nichols was unaware of any investigation into the conduct of Major Davis or that she had been identified as a victim. Nichols asked the Sheriff what she had done wrong. The Sheriff informed her that she had done nothing wrong, but she had been identified as a person who had information about the matter they were investigating.

19. Despite the Sheriff's assurances that she had done nothing wrong, Nichols was upset at the prospect of being interviewed on the matter. Nichols called another employee of the CCSO, Gail Rose Boyd, and conveyed her concerns. Boyd, in turn, called Defendant about Nichols. Defendant met with Nichols the following day, Saturday, December 16, 2000, to discuss her scheduled interview. Both Boyd and Nichols knew that Defendant was the legal advisor of the Sheriff and/or the CCSO.

20. Without the knowledge or authorization of the Sheriff, Defendant spoke with Senior Resident Superior Court Judge for Cumberland County, E. Lynn Johnson, on Saturday, December 16, 2000 after her meeting with Nichols and Boyd. In their conversation, Defendant complained to Judge Johnson that there was a problem with sexual harassment at the CCSO, that the Sheriff had been informed of the matter and had done nothing, and that the Sheriff was now intimidating victims and witnesses. Defendant told Judge Johnson that she believed the Sheriff was attempting to suborn perjury by witnesses. At the time Defendant made these revelations to Judge Johnson, Defendant was relying solely on the statements made to her by Delores Nichols about the scheduled interview session and Defendant had not discussed the matter with either the Sheriff or the County Attorney. Judge Johnson had no supervisory authority over the Sheriff or any authority with respect to the internal affairs of the CCSO.

21. Judge Johnson informed Defendant that he would consider the matter and respond to her later. Judge Johnson called Defendant on Sunday, December 17, 2000 and advised Defendant that he believed she had three options: talk with the Sheriff, report the matter to the District Attorney if she believed that there was criminal conduct, or consult with outside counsel with regard to her personal circumstances.

22. Defendant did not talk with the Sheriff or the County Attorney or report the matter to the District Attorney after her conversation with Judge Johnson.

23. Lt. Crain was also interviewed by the Sheriff and Ronnie Mitchell on December 18, 2000. During the course of the interview, Crain became upset. Mitchell asked her why she was hostile. Crain informed Mitchell that she wasn't hostile, but was concerned that she might lose her job. The Sheriff told Crain that her job was not in jeopardy.

24. Despite the statement by the Sheriff that her job was not in jeopardy, Crain contacted the Defendant and expressed her concerns about the ongoing investigation to the Defendant. Defendant informed Crain that she [referring to herself, the Defendant] needed to protect Nichols, Crain, and others and would go see Judge Johnson. Defendant did not confer or inform the Sheriff of her opinion that she needed to take action to protect Crain and Nichols or to see Judge Johnson.

25. Shortly after this conversation with Crain, Defendant met with Judge Johnson in his chambers. Judge Johnson again advised Defendant to speak with the Sheriff. Defendant did not communicate with the Sheriff.

26. On or about December 20, 2000, with knowledge that the Sheriff's investigation was still ongoing, Defendant, along with Lt. Crain and her husband, prepared a letter to the Equal Employment Opportunity Commission (EEOC) formally complaining of employment discrimination, including sexual harassment, at the CCSO and requesting an investigation by the EEOC.

27. Defendant did not inform the Sheriff or the County Attorney of her intent to send her letter of December 20, 2000 to the EEOC. Defendant sent the letter of December 20, 2000 to the EEOC on or about December 21, 2000.

28. Defendant stated in the letter that she was filing the EEO complaint on her own behalf and on behalf of other victims at the CCSO. The letter accuses the Sheriff and the County Attorney of failing to take action after being informed of the incidents. The letter also alleges other discriminatory employment acts on the part of the CCSO, including racial discrimination and disparity of training and assignments on the basis of gender. None of these issues were ever presented to the Sheriff or the County Attorney by the Defendant before Defendant filed the letter with the EEOC.

29. Defendant attached a list of persons she identified as victims, witnesses, and knowledgeable persons to her December 20, 2000 letter to the EEOC. Defendant did not inform or request authorization from any of these people to be identified in the letter.

30. Even though Defendant was aware that the Sheriff was conducting an investigation, Defendant wrote in her December 20, 2000 letter to the EEOC that "[t]here has never been any investigation undertaken into his [Major Davis'] conduct."

31. Defendant admits that she knew that there was an investigation being conducted, but contends that she did not believe that it was an "unbiased" investigation. She further contends that she believed that Mitchell was not the appropriate person to conduct the investigation. Defendant did not convey her opinion to the Sheriff, the County Attorney, the assistant County Attorney, or Mitchell at any time before sending the letter to the EEOC.

32. Defendant did not resign or terminate her contract or relationship with the Sheriff or the CCSO either before or after sending the December 20, 2000 letter to the EEOC.

33. In early January 2001, the Sheriff learned of Defendant's letter to the EEOC through the news media. Defendant had not informed or advised the Sheriff that she had filed the December 20, 2000 letter with the EEOC before its disclosure to the news media.

34. By letter dated January 22, 2001, after learning of her letter to the EEOC, the County Attorney asked Defendant to consider whether she had an irreconcilable conflict between her ethical obligations as an attorney for the Sheriff and/or the CCSO and her filing her personal claim against the Sheriff and/or the CCSO with the EEOC that required her withdrawal from her position as legal advisor.

35. On January 24, 2001, the Defendant filed a charge with the EEOC on her own personal behalf. Defendant reiterated some of the issues raised in the December 20, 2000 EEOC letter in her January 24, 2001, EEOC charge. Defendant alleged that the Sheriff was engaged in retaliation against her for her prior filing with the EEOC and specifically asked for damages as a remedy. At the time Defendant filed this charge with the EEOC, she had not resigned or withdrawn as the legal advisor for the Sheriff and/or the CCSO.

36. Simultaneously with her filing with the EEOC on January 23, 2001, Defendant, through her counsel, notified the Sheriff of that filing.

37. By written correspondence dated January 26, 2001, Defendant refused to resign or withdraw as the legal advisor to the Sheriff and/or the CCSO.

38. By letter dated January 25, 2001, the Sheriff terminated Defendant as the legal advisor.

39. Approximately one year after her termination, Defendant, along with two other former employees of the CCSO, sued the Sheriff, both individually and in his official capacity and the CCSO in federal court based on the matters related to these **Findings of Fact** in this cause.

Based upon the foregoing **Findings of Fact**, the Hearing Committee enters the following:

Conclusions of Law

1. All parties are properly before the hearing committee and the committee has jurisdiction over Deborah Koenig and the subject matter.
2. The Defendant's conduct, as set out in the Findings of Fact above, constitutes grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) as follows:
 - (a) By using information received in her capacity as legal advisor to the Sheriff to support her personal claim of sexual harassment against the Sheriff and/or the CCSO without the Sheriff's knowledge or consent, Defendant used confidential information of a client to the disadvantage of the client in violation of Rule 1.6(c)(2) and used confidential information of a client for her own advantage and the advantage of a third party in violation of Rule 1.6(c)(3);
 - (b) By revealing information received in her capacity as legal advisor to the Sheriff to persons not associated with the CCSO and with no supervisory authority over the Sheriff or the CCSO, Defendant revealed confidential information of a client in violation of Rule 1.6(c)(1);
 - (c) By continuing to act as the Sheriff's legal advisor after having filed an EEOC complaint on her own behalf against the Sheriff and/or the CCSO, Defendant represented a client when her own personal interests conflicted with those of her client in violation of Rule 1.7(b);
 - (d) By failing to pursue the legal issues related to the allegations of sexual harassment to a final decision by the highest authority within the CCSO, the Sheriff, and by not resigning before filing the EEOC charge on her own behalf, Defendant failed to act in the best interests of the organization and work within the organization in violation of Rule 1.13(b) and (c);

(e) By failing to fully counsel the Sheriff on her concerns and his obligations regarding the allegations of sexual harassment, Defendant failed to explain a legal matter to the extent reasonably necessary to permit a client to make an informed decision on his legal obligations in violation of Rule 1.4(b);

(f) By filing an EEOC complaint against her client on her own behalf while still representing the client and by not informing the Sheriff that she had filed the EEOC complaint, Defendant intentionally prejudiced her client's interests during the course of the professional relationship in violation of Rule 8.4(g); and

(g) By refusing to resign her position upon notice of her conflict of interest with her client, Defendant failed to withdraw as attorney as required in violation of Rule 1.16(a).

Based upon the foregoing **Findings of Fact and Conclusions of Law** and upon the evidence and arguments of the parties concerning the appropriate discipline, the hearing committee hereby makes these additional

Findings of Fact Regarding Discipline

1. The Defendant has no prior disciplinary record.

Based on the **Findings of Fact and Conclusions of Law** above and the additional **Findings of Fact Regarding Discipline**, the Hearing Committee makes the following:

Conclusions with Respect to Discipline

1. Defendant's misconduct is aggravated by the following factors:
 - (a) Substantial experience in the practice of law.
2. Defendant's misconduct is mitigated by the following factors:
 - (a) No prior disciplinary record; and
 - (b) Defendant was herself a victim of the inappropriate behavior of Major Davis.
3. The mitigating factors outweigh the aggravating factors.

4. Although there was the potential for harm to the client, the Committee concludes that, based on the mitigating factors, discipline greater than an admonition is not required for the protection of the public.

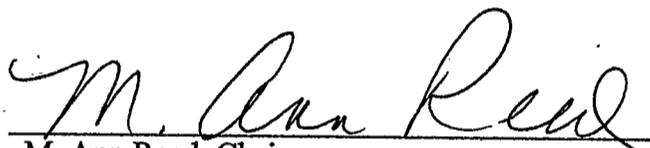
Based upon the foregoing Findings of Fact, Conclusions of Law and the Findings of Fact Regarding Discipline, and with the consent of the parties, the Hearing Committee enters the following:

Order of Discipline

1. The Defendant is hereby admonished.
2. The Defendant will pay all costs of this proceeding permitted by law within thirty days of service of notice of the amount of costs as assessed by the Secretary.

Signed by the undersigned Chair with the full knowledge and consent of the other members of the Hearing Committee.

This the 7th day of June, 2005


M. Ann Reed, Chair
Disciplinary Hearing Committee