

STATE OF SOUTH CAROLINA	)	
	)	
	)	BEFORE THE
	)	
	)	STATE ETHICS COMMISSION
EX PARTE	)	
	)	
RAYMOND NEWTON,	)	
LOUIS MORANT,	)	
GEORGETOWN COUNTY,	)	DECLARATORY RULING
	)	
<u>                    Petitioners.</u>	)	

Pursuant to S.C. Code Ann. §1-23-150, Petitioners filed a Petition for Declaratory Ruling from the South Carolina State Ethics Commission regarding the application of the South Carolina Ethics, Government Accountability, and Campaign Reform Act of 1991 (the Ethics Act), the South Carolina Code of Regulations (the Regulations), and the South Carolina Administrative Procedures Act (the APA) to the issuance of subpoenas and taking of depositions during the investigative stage of a State Ethics Commission Complaint. Specifically, Petitioners have requested that the Commission issue a declaratory ruling on the following issues:

1. [Whether] S.C. Code Ann. Regulation 52-710 provides that a respondent is entitled to discovery in addition to information gathered during an investigation and expressly allows a party to take a deposition pursuant to the provisions of Rule 30, SCRCP, at any point after a Complaint is filed.
  
2. [Whether] S.C. Code Ann. Regulation 52-211 ... preclude[s] an attorney from issuing a subpoena for the attendance at a deposition as provided in Regulation 52-710(B) and Rule 45(a)(3), SCRCP.
  
3. [Whether] S.C. Code Ann. Regulation 52-211 is permissive in that it allows a respondent to seek a subpoena from the Chair of the Commission [or his designee] but does not require a respondent to do so in the context of taking a deposition pursuant to Regulation 52-710(B) and Rule 45(a)(3), SCRCP.

4. If the Commission believes that a respondent has to obtain a subpoena from the Commission Chair [or his designee] in order to compel attendance at a deposition, please provide the statutory basis for that decision and the Commission's belief as to the proper form of the subpoena if different from the South Carolina Rules of Civil Procedure.
  
5. Whether the Commission believes, and can point to any regulation or statute to support the position, that a Complaint matter is not a "case" for the purposes of issuing a subpoena.

### **ANALYSIS**

The Ethics Act provides that a person subject to a complaint is afforded due process.

Section 8-13-320(h) states, in part:

The commission must afford a public official, public member, public employee, lobbyist, or lobbyist's principal who is the subject of a complaint the opportunity to be heard on the alleged violation under oath, the opportunity to offer information, and the appropriate due process rights including, but not limited to, the right to counsel.

Procedural due process requires a respondent be given notice, a meaningful opportunity to be heard, and judicial review.<sup>1</sup> See, Stono River Env'tl. Protection Ass'n v. S.C. Dep't of Health and Env'tl. Control, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991). See *also*, Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) ("The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review."); Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950) (Due process requires

---

<sup>1</sup> These rights are derived specifically from the South Carolina Constitution. ("No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; ...and he shall have in all such instances the right to judicial review." S.C. Const. Ann. Art. I, § 22)

"notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); In re Vora, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003) ("Procedural due process requirements are not technical; no particular form of procedure is necessary. The United States Supreme Court has held, however, that at a minimum certain elements must be present. These include (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." (internal citation omitted)).

South Carolina Code §8-13-320(12) of the Ethics Act grants power to the State Ethics Commission "to promulgate and publish rules and regulations to carry out the provisions of this chapter. Provided, that with respect to complaints, investigations, and hearings the rights of due process as expressed in the Rules Governing the Practice of Law must be followed[.]" (*emphasis added*) Pursuant to that statutory authority, the Commission has established procedural regulations. Those regulations afford respondents due process in conformity with the Rules Governing the Practice of Law, specifically, the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR and the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR (the Rules for Disciplinary Enforcement<sup>2</sup>).

---

<sup>2</sup> In 1998, the Supreme Court of South Carolina promulgated RLDE (procedural rules applicable to the investigation of allegations of misconduct or incapacity of lawyers) and RJDE (procedural rules applicable to the investigation of allegations of misconduct or incapacity of judges). In all respects pertinent to this Ruling, RLDE and RJDE are identical. As such, they will be referred to herein collectively as the Rules for Disciplinary Enforcement.

Although the Supreme Court of South Carolina has not specifically set forth what is required with regard to due process in the investigative stage of a State Ethics Commission Complaint, it has suggested that the opportunity to offer information is sufficient. In Sanford v. S.C. State Ethics Comm'n, a public official petitioned for a writ preventing the Commission from releasing information related to a complaint during the ongoing investigation stage on due process grounds. 385 S.C. 483, 685 S.E.2d 600 (2009). Citing S.C. Code §8-13-320(10)(h), the Court confirmed that the Commission “must afford a public official ... who is the subject of a complaint the opportunity to be heard on the alleged violation under oath, the opportunity to offer information, and the appropriate due process rights, including, but not limited to, the right of counsel.” Id., at 499, fn8. The Court, in dicta, stated that the public official had “been allowed to offer information during the investigatory process, and [had] availed himself of that opportunity,” and, therefore, had been afforded appropriate due process. Id.

The Regulations governing proceedings before the State Ethics Commission were promulgated and are interpreted with appropriate consideration of the right to due process of respondents. However, that is not the only consideration. The Commission must also protect the integrity of the process and the rights of complainants and witnesses. An investigation into allegations in a State Ethics Commission Complaint is conducted by the Commission, with appropriate due process afforded respondents, including notice and an opportunity to offer information, because that is what it is: an investigation by the Commission. Unlike civil litigation where filings and other proceedings are public record and are fully accessible to parties and witnesses, the investigative stage of a State Ethics Commission Complaint is completely confidential. Permitting respondents to conduct

depositions or otherwise issue their own subpoenas, particularly without notice to or knowledge of the Commission, would expose the investigation to interference and abuse, including possibly burdening or intimidating complainants and witnesses. The Regulations serve the dual purpose of facilitating the public's right to seek an investigation into allegations of misconduct on the part of its officials and affording those officials the opportunity to respond to such allegations before a recommendation is made by Commission staff and before a probable cause determination is considered by the Commission.

It is within that framework that we address the issues presented in the Petition as follows.

1. *[Whether] S.C. Code Ann. Regulation 52-710 provides that a respondent is entitled to discovery in addition to information gathered during an investigation and expressly allows a party to take a deposition pursuant to the provisions of Rule 30, SCRPC, at any point after a Complaint is filed.*

Regulation 52–710 (Discovery) does not expressly or impliedly allow a respondent to take a deposition “at any point after a Complaint is filed,” as argued by Petitioners. Regulation 52-710 clearly applies to proceedings after a determination of probable cause has been made pursuant to Regulation 52-705(C)(3)(a) and a notice of hearing has been issued pursuant to Regulation 52-707, not during the investigative stage of the proceedings. The Regulations setting out the procedures for processing of Complaints pursuant to the Ethics Act follow a logical and linear progression, beginning with the filing and processing of a Complaint (702-704), the investigation of allegations and a probable cause determination (705), the hearing process (706 to 717), etc.

The Regulations setting forth the process for investigation of complaints do not include any provision that would allow a respondent to conduct a deposition or otherwise engage in discovery during that stage. Authority to investigate allegations in a complaint by subpoena rests exclusively with the Commission. Regulation 52-705(C)(1) states that “[d]uring the investigation, the Commission may interview witnesses, issue subpoenas for persons and documents, and take such other action as is necessary to prepare a preliminary determination of the facts relating to the issues alleged in the complaint.”

The Petitioners are correct in stating that Regulation 52-710 “provides that a respondent is entitled to discovery in addition to information gathered during an investigation and expressly allows a party to take a deposition pursuant to the provisions of Rule 30, SCRCF”, but it is clear that such right arises subsequent to the investigation. Reg 52-710(A) states that “[i]n addition to the information previously gathered in the course of the investigation, the parties may engage in additional discovery.” This process ensures that respondents are afforded due process in the same manner provided in the Rules for Disciplinary Enforcement, pursuant to §8-13-320(12) of the Ethics Act. (See, Rule 15(b), RLDE/RJDE.)

Pursuant to Regulation 52-710, it is only after a probable cause determination and issuance of a hearing notice that a respondent is permitted to conduct depositions and engage in other discovery. Again, this is the same procedure that is used in the Rules for Disciplinary Enforcement, which the Legislature clearly intended to be the model for Commission proceedings under the Ethics Act. (See, Rule 15(c), RLDE/RJDE.) The

Regulations applicable for discovery in the hearing stage of a complaint to the Commission mirror that of a disciplinary investigation under the Rules for Disciplinary Enforcement. (See, Rule 25(c), RLDE/RJDE.)

Regulation 52-710(B) does entitle “[a]ll parties to the proceedings ... to engage in discovery as provided in the Administrative Procedures Act and the Ethics Act to the extent that depositions may be taken. Depositions may only be taken after a determination of probable cause and issuance of a notice of hearing.

The Petitioner’s reliance on Rule 30, SCRCP, is misplaced. The Regulations do not say that a respondent is entitled to take depositions pursuant to Rule 30, SCRCP, only that the procedures set forth in those rules govern “the taking of and use of depositions.” Regulation 52-710(B). The citation to the procedural rule does not bestow any right to take a deposition, it merely establishes the rules for conducting depositions when such is otherwise authorized by the Ethics Act or the Regulations.

Similarly, the APA does not override the Ethics Act or the Regulations with regard to which stage in the proceedings a respondent may take a deposition. The provision cited by Petitioners, S.C. Code Ann §1-23-320(C), simply dictates that the method of taking depositions must conform to the Rules of Civil Procedure.

A party to these proceedings may cause to be taken the depositions of witnesses within or without the State and either by commission or de bene esse. Depositions must be taken in accordance with and subject to the same provisions, conditions, and restrictions as apply to the taking of like depositions in civil actions at law in the court of common pleas and the same rules with respect to the giving of notice to the opposite party, the taking and

transcribing of testimony, the transmission and certification of it, and matters of practice relating to it apply.

The Regulations setting forth the process for discovery upon a determination of probable cause and issuance of a notice of hearing are directly in line with the statutory authority of the Commission. S.C. Code § 8-13-320(j) provides:

If a hearing is to be held, the respondent must be allowed to examine and make copies of all evidence in the commission's possession relating to the charges. The same discovery techniques which are available to the commission must be equally available to the respondent, including the right to request the commission to subpoena witnesses or materials and the right to conduct depositions as prescribed by subitem (f).

Based on the foregoing, a respondent is not entitled to discovery at any point after a complaint is filed. A respondent is only entitled to discovery if a hearing is to be held.<sup>3</sup>

2. *[Whether] S.C. Code Ann. Regulation 52-211 ... preclude[s] an attorney from issuing a subpoena for the attendance at a deposition as provided in Regulation 52-710(B) and Rule 45(a)(3), SCRCP.*

At the point at which a respondent becomes entitled to conduct a deposition (that is, after a probable cause determination is made and a notice of hearing is issued), a subpoena may only be issued by the Commission. This is specified in both the Ethics Act and the Regulations. Section 8-13-320 of the Ethics Act states:

(f) The commission may order testimony to be taken in any investigation or hearing by deposition before a person who is designated by the commission

---

<sup>3</sup> Petitioners point out that notice of a hearing must be issued “at least thirty days before the scheduled hearing” pursuant to Regulation 52-707(A), arguing that thirty days is not enough time to conduct discovery. While that might be the case in some circumstances, it does not follow that a respondent must be allowed discovery during the investigative stage. In fact, a respondent who determines there is insufficient time to conduct discovery prior to a scheduled hearing is free to request a continuance of that hearing pursuant to Regulation 52-715, affording such a respondent a meaningful opportunity to be heard.



and has the power to administer oaths and, in these instances, to compel testimony. The commission may administer oaths and affirmation for the testimony of witnesses and issue subpoenas by approval of the chairman, subject to judicial enforcement, and issue subpoenas for the procurement of witnesses and materials including books, papers, records, documents, or other tangible objects relevant to the agency's investigation by approval of the chairman, subject to judicial enforcement. ...

(j) If a hearing is to be held, the respondent must be allowed to examine and make copies of all evidence in the commission's possession relating to the charges. The same discovery techniques which are available to the commission must be equally available to the respondent, including the right to request the commission to subpoena witnesses or materials and the right to conduct depositions as prescribed by subitem (f).

Nowhere in the statute is a respondent authorized to issue his own subpoenas.

The Commission's Regulations conform to the stated legislative intent that, although the respondent is entitled to discovery during the hearing stage and such discovery includes conducting depositions, the respondent must obtain subpoenas from the Commission. Regulation 52-211(A) is clear: "A party may obtain a subpoena from the Commission signed but otherwise in blank."

3. *[Whether] S.C. Code Ann. Regulation 52-211 is permissive in that it allows a respondent to seek a subpoena from the Chair of the Commission but does not require a respondent to do so in the context of taking a deposition pursuant to Regulation 52-710(B) and Rule 45(a)(3), SCRCP.*

A deposition is taken pursuant to a subpoena. Under the Act and the Regulations, only the Commission has the authority to issue a subpoena, although such may be done at the request of the respondent. Regulation 52-211 specifically sets forth the process for issuing subpoenas. To the extent a respondent's access to witnesses and opportunity to

conduct depositions is a matter of due process, such is established by the Rules for Disciplinary Enforcement, Rule 9, which states:

Except as otherwise provided in these rules, ... the South Carolina Rules of Civil Procedure apply in lawyer discipline cases following the filing of formal charges, incapacity cases, and proceedings to determine whether a lawyer is unable to participate in a disciplinary investigation or assist in the defense of formal proceedings due to a physical or mental condition. The right to discovery, however, applies only after formal charges have been filed and shall be limited to that provided by Rule 25.

Similarly, the Rules of Civil Procedure apply to proceedings under the Act unless otherwise provided. In this instance, the process for issuance of subpoenas is “otherwise provided” by Regulation 52-211, which limits the authority to issue subpoenas to the Commission.

4. *If the Commission believes that a respondent has to obtain a subpoena from the Commission Chair [or his designee] in order to compel attendance at a deposition, please provide the statutory basis for that decision and the Commission’s belief as to the proper form of the subpoena if different from the South Carolina Rules of Civil Procedure.*

As stated above, a respondent who wishes to use a subpoena must obtain it from the Commission pursuant to Regulation 52–211(A), which was duly promulgated pursuant to S.C. South Carolina Code §8-13-320(12). As to the Commission’s exclusive authority to determine the proper form of a Commission subpoena, Regulation 52–204 (Official Forms and Documents) is clear:

- A. The Commission prepares and approves all forms required under the Act.
- B. A person shall use a Commission form and shall not substitute another document for a form unless permitted by these Regulations or approved by the Commission. Photocopying or reproduction of a form on paper the same size and color is permitted, provided content is not altered.

With regard to the second part of the Petitioner's inquiry, the Commission's subpoena form fully adheres to the requirements of Rule 45, SCRPC, and is not "different from the South Carolina Rules of Civil Procedure."

5. *Whether the Commission believes, and can point to any regulation or statute to support the position, that a Complaint matter is not a "case" for the purposes of issuing a subpoena.*

The APA, the Ethics Act, and the Regulations clearly distinguish an investigation from a contested case. Section 1-23-310(3) of the APA defines 'contested case' as "a proceeding ... in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing[.]" The provisions of Section 1-23-320 of the APA cited by the Petitioners provides for depositions and subpoenas following notice of a hearing in a contested case:

(A) In a contested case, all parties must be afforded an opportunity for hearing after notice of not less than thirty days[.]

...

(C) A party to these proceedings may cause to be taken the depositions of witnesses within or without the State and either by commission or de bene esse. Depositions must be taken in accordance with and subject to the same provisions, conditions, and restrictions as apply to the taking of like depositions in civil actions at law in the court of common pleas; and the same rules with respect to the giving of notice to the opposite party, the taking and transcribing of testimony, the transmission and certification of it, and matters of practice relating to it apply.

(D) The agency hearing a contested case may issue subpoenas in the name of the agency for the attendance and testimony of witnesses and the production and examination of books, papers, and records on its own behalf or, upon request, on behalf of another party to the case.

(E) Opportunity must be afforded all parties to respond and present evidence and argument on all issues involved.

This distinction between the investigative stage and the hearing stage is also made in the Ethics Act. S.C. Code § 8-13-320(j) provides:

If a hearing is to be held, the respondent must be allowed to examine and make copies of all evidence in the commission's possession relating to the charges. The same discovery techniques which are available to the commission must be equally available to the respondent, including the right to request the commission to subpoena witnesses or materials and the right to conduct depositions as prescribed by subitem (f).

And finally, the Regulations outline in detail the process for investigation and the opportunity for discovery after notice of a hearing.

### **RULING**

Based on the foregoing, the Commission issues its ruling as follows:

1. S.C. Code Ann. Regulation 52-710 provides that a respondent is entitled to discovery in addition to information gathered during an investigation and expressly allows a party to take a deposition pursuant to the provisions of Rule 30, SCRPC, after a hearing is noticed.
2. S.C. Code Ann. Regulation 52-211 precludes an attorney for a respondent from issuing a subpoena for the attendance at a deposition as provided in Regulation 52-710(B), and such may only be issued, upon request, by the Commission.
3. S.C. Code Ann. Regulation 52-211 requires a respondent who wishes to use a subpoena for any purpose, including taking a deposition pursuant to Regulation 52-710(B), to seek it from the Chair of the Commission or his designee.

To the extent Petitioners have requested that the Commission “point to any regulation or statute to support” its rulings, such is provided above in the Analysis set out above.