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COURT OF JUDICIAL DISCIPLINE
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**COMMONWEALTH OF PENNSYLVANIA
COURT OF JUDICIAL DISCIPLINE**

IN RE:

President Judge Farley Toothman :
Court of Common Pleas : No. 1 JD 2020
13th Judicial District :
Greene County :

**BRIEF IN SUPPORT OF OMNIBUS VERIFIED PRETRIAL MOTION AND
REQUEST FOR ENTRY INTO THE JUDICIAL DIVERSION PROGRAM**

President Judge Farley Toothman, by and through his undersigned counsel, respectfully presents this Brief in Support of Omnibus Verified Pretrial Motion and Request for Entry into the Judicial Diversion Program.

As Judge Toothman's Motion already contained legal authority to support the requested relief in Sections I through V, this Briefing is limited to the Motion for Admission to the Judicial Diversion Program. In submitting this Brief, it is necessary to provide some further factual background to explain the basis for the Motion and why the Program is appropriate. Accordingly, the facts discussed below are derived not only from the Board Complaint, but the Judge's verified Statement in Response to the Notice of Formal Investigation dated September 10, 2019.

As background, in 2016, this Court established an Interim Judicial Diversionary Program in *In re Domitrovich*, No. 1 JD 14, 150 A.3d 592, 2016 Pa. Jud. Disc. LEXIS 43 (2016). The Program is designed to be an alternative to formal disciplinary procedures and sanctions, so as to improve the judiciary by providing mentoring, educational and rehabilitative programs for judicial officers. The Court of Judicial Discipline may invite a judge to comply with education, docket management training, monitoring and mentoring, or other forms of remedial action. Below, Judge

Toothman directly addresses the conduct alleged to be at issue in this matter, in connection with the goals and potential benefits of the Program if he were to be admitted.

A. Pellegrini Incident

The Board Complaint alleges that Judge Toothman retaliated against Ms. Pellegrini by posting a copy of her grievance. Prior to the Board Complaint, Judge Toothman was candid in admitting the conduct. His actions and words flowed from frustration over a janitor blatantly undermining his attempt to secure the confidentiality of the court's chambers. The Judicial Diversion Program presents an opportunity for growth in an area in which the Judge lacks experience, namely, personnel matters.

As background, Judge Toothman had long expressed concerns about preserving confidentiality of the court's work and its independence. His concern was justified, as a prior janitor had been caught going through the Court's trash. Also, the AOPC had then recently investigated and confirmed that his concerns were warranted that the County Commissioners had designed the Court's digital network that they could have full access to all court computers, documents, copy machines, phone calls and messages. This experience resulted in separating the networks, and the AOPC circulating a "White Paper" statewide regarding Court digital privacy and independence.

The Judge required that unsupervised janitorial staff sign a confidentiality agreement in order to gain unsupervised access to chambers. Ms. Pellegrini refused to sign. No one with authority over Ms. Pellegrini took any action to require her to do so or to otherwise adequately address the matter of courtroom confidentiality.

Subsequently, Ms. Pellegrini filed a grievance alleging that the Judge used non-union labor when he had work done on a personal clock in his chambers. The Judge's frustration boiled over,

but was short-lived, as his posting of her grievance (which he acknowledges that he should not have done and has not since repeated) was taken down before the Court opened the following morning.

The case of In re Tidd, 3 JD 2016, 175 A.3d 1151, 2017 Pa. Jud. Disc. LEXIS 11 (2016) presented the first occasion in which the Court was called upon to analyze the contours of the anti-retaliation provisions of the Canons. For guidance, the Court turned to the employment protection statutes, including the United States Supreme Court case of Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006). Adopting the logic of Burlington, the Court recognized that while retaliation is serious misconduct, there must be “material adversity” so as to separate significant from trivial harms. Id. at 1159.

In In re Tidd, for instance, the judge crossed the line, in part. Upon learning of a complaint, he entered the court facility, locked the door behind him, and forcefully berated the court clerks about the complaints to the Judicial Conduct Board, as well as their assistance to a political opponent in the weeks leading to a contested election. Subsequently, he sought transfer of certain employees, partly, in retaliation for the filing of a complaint against him, although he did not have ultimate transfer authority. Applying an objective standard, angry confrontation of the judicial staff was found to be inappropriate, as it would deter a reasonable employee from cooperation with the Board. In contrast, the jurist’s mixed-motive request to transfer staff, over which he had no final say, did not result in any adverse employment decision and did not constitute retaliation. Id. at 1158-1160.

More recently, this Court again recognized a “triviality” standard in In re Hladio, 6 JD 16, 2019 Pa. Jud. Disc. LEXIS 4, *47 (2019). Again, referring to Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 56 (2006), the Court spoke of actionable retaliation in terms of being

“materially adverse to a reasonable employee” or those that would be “harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.” Id. at 57. In In re Hladio, *supra*, the Court found that the retaliatory conduct exceeded the “triviality” standard.

Judge Hladio was charged with 14 counts of misconduct in 2 separate complaints spanning approximately 6 years. At issue was the judge’s making constant advances upon a court clerk and ignoring all requests from the clerk herself, the District Court Administrator and even the President Judge, that he should cease such offensive behavior and not retaliate. Undaunted, the Judge continued to proposition the clerk. When he learned that she was already in a relationship, the Judge refused to speak to her, criticized her, reassigned her job duties, and engaged in other punitive conduct. *See, In re Hladio.*

A comparison of the charge in this case to the accusations in In re Hladio and In re Tidd reveals a significant contrast. Although Judge Toothman is not arguing herein that his conduct toward Ms. Pellegrini was proper, his handling of the situation once he learned of the employment implications reveals that he is willing to learn and reverse course when he has committed a mistake. Specifically, after he became informed of the implications of retaliatory conduct, he reflected and the posting immediately came down—all before the building opened to the public. Thus, the Judge learned from this misstep. Further, the grievant janitor was not harmed in any way and not dissuaded from proceeding with her grievance, which ultimately was not upheld. Unlike In re Tidd, there was no actual adverse employment sought against the janitor. But similar to In re Tidd, Judge Toothman had no final say over the janitors in any event, as janitors report to the Commissioners. Therefore, this conduct is subject to the “triviality standard” recognized by the Court.

Another important distinction here is that the Judge's goal was a principled one--to promote confidentiality for the benefit of the entire court-system—not to promote his personal interests. When Judge Toothman became a judge, and later President Judge, he had no background in employment law. And, to add to the complexity of this particular incident, Ms. Pellegrini was not even his employee. The Judge perceived the employee's grievance as a challenge to his authority and obligation to protect the court, coming on the heels of the employee's refusal to sign a completely justifiable confidentiality agreement and no one taking action to rectify the Judge's concern until after this incident occurred.¹ He was astute in recognizing the employee's motive. However, his reaction to call out the employee publicly for filing a grievance was not the best choice, among alternative better methods to handle a difficult situation.

The Judicial Diversion Program would present a good opportunity for Judge Toothman become more equipped to handle future employment and administrative issues. The Judge is already enrolled in a class in the fall of 2020 provided by the National Judicial College, entitled "Special Considerations for the Rural Court Judge." Both the Judge and the Court would benefit from developing improved methods to secure confidentiality within the court system and means to preserve the independence of the judiciary more generally.

B. Ms. McCarty Incident

In respect to the Judge's handling of the Ms. McCarty matter, the gist of the Board Complaint is that the Judge engaged in *ex parte* investigation, did not treat Ms. McCarty with fairness and impartiality, did not comply with the law, and otherwise brought the judicial office into disrepute. (Bd. Cmpl. ¶¶76, 83, 86-87, 102, 116).

¹ Subsequently, the Commissioners reassigned Ms. Pellegrini to other floors and she, and all other janitorial staff, signed confidentiality agreements approved by the union.

Like the incident with Ms. Pellegrini, the incident with Ms. McCarty also touched upon personnel issues, as his law clerk was involved in the initial incident at the Sunoco station. In that respect, Judge Toothman needs to better understand the parameters of his role as an employer and the things he can and cannot do (and should and should not do) in that role. And, as the incident evolved into a contempt finding against Ms. McCarty, the Judge desires also to learn from this incident and embrace any mentoring and education offered so he may steer clear of ever bringing the court into disrepute or his court rulings into question on grounds of impartiality in the future.

Turning to the specific allegation that the Judge engaged in *ex parte* communications and investigation, Judge Toothman appreciates that he is not to investigate facts in cases before him or communicate with parties or counsel *ex parte*. Without excusing the conduct involved in this matter, the typical misconduct charge of *ex parte* communication arises in the context of a jurist holding repeated communications excluding a litigant and/or entertaining a request to provide favorable treatment as a component of those conversations. That is not at all what happened here.

For example, in In re Segal, 3 JD 15, 2016 Pa. Jud. Disc. LEXIS 39, *40 (2016) a judge was repeatedly solicited, *ex parte* to give favorable treatment to litigants appearing before the judge. Similarly, in In re Roca, 14 JD 2015, 2016 Pa. Jud. Disc. LEXIS 55, *1 (2016), a jurist contacted another jurist to help gain relief for her son in an action that was pending against her son. Her *ex parte* conversations came to light due to an authorized wiretap. In these types of cases, there is often a component of secrecy that undermines the integrity of the judicial system.

In contrast, Judge Toothman's conduct in relation to the entire incident was not secretive at all. Beginning with the docket check, the docket itself is public in nature. Ms. McCarty's many entanglements with the law are available to anyone with an internet connection and the ability to check the AOPC Website. The Judge now understands, however, that whereas a routine docket

check in another context may be a necessary part of case handling, here, it followed on the heels of the Sunoco incident and Ms. McCarty having been brought to his attention other than through normal court proceedings, creating a different dynamic and a perception that the Judge did not contemplate or intend.

Further, Ms. McCarty's hearing on September 7, 2017 was held in open court and in the presence of a court reporter. Accordingly, Judge's statements and his rulings were all made a part of the public record. One might reasonably question whether a jurist would require a court reporter to be present and transcribe the proceeding if he sincerely thought that what he was about to do was in any way improper. There was no attempt to shield from discovery any action that Judge Toothman took. The absence of any clandestine behavior is telling in respect to consideration of whether Judge Toothman should be afforded the privilege of entry into the Judicial Diversion Program. The Judge, if mentored and trained, would be equipped to make better choices, including, recognizing more broadly the perception of his actions.

Importantly, Judge Toothman's actions were not done for any personal benefit. Judge Toothman was not under investigation. Nor was his law clerk charged with any type of criminal conduct at that time (or ever) or any other inappropriate behavior.

The Court is entitled to take action when a litigant misses a court appearance. Further, Ms. McCarty's list of offenses was long and warrants and fines were outstanding. It is certainly the function of a judge to address a habitual offender against whom there had been a lack of enforcement. In context, however, the Judge did not consider the perception of his appearing at the Sunoco, his subsequent review of the docket or his interactions with Ms. McCarty (who he acknowledges, had no lawyer at that time) when she was ordered to appear before him and jailed for contempt. Although Judge Toothman was not intending either to protect his law clerk or violate

Ms. McCarty's rights in any respect, the Judge could have and should have handled the matter differently by exercising more restraint from the outset and following proper procedures to enforce the outstanding warrants, fines and the missed court hearing. These are nuances that Judge Toothman has come to recognize with the benefit of retrospection, prompted by the Board's investigation and the Board Complaint.

It is the Judge's hope that if he is admitted to the Judicial Diversion Program, he will be better prepared to recognize and thus avoid, missteps in the future. The Judge is interested in becoming more informed about and prepared to handle Magistrate District Judge court processes and procedures, warrants and the enforcement of sentences, which were the root of the problem in this matter from his own perspective.

C. Courtroom Demeanor and Temperament

Portions of the Board Complaint pertain to incidents involving Judge Toothman's on-bench judicial temperament. Specifically, Judge Toothman is accused of failing to treat parties fairly, to require order and decorum and to be patient, dignified and courteous to litigants and counsel. (Bd. Cmplt. ¶59, 78, 95, 98). The Judicial Diversion Program arose from similar types of allegations in In re Domitrovich, *supra*. The Court found that the charges were caused by alleged underlying personal and professional issues including, but not limited to, the judge's inability to resolve administrative disagreements with other judges and staff and her lack of appropriate and respectful treatment of attorneys and litigants. *Id.* at 594.

As to Judge Toothman, the 2018 AOPC investigation articulated similar concerns. The AOPC expressed that the Judge's personal management style counter-productive to achieving his goals. (Letr. 9/17/18, Exh. B). As In re Domitrovich teaches, these types of issues are appropriately addressed through the Program. Therefore, Judge Toothman believes he has by now already

addressed and rectified some of the concerns from the past, given that he has had the benefit of a mentor in Judge Kopriva and additional education over the past 2 years. The Program would present further opportunity for improvement.

D. Knowledge of the Law / Competency

Finally, the Board Complaint also avers that Judge Toothman did not know and/or did not comply with the law. As already explained in the Omnibus Motion, the Judge disagrees with certain of the legal conclusions alleged. The Judge very much agrees, however, with the need to comply with all substantive and procedural aspects of the law, including in carrying out his administrative duties. The Program presents a forum for improving Judge Toothman's competencies in both legal and administrative skills.

WHEREFORE, President Judge Farley Toothman, an individual with no prior discipline and a willingness to rectify any past errors, submits that he would be a very good candidate for the Judicial Diversion Program and respectfully asks that the Court of Judicial Discipline consider his request for admission as part of his Omnibus Motion.

WEINHEIMER, HABER & COCO, P.C.



Bethann R. Lloyd, Esquire
PA Atty. I.D. 77385
brl@whc-pc.com

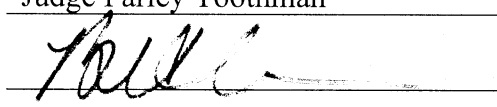


Amy J. Coco, Esquire
PA Atty. I.D. 73416
ajc@whc-pc.com

602 Law & Finance Building
429 Fourth Avenue
Pittsburgh, PA 15219-1503
412-765-3399

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that required filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Counsel on behalf of President
Judge Farley Toothman
Signature: 
Name: Bethann R. Lloyd, Esq.
Attorney ID No. 77385

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the within **BRIEF IN SUPPORT OF OMNIBUS VERIFIED PRETRIAL MOTION AND REQUEST FOR ENTRY INTO THE JUDICIAL DIVERSION PROGRAM** has been served on counsel and/or parties of records, by U.S. First Class Mail, postage prepaid (and by email), on this 22nd day of July, 2020, to the following:

Richard W. Long, Chief Counsel
Melissa L. Norton, Deputy Counsel
Judicial Conduct Board
Pennsylvania Judicial Center
601 Commonwealth Avenue, Suite 3500
Harrisburg, PA 17106

Respectfully submitted,

WEINHEIMER, HABER & COCO, P.C.



Bethann R. Lloyd, Esquire
PA Atty. I.D. 77385
brl@whc-pc.com

Amy J. Coco, Esquire
PA Atty. I.D. 73416
ajc@whc-pc.com

602 Law & Finance Building
429 Fourth Avenue
Pittsburgh, PA 15219-1503
412-765-3399