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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 13th Judicial District Greene County	:	No. 1 JD 2020

RESPONDENT'S BRIEF

Retired Judge Farley Toothman ("Respondent"), by and through his undersigned counsel, Bethann R. Lloyd and Amy J. Coco, respectfully presents this Brief for the Court's consideration in conjunction with the jointly submitted Stipulations in Lieu of Trial.

A. THE APPLIABLE STANDARD OF PROOF IS CLEAR AND CONVINCING EVIDENCE.

In cases tried before the Pennsylvania Court of Judicial Discipline against judicial officers who are alleged to have violated the Pennsylvania Code of Judicial Conduct or the Pennsylvania Constitution, the Judicial Conduct Board (JCB), as prosecutor, bears the burden of proof by clear and convincing evidence. Pa. Const. Art. V, § 18(b)(5).

Respondent's potential missteps are not nearly so egregious, nor clear and convincing, as is implied by the sheer volume of counts against Respondent. The JCB brought 21 separate counts against Respondent, alleging violations of Cannon 1 (Rule 1.1 Compliance with the Law; 1.2 Promoting Confidence in the Judiciary; Cannon 2 (Rule 2.2 Impartiality and Fairness; Rule 2.5(A) Competence; Rule 2.8(A) Decorum/Order; Rule 2.8(B) Decorum/Courteousness; Rule 2.9(C) *Ex Parte* communications), as well as an alleged derivative violation of Article V §17(b) Constitution of the Commonwealth of Pennsylvania.

With respect to the overarching allegation in Count 21 that Respondent's actions brought the judicial office into disrepute, the JCB Complaint focuses primarily on the Ms. McCarty

matter, but references the entirety of the allegations against him. Setting aside Ms. McCarty, it is hard to fathom why a judicial officer would face disciplinary action for interpreting a seldom utilized local rule to benefit the indigent, for closing a proceeding out of sensitivity for the privacy interests of two minor children, or for revisiting a prior court order to protect an unrepresented litigant from the court's perception that she may have been unfairly taken advantage of in an earlier proceeding. Respondent's actions were not erroneous, nor self-serving, and in no way brought the judiciary into disrepute. Even in the Pellegrini matter, as soon as Respondent was instructed to reverse course in respect to his posting of her grievance, he immediately did so, demonstrating compliance, not disrespect. Respondent acknowledges and regrets multiple errors in respect to Ms. McCarty, errors that he will not attempt to excuse herein.

Against this backdrop, it is appropriate to consider the applicable case law in respect to the charge that Respondent brought the judicial office into disrepute. It cannot be presumed that a violation of a provision (constitutional, canonical or criminal) *automatically* lowers public acceptance of the authority of the judicial office. In re Berkhimer, 877 A.2d 579, 591-593 (Pa. Ct. Jud. Disc. 2005); *citing*, In re Smith, 687 A.2d 1229 (Pa.Ct. Jud. Disc. 1996). "'Disrepute' necessarily incorporates some standard with regard to the reasonable expectations of the public of a judicial officer's conduct. Even if a judicial officer's conduct could reasonably result in the lessening of respect for that judge, it cannot be *assumed* that the same actions would necessarily bring the judicial office into disrepute." Id.

"To sustain a charge under this Section, the Board must make a persuasive showing that (1) the judicial officer has engaged in conduct which *is so extreme* that (2) it has resulted in bringing the judicial office into disrepute." Id. at 594 (italics in original).

B. RESPONDENT INTERPRETED A LOCAL RULE TO BENEFIT INDIGENT LITIGANTS.

The JCB charged Respondent with modifying a Local Rule without following proper procedures, demonstrating administrative incompetency. Respondent did not modify the approximately 20 year old Rule; he merely interpreted it to benefit indigent litigants. Respondent did not personally benefit in any way. (Stip. ¶155).

The Local Rule at issue, Green County Local Rule 1920.51, provided for the payment of an additional fee upon the filing of a divorce complaint. The fee was be used for the costs of transcribing hearings before a master in a divorce hearing. (Stip. ¶140-142). The parties have not been able to locate historical authority for the purpose of the Rule, but agree that the Rule was rarely invoked, leading to a substantial balance in the stenographer fund that needed to be addressed urgently. (Stip. ¶143). Respondent took action to have the money held in a financial institution, where it would be separate and protected, until it could be determined how to spend the money. (Stip. ¶143-145). Respondent then sought the assistance of the AOPC to determine the proper disposition of the funds. (Stip. ¶153).

Respondent felt the proper interpretation of the Rule was to utilize it in cases of indigency. He explained his interpretation to a master who was seeking payment. (Stip. ¶150). Respondent acknowledges that the Rule does not expressly restrict the use of funds to benefit the poor. (Stip. ¶152). However, it is hard to fathom why a Rule would create a stenographer fee fund to benefit parties that could afford to pay the stenographer themselves and directly.

A court has broad powers in construing its own rules. This includes the power to interpret them, to suspend them and to determine whether they are to be rigidly enforced. McFadden v. Pennzoil Co., 191 A. 584, 585 (Pa. 1937); *See also*, In re Stokes' Est., 74 A.2d 517, 520 (Pa. Super. 1950)("the court which makes the rule may interpret it, determine whether it shal [sic] be

rigidly enforced, and in a proper case may suspend or disregard it in order that injustice be prevented[.]" *See also*, Curran v. James Regulator Co., 36 A.2d 187, 188 (1944)(holding that the common pleas court had broad authority to suspend the application of its local rules to open a default judgment).

Consistent with the above guidance, Rule 126 of the Pennsylvania Rules of Civil Procedure teaches: "The court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties." Further, the Judicial Code provides: "The provisions of this title shall be construed so as to vest in the unified judicial system and in the personnel of the system power to do all things that are reasonably necessary for the proper execution and administration of their functions within the scope of their respective jurisdiction." 42 Pa.C.S. § 103.

Respondent's actions demonstrated no violation of the law or incompetency. Further, his actions demonstrated that he was performing his administrative functions in interpreting and implementing the Local Rule, benefiting poor litigants and protecting the fund itself. By August 2019, the Court completed a re-write of all Local Rules, in compliance with Pennsylvania Rule of Judicial Administration 103(c)&(d). (Stip. ¶154). Respondent's actions were fully consistent with the concept of judicial administration and did not, in any manner, bring the judiciary into disrepute. Therefore, he asks that the charge be dismissed and no violation found.

C. IN THE *WEBSTER* MATTER, RESPONDENT STRUCK A DIFFICULT BALANCE BETWEEN THE RIGHT TO PRIVACY AND THE RIGHT TO OPEN COURTS.

Respondent has been charged with incompetency and failure to comply with the law because he closed the courtroom to protect two children, ages 8 and 11, who were going to be called to provide testimony of their being abused in the context of a Protection from Abuse

proceeding. (Stip. ¶124-125). Specifically, Respondent was concerned that the children did not want to testify, that one had potentially embarrassing manifestations of the turmoil in her life and was concerned that the girls might be intimidated by those watching. (Stip. ¶125-127). Respondent was neither incompetent, nor ignorant of the law. Rather, Respondent was protective of the children and engaged in an appropriate balancing act of the competing interests involved. Although the JCB challenges Respondent as citing inapplicable authority for his decision-making, a deeper probe into the law in this area reveals that Respondent's overall balancing and recognition of the competing interests involved was ultimately correct.

The Explanatory Report for the AOPC Unified Judicial System Public Access Policy, which was one of the authorities cited by Respondent, teaches that the presumption of openness has to be weighed against other considerations, such as privacy and security; striking the right balance is not an easy task. (Stip. ¶138). The constitutional and common law presumption of openness is not absolute and must be carefully weighed against privacy concerns.

Article 9 and 11 of the Pennsylvania Constitution specifically address the concept of keeping courts open to the public. Article 11 provides: "All courts shall be open[.]" Article 9 provides that a criminal defendant has a right to a public trial. Although Article 9 is not applicable to a PFA proceeding, which is not criminal in nature,[1] its interpretation is nevertheless instructive here, as the Pennsylvania Supreme Court has held: "[T]he right to a public trial is not absolute; rather, it must be considered in relationship to other important interests." Commonwealth v. Knight, 364 A.2d 902, 906 (1976).

[1] A PFA proceeding is governed by the Pennsylvania Rules of Civil Procedure. See, Pa.R.C.P. 1901 et seq.

> In considering such other interests, a court must assess all of the circumstances to determine if they present a situation in which an exclusion order is necessary. If the court determines a necessity exists, it may then issue an exclusion order; but the exclusion order must be fashioned to effectuate protection of the important interest without unduly infringing upon the accused's right to a public trial either through its scope or duration. Id.

The Knight case is particularly instructive, as it involved a minor witness who had suffered and was still suffering emotional trauma. It was apparent to the trial court that the minor was under a great deal of emotional stress. Under such circumstances, the trial court was held not to have abused its discretion in issuing an exclusion order. Id. at 907.

Like Knight, in the *Webster* Matter, two children of impressionable age were in the courthouse to potentially provide testimony on the topic of abuse. One pre-teen girl was emotionally traumatized and Respondent was concerned the girls might be intimidated. These special circumstances warranted an exception to the constitutional requirement of an open court.

The "open court" mandate of Article 11 is not absolute. *See*, R.W. v. Hampe, 626 A.2d 1218, 1221 (Pa. Super. 1993)(a party may rebut the presumption of openness, and obtain closure of judicial proceedings and records for "good cause."). For example, divorce cases present an exception to the general rule of openness, precisely because the issues frequently involve emotional accusations and testimony, which if published, could serve only to embarrass and humiliate the litigants. Katz v. Katz, 514 A.2d 1374, 1379 (1986). For similar reasons, the Juvenile Act provides that "the general public shall be excluded from hearings under this Chapter," for the salutary reasons of protecting the privacy interests of minors." 42 Pa.C.S.A. §6336(d).

As yet another example, in the context of a civil trial, a trial judge may regulate or exclude the public or persons in the interest of the "public good, order or morals." Pa.R.C.P. 223. The

Note to Rule 223 provides further: "Trial courts in Pennsylvania customarily exercise discretion as to the exclusion of persons from the courtroom in the interest of good order and morals."

Although counsel questioned whether the courtroom could be closed, no one objected. No one appealed. No press sought access. No member of the public sought access. No participant in the proceeding was excluded. The record was not sealed. (Stip. ¶135).

To the extent that a lawyer, an appellate Judge or even the JCB might disagree in hindsight with Respondent's balancing of the competing interests, that is the reason why appeals are taken, such that the parameters of Constitutional law can be reviewed by the appellate courts, set future precedent and guide the entire judiciary. However, it cannot be shown that Respondent violated the Constitution or any other established statutory law or precedential case law. Therefore, Respondent asks that no violation be found in respect to the *Webster* matter.

D. IN *KIGER*, RESPONDENT REVISITED AN ORDER BECAUSE HE THOUGHT ONE SPOUSE HAD IMPROPERLY TAKEN ADVANTAGE OF ANOTHER UNREPRESENTED SPOUSE AT THE TIME IT WAS ENTERED.

In respect to the *Kiger* matter, Respondent revisited an earlier Order, upon coming to the conclusion that a husband may have been taking advantage of an unrepresented wife, and the Court in the presentation of the prior motion. (Stip. ¶115). The JBC alleges that Respondent failed to comply with the law, failed to treat both parties fairly and failed to be courteous to the litigants. Upon close examination, that is not the case. Respondent's actions were taken to ensure that all litigants could be heard at once and with representation. He revisited his earlier order to protect the unrepresented mother of four children and did not in any way personally benefit from his ruling in her favor. (Stip. ¶122-123).

As background, before ever appearing before the Court, the spouses signed a statement that would have ensured that the wife had a vehicle. (Stip. ¶107). In May 2017, at a time when the wife was unrepresented, husband's lawyer presented a motion directing wife to return the vehicle. (Stip. ¶108). As wife was not present to oppose, Respondent entered the order. (Id.). However, shortly thereafter, when wife appeared in Court *pro se* moving for the return of two vehicles, Respondent vacated the earlier Order. (Stip. ¶110). Meanwhile, Judge Dayich also entered two Orders on the same matter, on June 5th and June 7, 2017. (Stip. ¶111-112).

The matter finally came to a head on June 7th, when both spouses appeared in court for a hearing before Respondent. Both had counsel at that point. (Stip. ¶113). Although Respondent stated that he regretted signing the second Order, he also expressed a desire to understand the situation. (Stip. ¶113). Respondent felt the husband had taken advantage of the wife, and the Court, by presenting the original motion as unopposed and without wife's presence. (Stip. ¶115).

Some of Respondent's language was colorful, but not disrespectful. As to the specific comment ("I don't think that's effective advocacy here"), such comment was not hostile, offensive or even inappropriate, but a candid assessment that counsel's argument was not convincing him. Clearly, the former spouses had much ground to cover in the future in terms of divvying up marital property, but Respondent's focus that particular day was understanding what had happened and revisiting earlier rulings with the benefit of *both* parties being in court *with counsel* and resolving the limited issue of the vehicle. In sum, Respondent tried to protect a mother of four children from an order that was entered at a time when she did not have counsel and may not have understood the need to appear to state any concerns. (Stip. ¶122). No actual violation of any law nor disrespect to any litigant or counsel has been shown. Therefore, Respondent asks the Court to dismiss this charge against him and find no violation.

E. MS. PELLEGRINI WAS NOT A LITIGANT APPEARING BEFORE THE COURT, BUT A CUSTODIAN WHO REFUSED TO COOPERATE WITH RESPONDENT'S ATTEMPT TO PROTECT AND PRESERVE THE COURT'S CONFIDENCES.

The chambers of a judicial officer have sensitive and confidential information. Custodian Pellegrini's refusal to cooperate with Respondent in protecting the Court's confidences gave rise to this matter. After not signing a confidentiality agreement, Ms. Pellegrini filed a baseless grievance against Respondent. Although Respondent acknowledges that he should not have posted the grievance publicly, he certainly had the right and duty to protect the confidentiality of the court's work from a custodian who was rejecting his reasonable request. He also had the right to defend himself against her unfounded allegations.

The JCB alleges that Respondent did not treat Ms. Pellegrini with respect and accuses him of lacking impartiality. However, when the actions at issue arose, Ms. Pellegrini was not a litigant or counsel appearing before him, but an adverse party making unfounded allegations against the Judge. Perhaps more restraint was in order, but surely the Cannons cannot be interpreted to impose discipline upon a judicial officer who expresses frustration when confronted with a frivolous allegation against him. The duty of impartiality owed to litigants should not be interpreted to apply to a scenario by which the judicial officer is the object of the litigation. To hold otherwise would render the officer unable to defend, or at the very least, impose limitations on such a defense for fear of disciplinary action. Moreover, Respondent was obviously not the decision-maker in the grievance brought by Ms. Pellegrini against him. In this context, wherein there is an adversarial relationship between an individual and the judicial officer, the strict application of Canons 1 and 2 (Rule 1.2 Promoting Confidence in the Judiciary; Rule 2.2 Impartiality and Fairness; Rule 2.8(B) Decorum) would make little sense.

Ironically, in this instance, although Respondent has been accused of undermining confidence in the judiciary, Respondent's goal was to promote greater confidence in the judiciary by ensuring the confidentiality of the court's work. Ms. Pellegrini flouted Respondent's very reasonable request to sign a statement of confidentiality at that time, and the Commissioners who supervised her also failed to take action at that time.

The JCB alleges that Respondent violated the law. There was no violation in the posting. A grievance itself is not confidential; nor is the arbitration decision or any appeal. (Stip. ¶98). Therefore, no law was violated in the posting of the grievance.

Nor did Respondent engage in retaliatory conduct in violation of the law. 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. Specifically, after Respondent became informed of the implications of retaliatory conduct, he reflected and directed that the posting come down—all before the building opened to the public. (Stip. ¶95-96). Unlike In re Tidd, there was no actual adverse employment action taken or sought against the janitor. But similar to In re Tidd, Respondent had no final say over the custodian in any event. Ms. Pellegrini was not under Respondent's direction

and control, or he would have been able to take further action to secure her agreement to confidentiality in the first instance. The janitorial staff was and still is under the supervision of the Board of County Commissioners. (Stip. ¶84). Therefore, Respondent's slight missteps in this case, both as to conduct and words expressed in frustration in response to the grievance against him, is subject to the "triviality standard."

It bears repeating, another important distinction here is that the Respondent's goal was a principled one--to promote confidentiality for the benefit of the entire court-system—not to promote his personal interests. Ms. Pellegrini ignored Respondent's reasonable steps to protect the court with a completely justifiable confidentiality agreement. Respondent's reaction to call out the employee publicly for filing a grievance was admittedly, not the best choice, among alternative better methods to handle a difficult situation. However, Respondent did not violate the Code of Judicial Conduct or any law in respect to this incident.

F. RESPONDENT ACKNOWLEDGES THAT HE DID NOT AFFORD MS. MCCARTY THE DUE PROCESS TO WHICH SHE WAS ENTITLED.

Respondent's procedures did not afford Ms. McCarty the due process to which she was entitled. Initially, Respondent became involved in the Sunoco incident, thinking there was a potential misunderstanding involving his law clerk, a Ukranian immigrant who was sensitive to the character and fitness requirements to become a lawyer and the potential impact of an allegation against her. (Stip. ¶21-23). Also, Respondent, a lifelong resident of Greene County, knew the owner of the Sunoco. (Stip. ¶2, 28). Respondent often made himself available to community members in the small rural borough where the courthouse is located. (Stip. ¶12, 26).

However, Respondent became too involved in this particular matter. Respondent acknowledges multiple missteps, including having Ms. McCarty report to the courtroom on short

notice and without a pending proceeding or notice of the nature of the proceeding and without affording her a right to counsel. Respondent allowed himself to be influenced by his knowledge of millions of dollars in accumulated in unpaid fines in the County, Ms. McCarty's failure to keep current on her own obligations, his review of a 10-page court summary of cases pertaining to Ms. McCarty and his understanding that Ms. McCarty was constantly causing trouble wherever she went.

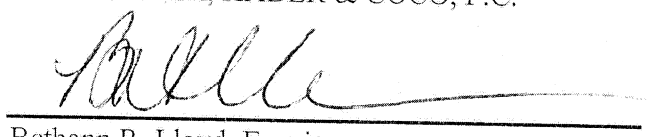
Respondent's error was not limited to applying the incorrect contempt procedure, which he has also previously acknowledged. Respondent's more significant error in this matter was failing to pause and reflect as to whether the court's powers, inclusive of the power of contempt, should have been applied at all in the context in which this incident presented.

However, Respondent's conduct, while mistaken in this particular matter, has not been shown to have been persistent, pervasive and so extreme in nature to have brought disrepute upon the judicial office itself. Respondent certainly hopes that is not the case. At the time, Respondent was focused on Ms. McCarty's extensive record and unpaid fines. He provided her with credit that released her from the sentencing in more than 9 cases, including accrued fines and community service. (Stip. ¶81). This, however, is not a substitute for affording her due process in the first instance.

The Stipulation shows no pattern by which Respondent denied due process to litigants appearing before him. Respondent failed Ms. McCarty and accepts full responsibility, but respectfully requests that the Court find that this instance of misjudgment on his part does not rise to the level of conduct that is so extreme that he brought the judicial office into disrepute.

WHEREFORE, Retired Judge Farley Toothman respectfully requests that the Court of Judicial Discipline find no violation and that no discipline is warranted.

WEINHEIMER, HABER & COCO, P.C.



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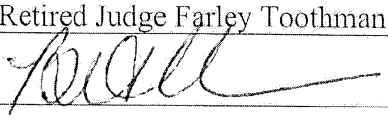
CERTIFICATE OF COMPLIANCE

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 Retired Judge Farley Toothman

Signature: 

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