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2016 APR 20 A 11:10
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April 18, 2016

Honorable Patricia A. McCullough
Honorable Anne E. Covey
Honorable Dan Pellegrini, Senior Judge
Court of Judicial Discipline
601 Commonwealth Avenue, Ste. 5500
Harrisburg, PA 17106-2595

In Re Kenneth Miller, 8 JD 2015

Dear Judges McCullough, Covey and Pellegrini:

Please accept this letter Memorandum in support of Senior Judge Kenneth Miller's position in the above-captioned matter.

On October 27, 2015 the Judicial Conducted Board, submitted by letter Memorandum, its position regarding whether or not this court lacks the subject matter jurisdiction to entertain the Board's complaint on the grounds that the criminal acts for which Sr. Judge Miller's stands convicted were not undertaken by him during a period of actual judicial service and, therefore, whether such acts can or cannot form the basis of a Board Complaint.

There are no disputes as to the relevant facts and procedural history in this case. Specifically, that on January 31, 2013 Judge Miller was charged with criminal information of one felony count of mail fraud, for one singular act of using the mail to request relief in an *ex parte* fashion in a Philadelphia Traffic Court case that occurred in December, 2010; that prior to the filing of the criminal information, whether Judge Miller resigned from his status of Certified Senior Magisterial District Justice; that Judge Miller waived his right to Indictment and pled guilty to the aforementioned criminal information on February 12, 2013 and was sentenced on January 5, 2015 to one year probation, plus \$100.00 assessment, plus a \$1,000.00 fine.

As correctly set forth in the Board's Memorandum the issue raised by Judge Miller is whether or not this court lacks subject matter jurisdiction to entertain the Board's complaint on the grounds that the criminal act for which Judge Miller now stands convicted were undertaken at a time when he was not in actual judicial service.

In support of its position the Board cites the case of *In Re Cain*, 590 A.2d 291 (Pa. 1990). The Board correctly notes that in *Cain* the Supreme Court was presented with an issue dissimilar to the present scenario of Judge Miller. In *Cain*, Judge Cain having reached his 70th birthday, then served as a senior Judge in the Philadelphia Court of Common Pleas until December 4, 1986 when, then Chief Justice Robert N.C. Nix, Jr. signed an Order revoking Judge Cain's Order to sit as a senior Judge in the Philadelphia Court of Common Pleas. Judge Cain was then indicted by a Federal Grand Jury on October 15, 1987 for acts that occurred when Judge Cain was sitting as a Court of Common Pleas Judge. The distinction between Judge Cain and Judge Miller is first and foremost the criminal act for which Judge Cain was charged occurred while he was acting as a senior Judge. In fact, the indictment was alleged that Judge Cain accepted money from two attorneys in exchange for actions in criminal cases in which the attorneys represented those defendants. The issue in *Cain* was not whether or not he was an active Judge when the crimes for he was indicted were committed, and which subjected him to the Judicial Inquiry and Review Board, but rather, whether or not the mandatory retirement provisions of Article V section 16(b) and the fact that he was not assigned as a sitting judge at the time of the indictment, make the JIRB's request for sanctions moot. Clearly the distinction between Judge Cain and Judge Miller is obvious, that is, Judge Cain's action was for specific acts that occurred while he was a sitting Judge. There is no dispute that this court would have authority over such an action.

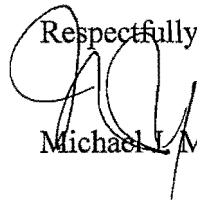
The Board is incorrect in noting that *Cain* is applicable and that this Court has jurisdiction that because "it alleges misconduct committed by Mr. Miller during the time that he was eligible to serve as a senior magisterial district judge, which eligibility constitutes the holding of 'judicial office'". (Board's letter p. 5)

The Board correctly notes that the New Rules Governing Standards of Conduct of Magisterial District Judges state that the Rules are applicable to "[a]ll senior magisterial district judges, active or eligible for recall to judicial service," and is correct in noting that said Rules, which became effective on December 1, 2014 are not applicable to the present case. The standard applicable in Judge Miller's case is distinctly different that the New Rules cited by the Board which states: "the Code shall not apply to Magisterial District Justices and Judges of the Traffic Court of the City of Philadelphia". *Judicial Conduct Chapter 33 subchapter S, Subchapter 1*. The Board's argument that The New Rules Governing in Standards for Magisterial District Judges are merely codifying *Cain* is incorrect. Such reasoning is flawed due to the fact that there was a specific, applicable canon in place at all times relevant to Mr. Miller's case, as it relates to Magisterial District Justices, and therefore, Mr. Miller was not an active senior Magisterial District Justice at the time of this infraction.

The Board further cites *In Matter of Glancey* 542 A.2d, 1350, 518 (Pa. 1988) wherein a Petition was filed against Judge Glancey for actions that occurred when he was an active Judge. Further, the Board cites *In Judicial Inquiry and Review Board v. Judge Bernard Snyder*, 523 A.2d 294 (Pa. 1987) again for acts occurred when Judge Snyder was an active Judge.

In conclusion, Mr. Miller supports the Board's statement that "it is true, however, that, unlike the factual scenario presented in *Cain*, the criminal acts and ultimate conviction at issue here did not arise directly from Mr. Miller's service as a senior magisterial district judge. (p. 6) Mr. Miller does dispute, the Board's position that this Court has subject matter jurisdiction to entertain the Board's complaint.

Respectfully submitted



Michael L. Malloy

MJM:sa

cc: Robert A. Graci, Chief Counsel
James P. Kleman, Jr., Assistant Counsel
Kenneth Miller