

COMMONWEALTH OF PENNSYLVANIA
COURT OF JUDICIAL DISCIPLINE

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AUG 5 7 2020

COURT OF JUDICIAL DISCIPLINE
OF PENNSYLVANIA

IN RE:

President Judge Farley Toothman :
Court of Common Pleas : 1 JD 2020
13th Judicial District :
Greene County :

**BRIEF OF JUDICIAL CONDUCT BOARD IN OPPOSITION TO
OMNIBUS VERIFIED PRETRIAL MOTION AND REQUEST FOR
ENTRY INTO THE JUDICIAL DIVERSION PROGRAM**

AND NOW, this 5th day of August, 2020, comes the Judicial Conduct Board of the Commonwealth of Pennsylvania (Board) by undersigned counsel and files this Brief of Judicial Conduct Board In Opposition To Omnibus Verified Pretrial Motion and Request for Entry Into the Judicial Diversion Program.

The Brief of Judge Toothman (Respondent) was limited to his Motion for Admission to the Judicial Diversion Program. Therefore, the Board will limit its Brief in the same manner.

Article V, § 18(b)(5) of the Constitution of the Commonwealth of Pennsylvania grants this Court the authority to discipline judges by ordering removal from office, suspension, censure, or other discipline. Pursuant to that authority, this Court initiated a judicial diversion program (Program) as a disposition and provided guidance and uniform practices for the Program in its Interim Policy Statement. **See** Attachment A. The Interim Policy Statement provides that the Program is "an alternative to formal disciplinary procedures and sanctions." Attachment A at 3. The Interim Policy Statement provides that the Program is intended for judges who "typically" fall into one of the four enumerated categories: (1) Judges charged with

conduct which may have violated the Constitution or the Code of Judicial Conduct, but would not likely result in the imposition of serious discipline, such as suspension or removal from office; (2) Judges with a mental, physical or emotional disability; (3) Judges with substance abuse issues; (4) Judges who have not previously had formal disciplinary charges filed against them. Id. at 1-2.

It is the position of the Board that Respondent is not an appropriate candidate for participation in the Program because, if proven, the misconduct he is alleged to have engaged in would likely result in the imposition of serious discipline.

Christy McCarty matter

In its Complaint, the Board alleged that at approximately 4 p.m. on September 6, 2017, Respondent's law clerk, Alexandra Chamberlain, shopped in a Sunoco station convenience store located in close proximity to the Greene County Courthouse. When Chamberlain exited the Sunoco store, Christy McCarty followed her out and asked her about her activity in the store. Believing that Ms. McCarty was accusing her of retail theft, Chamberlain returned to the store where the store clerks told her that the owner of the store would check the store surveillance footage to determine if she had committed retail theft. Chamberlain then returned to the Courthouse where she told Respondent about the incident. Board Complaint at 2.

Immediately after learning about the incident, Respondent commenced an investigation into the incident by taking the following actions:

- went to the Sunoco store and spoke to the store clerks;
- called the police to respond to the scene;
- learned Ms. McCarty's name;

- directed a court employee to obtain a copy of Ms. McCarty's secure court summary;
- directed a court employee to obtain all files pertaining to Ms. McCarty;
- determined the whereabouts of Ms. McCarty by questioning Greene County probation office staff; and
- directed a Greene County probation officer to instruct Ms. McCarty to report to his courtroom on September 7, 2017.

Id. at 2-3.

On September 7, 2017, at approximately 9:30 a.m. Ms. McCarty appeared before Respondent as directed by a probation officer. No petition, motion, or other pleadings had been filed to establish the purpose of the proceeding. No attorney or opposing party was present for the unscheduled proceeding. Ms. McCarty attempted to learn the nature of the proceeding, asking Respondent, "What is the matter I'm here for, the Sunoco incident yesterday?" Respondent replied, "No, you're actually here for violating the order of 72 of 2010." Prior to and during the proceeding, Ms. McCarty was not afforded notice of the proceeding, was not apprised of the nature of the proceeding, was not represented by counsel, and was not afforded an opportunity to retain counsel or have counsel appointed to represent her. After informing Ms. McCarty that "we" "have come to understand that you're in violation of a payment plan," and without making an effort to determine if Ms. McCarty had the ability to meet her payment obligation, Respondent found her in civil contempt for failing to make a \$10 monthly payment in the matter of *Commonwealth v. Christy L. McCarty*, CP-30-MD-72-2010. Pursuant to Respondent's order, less than 18 hours after Ms.

McCarty spoke to Respondent's law clerk at the Sunoco store, she was sent to prison for a period of 26 days. Id. at 3-5.

On October 2, 2017, Ms. McCarty was transported from the prison to Respondent's courtroom. Before ordering her release from incarceration, Respondent asked Ms. McCarty if he should "order [her] to stay away from the Sunoco." Id. at 5.

In Respondent's Brief, he acknowledges that he "could have and should have handled the matter differently by exercising more restraint from the outset and following the proper procedures" when he incarcerated Ms. McCarty for failing to make a \$10 payment. Respondent states, "These are nuances that Judge Toothman has come to recognize with the benefit of retrospection, prompted by the Board's investigation and the Board's Complaint." Respondent's Brief at 8.

Constitutional rights such as the right to counsel and the right to due process are not "nuances." Respondent's failure to understand, respect, and uphold important constitutional rights such as the right to counsel and the right to due process, directly resulted in Ms. McCarty's complete loss of liberty for 26 days. It is the position of the Board that it is abysmal that a judge with more than ten years on the bench only came to "recognize" that he "should have" followed "the proper procedures" when he became aware of the Board's investigation and Board Complaint.

The right to counsel and the right to due process are fundamental hallmarks of our criminal justice system. For Judge Toothman to relegate such constitutional rights to mere "nuances" which he has only recently come to recognize is more than troubling; it is alarming. His failure to understand, respect, and uphold core

constitutional rights accorded all criminal defendants directly resulted in Ms. McCarty's complete loss of liberty for 26 days – something no court can restore. The Board posits that for a jurist with more than ten years on the bench to only recognize that he “should have handled the matter differently” and “followed the proper procedures,” namely according a criminal defendant due process and the right to counsel, after he became aware of the Board's investigation and the filing of the Board Complaint, is as astounding as it is disturbing.

Should this Court accept the explanation of Respondent, which essentially amounts to an admission of a complete lack of knowledge and/or concern for important constitutional rights, remedial measures such as those offered through the Program would fall far short of the extensive legal education needed to address Respondent's shortcomings as a judge.

Furthermore, should this Court determine that Respondent's conduct did not meet the reasonable expectations of the public for the judiciary, i.e., that jurists are aware of and seek to protect important constitutional rights, it may determine that Respondent's conduct was so extreme as to bring the judicial office into disrepute, in violation of Article V, § 18(d)(1) of the Constitution of the Commonwealth of Pennsylvania. **See** *In re Berkheimer*, 930 A.2d 1255, 1258 (Pa. 2007). A finding of disrepute, by this Court, has resulted in serious discipline, specifically, removal from the bench. **See** *Id.* at 1260; **see also** *In re Merlo*, 34 A.3d 932, 974 (Pa.Ct.Jud.Disc. 2011), *affd.* 58 A.3d 1, (Pa. 2012); *In re Roca*, 151 A.3d 739, 744 (Pa.Ct.Jud.Disc. 2016), *affd.* 173 A.3d 1176 (Pa. 2017). Given Respondent's admissions regarding his conduct pertaining to Ms. McCarty, serious discipline, including removal, is a likely result of his conduct, making him an inappropriate candidate for the Program.

Waynette Pellegrini matter

On January 24, 2018, Waynette Pellegrini, a custodian in the Greene County Courthouse, filed a grievance through her labor union alleging that union work was being done in Respondent's judicial chambers by non-union employees. On January 28, 2018, Respondent made a copy of Ms. Pellegrini's grievance on bright orange paper and posted the copy on a public bulletin board in the courthouse. He did not redact her private information from the publically posted copy. When, during a meeting with several Greene County officials, Respondent was advised that posting the grievance on the public bulletin board may constitute retaliation, Respondent exclaimed, "You think I'm going to retaliate? You're damned right I'm going to retaliate!" Board Complaint at 5-7.

In his Brief, Respondent recalled that prior to posting Ms. Pellegrini's union grievance, he had "long expressed concerns about preserving confidentiality of the court's work and its independence." Therefore, he required that janitorial staff sign a confidentiality agreement. According to Respondent, Ms. Pellegrini refused to sign the agreement. With that background, Respondent explained that "his actions and words" regarding Ms. Pellegrini's unrelated union grievance "flowed from frustration over a janitor blatantly undermining his attempt to secure the confidentiality of the court's chambers." He stated that his "frustration boiled over." Respondent's Brief at 2-3.

Respondent offered another justification for his conduct pertaining to Ms. Pellegrini's union grievance, stating in his Brief that his "goal was a principled one—to promote confidentiality for the benefit of the entire court-system—not to promote his interests." However, he appeared to contradict that statement in a subsequent

remark saying he “perceived the employee’s grievance as a challenge to his authority” and claimed to have been “astute in recognizing the employee’s motive.”
Id. at 5.

After consideration of Respondent’s various justifications for his conduct pertaining to Ms. Pellegrini’s union grievance, it appears that the conduct was sparked by his frustration that she would not bend to his will regarding a matter completely unrelated to her union grievance. Rather than treat Ms. Pellegrini with patience, dignity and courtesy, as required by the Code of Judicial Conduct, Respondent allowed his frustration over an unrelated matter to “boil over” to the point that he exposed her to potential embarrassment and risk. Additionally, Respondent’s remarks about retaliation during the meeting with Greene officials establish that he was still unable to control his frustration over Ms. Pellegrini’s perceived “challenge to his authority.”

Respondent’s inability to control his actions and words over an extended period of time when confronted with a frustrating situation indicates that the remedial measures offered through the Program would not be successful. His apparent belief that his position as a jurist entitles him to unquestioning obedience (signing the confidentiality agreement) and absolute silence in the face of suspected improper behavior (union work being done by non-union employees) is indicative of a deeply flawed view of the power and authority of the judiciary which cannot be addressed through the Program.

If, through his own admissions and trial testimony this Court finds that there is clear and convincing evidence that Respondent failed to be patient, dignified and courteous within the meaning of the Code of Judicial Conduct, in his conduct

pertaining to Ms. Pellegrini's union grievance, it may impose a serious sanction on Respondent, including removal. **See** *In re Lokuta*, 964 A.2d 988, (Pa.Ct.Jud.Disc. 2008), *affd.* 11 A.3d 427, (Pa. 2011). The likelihood of serious discipline makes Respondent an inappropriate candidate for the Program.

Kiger v. Depetris matter

During a hearing on June 7, 2017, regarding the division of marital property, Respondent effectively joined counsel for one party in advocating against the other party. The following statements made by Respondent during the hearing are indicative of Respondent's failure to remain fair and impartial, failure to require order and decorum and failure to be patient, dignified and courteous within the meaning of the Code of Judicial Conduct.

- "I'm here about the spitefulness of taking two vehicles in that situation, and I can't believe that you want to argue about it."
- ". . . when I have a mother of four crying in the Courtroom because a spiteful former concubine took off with all the vehicles and his money, I don't get it really."
- "I don't care about all the legal title and equitable interest and all of those moons, I just simply wanted to get the mommy a car that I thought was parked in a driveway while [the plaintiff] was earning \$120,000 a year."
- When the attorney for "mommy" spoke to opposing counsel saying, "If it was up to your client, she'd either be riding a bike around town or she'd be feeding a horse right now", Respondent concurred with the attorney stating, "I'm afraid that's true, isn't

it? What's - - is this what we have resigned to - - "

- Respondent openly criticized the legal skills of the attorney for the plaintiff saying in open court, "I don't think that's effective advocacy here."

Board Complaint at 7-8.

In his Brief, Respondent referenced a September 17, 2018 letter from Thomas Darr (former Court Administrator of Pennsylvania) to Respondent which was appended to his Omnibus Verified Pretrial Motion and Request for Entry Into the Judicial Diversion Program as Exhibit B.¹ Respondent points out that the letter "expressed that the Judge's personal management style [is] counter-productive to achieving his goals." Respondent claimed, in his Brief, that he has "already addressed and rectified some of the concerns from the past . . ." and suggests that the Program offered by this Court "would present further opportunity for improvement." Respondent's Brief at 8-9.

The letter referenced by Respondent, while heavily redacted, does not appear to address the conduct exhibited by Respondent in the *Kiger v. Depetris* hearing. Therefore, it is unknown if the "concerns from the past" which Respondent believes he has rectified are the same as the misconduct alleged in the Board Complaint. Furthermore, regardless of whether the Court Administrator of Pennsylvania investigated and addressed the matters raised in the Board Complaint or not, it is this Court, not the Court Administrator of Pennsylvania, that has the authority to determine if Respondent has violated the Code of Judicial Conduct and/or

¹ Exhibit B is a heavily redacted version of the referenced letter. This court has not been provided with an unredacted version of the letter, nor has it been provided with any evidence pertaining to the investigation referenced in the letter.

Constitution of the Commonwealth of Pennsylvania as alleged in the Board Complaint and to discipline him accordingly. **See** Constitution of the Commonwealth of Pennsylvania, Article V, § (b)(5).

It is the position of the Board that Respondent's inability, after almost a decade on the bench, to remain fair and impartial, to require order and decorum and to fail to be patient, dignified and courteous while presiding in court, is beyond the scope and intent of the Program.

Webster v. Frank

On April 2, 2018, Respondent closed a hearing on a Protection from Abuse petition. When he was challenged by an attorney in the courtroom to state the authority for closing the hearing to the public, he responded that the authority was "mine, right now." He went further, telling the attorney that if he wants to be a judge, he should "run for it . . ." Board Complaint at 8.

When queried during the course of the Board's investigation regarding his conduct, Respondent said, "If this is wrong, please let me know." He also provided two inapplicable, non-statutory sources as authority for his act of closing a public proceeding.

Respondent's lack of knowledge of the general requirement that courts are to be open to the public and then to cite inapplicable, non-statutory authority to support his failure to keep a court proceeding open, is indicative of a jurist failing to understand important and basic legal concepts. The described conduct is also similar to some of his conduct in the Christy McCarty matter, wherein he failed to recognize and protect basic constitutional rights. Furthermore, his haughty reaction to having his authority questioned is reminiscent of his reaction to Ms. Pellegrini when she

questioned his use of non-union workers and he allowed his frustration to "boil over." These patterns of conduct lead to the conclusion that the Program established by this Court as an "alternative to formal disciplinary procedures and sanctions" cannot address what appear to be significant deficiencies in Respondent's ability as a jurist. Attachment A at 3.

CONCLUSION

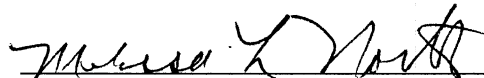
Due to the extreme nature of Respondent's alleged misconduct pertaining to Ms. McCarty and Ms. Pellegrini as well as his alleged misconduct in the *Kiger v. Depetris* and *Webster v. Frank* matters, placement of Respondent in the judicial diversion program is not an appropriate alternative to formal disciplinary procedures and sanctions. For this reason, the Board objects to the placement of Respondent in the judicial diversion program.

Respectfully submitted,

RICHARD W. LONG
Chief Counsel

DATE: August 5, 2020

By:



MELISSA L. NORTON
Deputy Counsel
Pa. Supreme Court ID No. 46684

Judicial Conduct Board
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**COMMONWEALTH OF PENNSYLVANIA
COURT OF JUDICIAL DISCIPLINE**

IN RE:

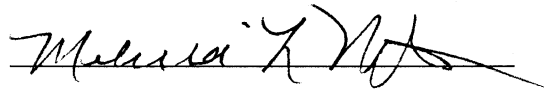
President Judge Farley Toothman :
Court of Common Pleas : 1 JD 2020
13th Judicial District :
Greene County :

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Judicial Conduct Board of Pennsylvania

Signature:



Name:

Melissa L. Norton
Deputy Counsel

Attorney No.:

46684

**COMMONWEALTH OF PENNSYLVANIA
COURT OF JUDICIAL DISCIPLINE**

IN RE:

President Judge Farley Toothman :
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PROOF OF SERVICE

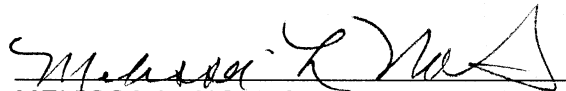
In compliance with Rule 122 of the Court of Judicial Discipline Rules of Procedure, on August 5, 2020, a copy of the Brief of Judicial Conduct Board In Opposition To Omnibus Verified Pretrial Motion and Request for Entry Into the Judicial Diversion Program was sent by first class mail to Amy J. Coco, Esquire, and Bethann R. Lloyd, Esquire, counsel for Judge Toothman, at the following address:

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

Respectfully submitted,

DATE: August 5, 2020

By:



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ATTACHMENT

A

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A

INTERIM POLICY STATEMENT
Judicial Diversion Program

The Court of Judicial Discipline wishes to explore the possibility of implementation of a permanent Judicial Diversion Program as a disposition available to the Court upon the filing of a formal complaint or a petition for relief¹ by the Judicial Conduct Board.

The Court adopts this Interim Policy Statement for guidance and uniform practices pending the decision of the Court to adopt a permanent Judicial Diversion Program.

The Court hopes to develop this Judicial Diversion Program to rehabilitate, and not to punish, therefore the Program, interim and permanent, is for judges who, while charged with ethical violations, typically fall into one of the following categories:

- a. Judicial officers charged with conduct that, if proven, would constitute a violation of the Constitution, the Code of Judicial Conduct, the Rules Governing Standards of Conduct of Magisterial District Judges, or Orders of the Supreme Court of Pennsylvania, but would not likely result in the imposition of serious discipline such as suspension or removal from office following adjudication;
- b. Judicial officers with a mental, physical or emotional disability. In addition to the authority vested in the Court under C.J.D.R.P. No. 601;
- c. Judicial officers with substance abuse issues;

¹ Pursuant to C.J.D.R.P. No. 701, the Judicial Conduct Board may file a Petition for Relief rather than file formal charges under Article V, §18(b)(5) of the Pennsylvania Constitution.

d. Judicial officers who have not previously had formal charges filed against them.

This Judicial Diversion Program is not an option in cases involving criminal charges or corruption.

1. The Pennsylvania Constitution provides authority to the Court of Judicial Discipline to implement a Judicial Diversion Plan:

Article V, § 18(b)(5)

Upon the filing of formal charges with the court by the board, the court shall promptly schedule a hearing or hearings to determine whether a *sanction* should be imposed against a justice, judge or justice of the peace pursuant to the provisions of this section. The court shall be a court of record, with all the attendant duties and powers appropriate to its function. Formal charges filed with the court shall be a matter of public record. All hearings conducted by the court shall be public proceedings conducted pursuant to the rules adopted by the court and in accordance with the principles of due process and the law of evidence. Parties appearing before the court shall have the right to subpoena witnesses and to compel the production of documents, books, accounts and other records as relevant. The subject of the charges shall be presumed innocent in any proceeding before the court, and the board shall have the burden of proving the charges by clear and convincing evidence. All decisions of the court shall be in writing and shall contain findings of fact and conclusions of law. A decision of the court may order removal from office, suspension, censure or other discipline as authorized by this section and as warranted by the record.

Article V, § 18(d)

A justice, judge or justice of the peace shall be subject to disciplinary action pursuant to this section as follows:

(1) A justice, judge or justice of the peace may be suspended, removed from office *or otherwise disciplined* for conviction of a felony; violation of section 17 of this article; misconduct in office; neglect or failure to perform the duties of office or conduct which prejudices the proper administration of justice or brings the judicial office into disrepute, whether or not the conduct occurred while acting in a judicial capacity or is prohibited by law; or conduct in violation of a canon or rule prescribed by the Supreme Court. In the case of a mentally or physically disabled justice, judge or justice of the peace, the court may enter an order of removal from office, retirement, suspension *or other limitations on the activities of the justice, judge or justice of the peace as warranted by the record*. Upon a final order of the court for suspension without pay or removal, prior to any appeal, the justice, judge or justice of the peace shall be suspended or removed from office; and the salary of the justice, judge or justice of the peace shall cease from the date of the order.

2. The Judicial Diversion Program is an alternative to formal disciplinary procedures and sanctions, and participation is a matter of privilege, not of right. The purpose of the Program is to improve the quality of the judiciary by providing mentoring, educational, remedial and rehabilitative programs for judicial officers. The Court of Judicial Discipline expressly reserves the right and obligation to ensure that only appropriate judicial officers are invited to participate in the Program and to ensure the compliance of judicial officers with the conditions of the Program.

3. Upon the filing of a formal complaint or petition for relief, but before adjudication, the Court of Judicial Discipline may invite a judicial officer to comply with a Judicial Diversion Program plan, including but not limited to education, counseling, drug and alcohol testing and follow-up treatment, docket management training, monitoring and/or mentoring programs, or other forms of remedial action, including any combination of dispositions that the Court of Judicial Discipline believes will reasonably improve the conduct the judicial officer. Such invitation may be accompanied by the deferral of final disciplinary proceedings.

If a judicial officer refuses to agree to the diversion plan formal proceedings will be followed.

If the counselor, mentor or other professional appointed to supervise the diversion program reports to the Court of Judicial Discipline, or if the Court of Judicial Discipline otherwise determines, that the judicial officer has been noncompliant with the terms, conditions and obligations of diversion formal proceedings will be re-instituted and the judicial officer will be removed from the diversion program.

4. The judicial officer will be required to sign a formal Judicial Diversion Program agreement or contract outlining the terms, conditions and obligations of the diversion plan.

5. Qualified counselors, mentors or other professionals will be appointed by the Court to supervise the Judicial Diversion Program plan, and

will be permitted to submit to the Court of Judicial Discipline reimbursement vouchers for expenses accrued during their service. The Court of Judicial Discipline shall determine what, if any, additional reasonable compensation shall be paid to any counselor, mentor, or other professional appointed by the Court.