

COMMONWEALTH OF PENNSYLVANIA
COURT OF JUDICIAL DISCIPLINE

IN RE:

Andrew T. LeFever, Esq.	:	
Magisterial District Judge	:	7 JD 2020
Magisterial District 02-2-04	:	
2nd Judicial District	:	
Lancaster County	:	

**MEMORANDUM OF LAW IN OPPOSITION TO THE MOTIONS
IN LIMINE FILED BY THE JUDICIAL CONDUCT BOARD¹**

- A. As Previously Decided by this Court, A Magisterial District Judge’s Testimony That He Intended to Comply with The Rules Governing Standards of Conduct of Magisterial District Judges (Rules) Is Relevant and Admissible in Proceedings to Determine Whether the Judge’s Conduct Violated the Rules and to Sanctions That May Be Imposed for Any Violation of the Rules.**

The Board gives an excellent dissertation of the law regarding when, in the criminal law, the prosecution need not prove any criminal intent to secure a conviction for “an absolute liability offense.” Memorandum of Judicial Conduct

¹ In its Memorandum, the Judicial Conduct Board (Board) only addresses the first of the two motions in limine that it filed with the Court, *i.e.*, to exclude testimony from Magisterial District Judge LeFever related to his intent to comply with the Rules Governing Standards of Conduct of Magisterial District Judges. Judge LeFever’s memo will address that motion as well as the second motion filed by the Board to exclude the testimony of two witnesses regarding whether Judge LeFever voted to endorse candidates for Lancaster City Council and School Board Director during the February 11, 2019 Lancaster City Democratic Committee (LCDC) meeting.

Board Regarding Motion in Limine to Preclude Testimony From Respondent Related to His Intent to Comply With the Rules Governing Standards of Conduct of Magisterial District Judges (Board Memo), p.5. The Board Memo cites the Commonwealth's Constitution, the Preamble to the Rules and opinions from the Supreme, Superior and Commonwealth Courts to advance its argument. Board Memo, pp. 5-8. However, it fails to address or even cite the precedential decision of this Court which rejected the idea that alleged violations of the Rules are akin to regulatory offenses which have no scienter or *mens rea* requirement. This Court has held unanimously that the Board must prove a judge's intent in order to establish a violation of the Rules. That case requires the denial of the Board's first motion in limine.

In re Whittaker, 948 A.2d 279 (Pa.Ct.Jud.Disc.2008), involved, *inter alia*, a claim by the Board that Judge Whittaker violated Rule 15A of the then-extant Rules. Rule 15A stated: "Magisterial district judges shall not hold another office or position of profit in the government of the United States, the Commonwealth or any political subdivision thereof, except in the armed services of the United States or the Commonwealth."² Judge Whittaker was alleged to have violated this

² Rule 15A of the prior Rules is now found verbatim in Rule 3.10 (C) which states: "Magisterial district judges shall not hold another office or position of profit in the government of the United States, the Commonwealth or any political subdivision thereof, except in the armed services of the United States or the Commonwealth."

provision of the prior Rules because while he was serving as a magisterial district judge he was also employed part-time as a fire truck driver by a local township. *Id.* at 285 and 295. When the Board notified Judge Whittaker that his employment with the township might be a violation of prior Rule 15A, he immediately resigned. *Id.* at 286 and 296. Important for current purposes is that the last fact found by the Court pertinent to this charge was that “[a]t no time during his employment with the Newport Township Fire Department did [Judge Whittaker] know that the employment might be a violation of a Rule Governing Standards of Conduct of Magisterial District Judges or any ethical standard; and at no time during his employment with the Newport Township Fire Department did [Judge Whittaker] have any consciousness that it might be a violation of Rule 15A of the Rules Governing Standards of Conduct of Magisterial District Judges.” *Id.*

After re-reciting the pertinent facts and quoting the Rule allegedly violated, the Court then examined the state of the law as to the mental components of offenses. In doing so, the Court quoted extensively from the prior Opinion in Support of Dismissal in its earlier case, *In Re Crahalla*, 747 A.2d 960 (Pa.Ct.Jud.Disc. 2000), which the Court found to be “on all fours” with Judge Whittaker’s case. *Whittaker, supra*, at 296.

In *Crahalla*, the magisterial district judge was charged with a violation of old Rule 11 which said, in pertinent part: “Magisterial district judges shall not

solicit funds for any educational, religious, charitable, fraternal or civic organization”³ As explained in *Whittaker*, Judge Crahalla had been accused of soliciting funds for the Boy Scouts, an activity that the members of the Court supporting dismissal found to be “inherently good” rather than “inherently bad” or “inherently evil.” *Whittaker, supra*, at 296. Judge Whittaker’s employment as a fire truck driver for his township was likewise found to be “not an inherently evil act.” *Id.* The *Whittaker* Court characterized the activities at issue in the two cases as “*malum prohibitum*” and not “*malum in se.*” *Id.* at 296 and nn. 12 and 13 (defining those terms). Referring back to *Crahalla*, and applying its language to Judge Whittaker, the Court continued

This is a hoary jurisprudential distinction which is not hard to understand, and [we] would require some degree of *mens rea* [defined in footnote 13 “[a]s an element of criminal responsibility; a guilty mind; a guilty or wrongful purpose; a criminal intent”] before finding a violation of this rule. *In this case there was no “guilty mind” or “wrongful purpose” -- no mens rea whatsoever -- as demonstrated by Respondent’s immediate resignation as Dinner Chairman [or as a fire truck driver] upon being advised that serving in that capacity was a possible violation of a Rule of Conduct.*

Whittaker, supra, at 296 (emphasis added). Later in the opinion, *Whittaker* would state that “the existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence. . . .” *Id.* at 300, quoting *Staples v. United States*, 511 U.S. 600, 605-606, 114 S.Ct. 1793, 1797, 128 L.Ed.

³ The current iteration of that rule is found at Rule 3.7(b)(2) of the Rules.

2d 608 (1994), quoting *Morrisette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952), *supra*.

Citing extensively from *Morrisette*, *Whittaker* “examined the *raison d’etre* for the requirement of criminal intent as an element of criminality in our jurisprudence” and noted how various courts spoke in terms like “‘willfulness,’ ‘scienter’ ... or ‘*mens rea*.’” *Whittaker, supra*, at 297, quoting *Morrisette, supra*, at 250-252. Continuing its reliance on *Morrisette*, *Crahalla* as repeated in *Whittaker* noted the “proliferation of a myriad of what [*Morrisette*] termed ‘public welfare offenses’” which it defined in a footnote as “[r]elating, for example, to the regulation of the distribution of food, drink, drugs, and products of any kind, even securities, workplace safety, motor vehicle traffic, environmental pollution.” *Whittaker, supra*, at 297 and n. 15 (citations omitted). *Whittaker* rejected the conclusion advanced by the Board that the Rules were like public welfare offenses that require no intent or mental state, equating our Supreme Court’s rules to speeding offenses or the Dog Law. See Board Memo, p. 7, and compare *Whittaker, supra*, at 298. In reaching that conclusion, *Whittaker* set forth six important considerations supporting its conclusion. *Whittaker, supra*, at 298-302. Those considerations included, *inter alia*:

1. The legislative purpose of discouraging the conduct prescribed by the rules at issue “is not thwarted by requiring the element of scienter to constitute a violation of the rule” *Id.* at 298.⁴

2. The penalties for any violation of the Rules “are not ‘relatively small’ ranging, as they do, from reprimand to removal from office.” *Id.*

3. Different from a public welfare offense “where the effect of a conviction on the reputation of the offender is negligible, the injury to the reputation of a judicial officer ‘disciplined’ by this Court cannot be overassessed.” *Id.*

This guidance from the Court’s earlier decision in *Whittaker* compels the denial of the Board’s motions. Two of the charges against Judge LeFever derive from Rules with language similar to the violations charged in *Whittaker* and *Crahalla*. Rule 4.1(A)(1) and Rule 4.1(A)(3) both contain language that the judge “shall not” engage in particular campaign-related conduct. Just as in *Whittaker* and *Crahalla*, the purpose of discouraging the conduct prescribed by the Rules at issue is not thwarted by requiring the element of scienter to constitute a violation of the Rules. Unlike the traffic offenses noted by the Board, the penalties that might befall Judge LeFever, ranging from reprimand to removal are not relatively small

⁴ Here, the Court noted that the judges in *Crahalla* and *Whittaker* immediately self-corrected their errant activities after the potential violations were brought to their attention. *Whittaker*, at 298.

and the damage to Judge LeFever's reputation if he is disciplined by this Court is potentially overwhelming and cannot be overassessed.

Moreover, the conduct charged, like the fundraising for the Boy Scouts in *Crahalla* and truck driving for the township fire department in *Whittaker*, is not inherently bad or evil. Participation in the political process as a committee person is inherently good. It is critical to our democracy and our democratic institutions, including the two-party system.⁵

Also like the judge in *Whittaker*, Judge LeFever did not hide his conduct. All of his activities were public. Different from the judges in *Crahalla* and *Whittaker*, he was not told by the Board or anyone else that his campaign-related conduct until his resignation as a committee person just before filing his nominating petitions was potentially violative of any of the Rules. However, he was mindful of the Rules, including the proscription of Rule 4.1(A)(1) and, like the good lawyer that he is, Judge LeFever researched Rule 4.1(A)(1) and followed what little precedent there was on the subject. *See, e.g., In re Nomination Petition of Denick*, 729 A.2d 168 (Pa. Cmwlth. 1999). *See also* Joint Stipulations of Fact Pursuant to C.J.D.R.P.

⁵ This view aligns with the sentiments expressed in Board Trial Exhibit 3 which describes "Committee Members" of the Lancaster City Democratic Committee as "elected officials [who] promote our most sacred civic duties: voting and being involved in our government."

No. 502(D)(2), ¶ 17, p.3.⁶ Evidence that the parties have stipulated to in the form of the minutes of the meeting of the LCDC held on March 11, 2019 will show that he resigned because he understood that he could not be a committee person in a political organization while he was a candidate for judicial office.⁷ Like the resignations by the judges in *Whitaker* and *Crahalla*, Judge LeFever should be credited for his efforts in seeking to comply with the Rules and acting consistently with the precedent regarding Rule 4.1.

Judge LeFever observes that the language of Rule 4.2(A)(1) is dissimilar to the “shall not” language of the other two rules he is charged with violating. Nevertheless, the precepts discussed above similarly yield the same result that Rule 4.2(A)(1) is not an absolute liability offense as the Board argues. Enforcement of this rule is not thwarted any more than any other rule by a scienter requirement. The potential sanction for this asserted violation is no less severe than for any other violation. And the potential harm to Judge LeFever’s reputation is just as great.

Finally, contrary to the Board’s argument, Judge LeFever’s efforts and intent to comply with the Rules is relevant not only to any sanction to be imposed on him should the case proceed that far, *see* Board Memo, p. 8, but his testimony in that

⁶ By its Order of June 11, 2021, the Court accepted the stipulations submitted by the Board and Judge LeFever.

⁷ *See* Board Trial Exhibit 7, p. 2 (“Andrew [LeFever] announced that because he is a candidate for judge, he must resign from his seat on the [LCDC], in accordance with ethics rules”).

regard is relevant at the trial on the merits of the Board Complaint. Rule 401 of the Rules of evidence states that “[e]vidence is relevant if ... it has any tendency to make a fact more or less probable than it would be without the evidence; and ... the fact is of consequence in determining the action.” Ra.R.E. 401.

As demonstrated above, Judge LeFever’s intent is part of the equation in determining whether the Board carried its constitutional burden of proving the charges that it leveled against him by clear and convincing evidence. *Whittaker, supra*, at 286, *quoting* Pa. Const., Art. V, §18(b)(5). The Board’s argument that this testimony is only relevant to sanctions misunderstands paragraph [6] of the Preamble to the Rules. That paragraph states, in pertinent part:

“[I]t is not intended that disciplinary action would be appropriate for every violation of the Conduct Rules’ provisions. *Whether disciplinary action is appropriate*, and the degree of discipline to be imposed, should be determined through a reasonable application of the text and *should depend on such factors as* the seriousness of the violation, *the intent of the magisterial district judge*, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system.”

Rules, *Preamble* [6]. The Supreme Court has explained, in an appeal from a case before this Court, that “[t]he discipline of a judicial officer is a process which begins the moment a complaint is received by the [Judicial Conduct B]oard.” *In re Hasay*, 686 A.2d 809, 817 (Pa. 1996). Certainly, if discipline of a judicial officer starts with the receipt of a complaint by the Board, it continues through the trial of the matter and beyond to any sanctions hearing and appeal. Accordingly, Judge

LeFever's intent to comply with the Rules is a fact of consequence in determining whether he violated Rule 4.1(A)(1), Rule 4.1(A)(3) or Rule 4.2(A)(1).

For these reasons, this Court should follow its decisions in *Whittaker* and *Crahalla* and the Supreme Court's decision in *Hasay* and deny the Board's Motion in Limine to exclude the admission of testimony from Judge LeFever regarding his intent to comply with the Rules.

B. Testimony Regarding Whether or Not Respondent Voted to Endorse Non-Judicial Candidates for Public Office Is Relevant and Potentially Exculpatory and Is Admissible.

Judge LeFever's Pre-trial Memorandum identifies, *inter alia*, two individuals, Alan Silverman and Lauren Slesser, who attended the meeting of the LCDC held on February 11, 2019. It is anticipated that both will testify that they do not remember or recall if Judge Lever, as an LCDC Committee Person, voted to endorse the candidates for City Council or School Board Director during that meeting. Pre-Trial Memorandum of Respondent, Magisterial District Judge Andrew T. LeFever, ¶¶ A.7 and A.8, p. 3. The anticipated testimony attributed to Mr. Silverman and Ms. Slesser was derived from separate Reports of Interview of Mr. Silverman and Ms. Slesser prepared by a Judicial Conduct Board Investigator and provided to Judge LeFever, through undersigned counsel, by Board Counsel. These reports were provided pursuant to Rule 401(E) of the Court of Judicial

Discipline Rules of Procedure, C.J.D.R.P. 401(E), stating that the documents provided, including the separately identified Reports of Interview of Mr. Silverman and Ms. Slessor, “*may contain evidence that could be considered exculpatory regarding the charges against [Respondent]*”(emphasis added).”

Rule 401(E) requires the Board to provide the judicial officer charged by the Board “with any exculpatory evidence relevant to the charges contained in the Board Complaint.” C.J.D.R.P. 401(E). In this case, the Board has fully complied with this procedural rule. It identified the information provided by these witnesses to the Board’s investigator as containing evidence that may be exculpatory.

“Exculpatory” is an “adj[ective] applied to evidence which may justify or excuse an accused defendant’s actions, and which will tend to show the *defendant is not guilty* or *has no criminal intent*.” See freedictionary.com/legal-dictionary,

“exculpatory” (emphasis added). Black’s Law Dictionary defines “exculpatory evidence” as “[e]vidence tending to establish a criminal defendant’s innocence.”

Black’s Law Dictionary, 10th Edition, “exculpatory evidence,” p. 675 (2014).⁸ As

noted above, Rule 401 of the Rules of evidence states that “[e]vidence is relevant if

... it has any tendency to make a fact more or less probable than it would be

⁸ “Judicial conduct proceedings have been held to be quasi-criminal in nature; thus, the defendant is granted constitutional rights afforded to criminal defendants.” *In re Berkheimer*, 930 A.2d 1255, 1258(Pa. 2007), *citing In re Chiovero*, 570 A.2d 57, 61 (Pa. 1990). Accordingly, this definition applies to judges facing charges before this Court.

without the evidence; and ... the fact is of consequence in determining the action.”

Ra.R.E. 401.

That persons who were present at the meeting at which it is alleged that Judge LeFever voted, as a member of the LCDC, to endorse non-judicial candidates in violation of Rule 4.1(A)(3) and do not recall or remember that he did so is potentially exculpatory as noted by Board Counsel and, whether considered alone or in conjunction with other testimony on that issue, will assist the Court in deciding if the Board has carried its constitutional burden of proving the charge under Rule 4.1(A)(3) by clear and convincing evidence as required by Article V, § 18(b)(5) of the Pennsylvania Constitution.⁹ That testimony is relevant as having a tendency to make that fact of the endorsements of non-judicial candidates less probable than it would be without the evidence and is clearly of consequence in determining that charge. *See* Pa.R.E. 401. This is particularly so in light of the stipulated testimony of Lauren Edgell that Judge LeFever did not vote for these endorsements and the proffered testimony of these witnesses that, though they

⁹ “The Judicial Conduct Board is responsible for investigating and bringing charges, and at trial, the *board must prove the charges by clear and convincing evidence*. In considering whether the evidence presented is clear and convincing, *the court must find the witnesses to be credible, and the facts and details to be distinctly remembered*. The witnesses’ testimony must be sufficiently clear, direct, weighty, and convincing.” *In re Berkheimer*, 930 A.2d 1255, 1258 (Pa. 2007), *citing In re Cicchetti*, 743 A.2d 431, 443 (Pa. 2000) (emphasis added).

were both at the meeting of the LCDC on February 11, 2019, neither of them recalls Judge LeFever casting any such vote for non-judicial candidates.¹⁰

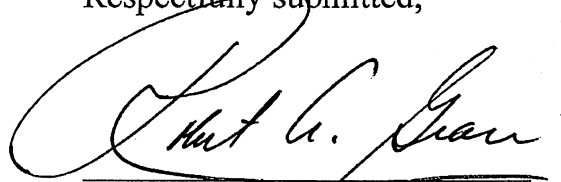
For these reasons, the Board's motion in limine to exclude the testimony of Mr. Silverman and Ms. Slesser should be denied.

¹⁰ This is not diminished by the fact that at his deposition taken by Board Counsel Judge LeFever testified that, as a LCDC Committee Member, he voted to endorse candidates for Lancaster City Council, and he believed he voted to endorse candidates for Lancaster School Board Director. *See* Additional Joint Stipulations of Fact Pursuant to C.J.D.R.P. No. 502(D)(2), ¶¶ 61 and 62. At trial, Judge LeFever will testify consistent with his Answer to the Board Complaint that he is no longer sure if, as a LCDC Committee Member, he voted to endorse these non-judicial candidates at the LCDC meeting of February 11, 2019. *See* Answer to Judicial Conduct Board Complaint, ¶ 11, p. 4.

C. Conclusion

For the reasons set forth above and any additional reasons set forth in the Response to Motions in Limine filed on behalf of Judge LeFever simultaneously herewith, it is respectfully requested that this Honorable Court deny the Motions in Limine of the Judicial Conduct Board in their entirety.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert A. Graci", written over a horizontal line.

Robert A. Graci, Esquire
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Harrisburg, Pa 17112

Attorney for Andrew T. LeFever
Magisterial District Judge

Date: September 3, 2021

COMMONWEALTH OF PENNSYLVANIA
COURT OF JUDICIAL DISCIPLINE

IN RE:

Andrew T. LeFever, Esquire :
Magisterial District Judge : 7 JD 2020
Magisterial District 02-2-04 :
2nd Judicial District :
Lancaster County :

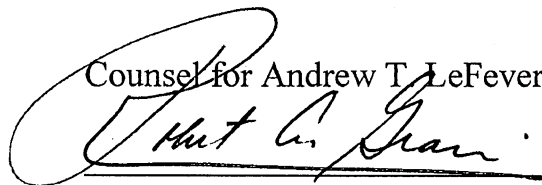
CERTIFICATE OF COMPLIANCE

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

Submitted by:

Counsel for Andrew T. LeFever

Signature:



Name:

Robert A. Graci, Esquire

Attorney ID Number: 26722

**COMMONWEALTH OF PENNSYLVANIA
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IN RE:

Andrew T. LeFever, Esquire :
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PROOF OF SERVICE

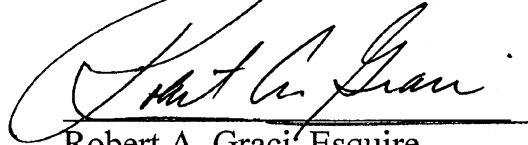
In compliance with Rule 122 of the Court of Judicial Discipline Rules of Procedure, on the date below a copy of the Memorandum of Law In Opposition To The Motions In Limine Filed By The Judicial Conduct Board was mailed and emailed to Colby J. Miller, Judicial Conduct Board Deputy Counsel, at the following addresses:

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and

Colby.Miller@jcbpa.org

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Robert A. Graci", is written over a horizontal line.

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Date: September 3, 2021