COMMONWEALTH OF PENNSYLVANIA
COURT OF JUDICIAL DISCIPLINE

IN RE: JUDGE MARISSA J. BRUMBACH MUNICIPAL COURT JUDGE 1ST JUDICIAL DISTRICT PHILADELPHIA COUNTY	: : : : :	2 JD 2022

JUDGE MARISSA J. BRUMBACH'S OBJECTIONS TO THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to C.J.D.R.P. No. 503(B), Respondent Judge Marissa J. Brumbach respectfully submits the following objections to the March 12, 2024 Opinion and Order, containing this Court's Findings of Fact and Conclusions of Law (the "March 12 Opinion").

I. INTRODUCTION.

The Court's March 12 Opinion aptly summarized the material facts of this case and[1]—with the exception of the matters discussed below—provides a generally accurate rendition of the legal landscape governing this matter. Indeed, the Court's credibility determinations find ample support in the record and are, therefore, practically unassailable. And, critically, its finding that the Judicial Conduct Board has failed to carry its burden on seven of the nine charges lodged against Judge Brumbach is supported by settled jurisprudence. In short, therefore, Judge Brumbach is largely in accord with this Court's analysis of this matter.

[1] *But see* note 3 *infra.*

Yet, the March 12 Opinion is mistaken in holding that Judge Brumbach violated Rule 2.5(A) (and, by extension, Article V, Section 17(B) of the State Constitution). Specifically, this Court's finding that Judge Brumbach's breached her duty of competence and diligence is fundamentally flawed for two overarching reasons. *First*, this conclusion is premised on a materially inadequate definition of a "disposition." *Second*, in concluding that Judge Brumbach's conduct violated Rule 2.5(A), this Court has misconceived the duties of competence and diligence imposed by that rule.

This mistaken formulation of the legal principles can be easily rectified. But it is crucial that the Court's take the necessary steps to do so now—not only to prevent the unwarranted damage to Judge Brumbach's reputation, but also to protect jurists in the future. Indeed, as laid bare in the ensuing discussion, the Court's decision, in its present form, has no readily discernible limiting principles and, thus, can easily be weaponized to erode basic principles of judicial independence. Rather than waiting for the inevitable recurrence of prosecutorial overreach in future cases, the Cout should articulate the necessary guideposts now.

II. THIS COURT'S MARCH 12, 2024 OPINION AND ORDER AND JUDGE BRUMBACH'S OBJECTIONS THERETO.

Given this Court's familiarity with this action, Judge Brumbach will offer only a brief summary of the procedural and factual background. As this Court is aware, this matter concerns Judge Brumbach's handling of 95 traffic citations, which were originally scheduled to be heard on January 7, 2022. Specifically, according to the Complaint filed by the Judicial Conduct Board (the "Board"), Judge

Brumbach—who had notified then-President Judge Dugan that she would be attending an event in Florida on January 7, 2022 nearly two months earlier—violated various provisions of the Code of Judicial Conduct and the Pennsylvania State Constitution by reviewing and marking the 95 citations a day early (*i.e.*, on January 6, 2022). Shortly after filing its Complaint, the Board requested that this Court suspend Judge Brumbach without pay. That request was denied in February 2023 and on November 16, 2023, a trial was held on each of the nine charges of alleged misconduct advanced by the Board.

After considering the evidence adduced by the parties and their competing legal arguments, this Court issued the March 12 Opinion, finding that the Board failed to prove seven of the nine charges of misconduct by clear and convincing evidence.[2] Nevertheless, the Court determined that clear and convincing evidence had been presented to sustain a finding that Judge Brumbach had violated Canon 2, Rule 2.5(A) because she had "made a disposition on each of the 95 traffic citations" by "affix[ing] her official signature on each indicating such disposition[,]" Op. at 16, and "circling her finding[]" on each of them. *Id.* at 19. In this connection, the Court expressly rejected Judge Brumbach's argument that her markings were merely preliminary annotations and that "the disposition does not actually occur until the Dispositioner Unit enters the disposition into the eTIMS computer system." *Id.* at 16. Specifically, the Court reasoned that "[t]he judge is the

[2] Specifically, the Court found that Board did not carry its burden with regard to Counts I, II, III, V, VII, VIII, and IX.

authority who makes the finding for the case" and, because the "subsequent entering or recording of" by the Dispositioner Unit "is a ministerial act[,]" entry into the eTIMS system is not determinative of whether a disposition had occurred. *Id.* Based solely on this construct of the term "disposition," the Court rendered the following conclusions of law:

> Judge Brumbach's signature on the 95 Certificates of Disposition constitutes a violation of Canon 2, Rule 2.5 (A) Competence, Diligence and Cooperation: A judge shall perform judicial and administrative duties competently and diligently.
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> By violating Canon 2, respondent thereby violated ARTICLE V § 17(B) CONSTITUTION OF THE COMMONWEALTH OF PENNSYLVANIA—Justices and judges shall not engage in any activity prohibited by law and shall not violate any canon or judicial ethics prescribed by the Supreme Court.

For the reasons discussed below, Judge Brumbach objects to the foregoing Conclusions of Law, set forth in Paragraphs One and Two.

III. ARGUMENT.

The Court's conclusion that Judge Brumbach violated her duty of competence and diligence is fundamentally flawed for two discrete reasons. *First*, while entry into eTIMS ***may*** properly be characterized as a ministerial act (and, thus, not a prerequisite to a finding of a disposition), the Court mistakenly concludes that Judge Brumbach's markings on the citations specifically at issue here were a disposition. *Second*, even assuming *arguendo* Judge Brumbach had "made a disposition on each of the 95 traffic citations," *id.* at 16, she did not (and could not) violate Rule 2.5(A); this is so because this Court's own legal and factual

determinations indicate that Judge Brumbach's actions on those citations did not implicate either her competence or her diligence.

A. Although, in theory, this Court's preferred interpretation of "disposition" is not altogether unreasonable, that formulation should be coupled with a scienter requirement to avoid unbridled expansion of judicial discipline.

Above all else, this Court's finding that Judge Brumbach breached her duty of competence and diligence is unsustainable because it is predicated on a faulty premise—namely, that disposition of the 95 citations had occurred. In this regard, it is important to stress from the outset that, for purposes of these Objections, Judge Brumbach ***does not*** challenge the Court's overriding conception of what constitutes a "disposition."[3] Indeed, although Judge Brumbach continues to believe that the most jurisprudentially sound definition of the term is the one set forth in her prior submissions in this matter, it would be foolhardy to suggest that this Court's rationale for adopting an alternative formulation is wholly unreasonable. As this Court correctly points out, "the authority who makes the finding for the case" is, after all, the judge—not a court employee performing a clerical task. And relatedly, at least for purposes of judicial discipline, the Court's apparent hesitation to ascribe dispositive weight to the occurrence (or nonoccurrence) of a ministerial act in discerning the meaning a "disposition" is understandable (albeit somewhat overblow). In short, therefore, Judge Brumbach is not requesting that the Court

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[3] In this connection, Judge Brumbach also takes issue with the Court's findings of fact, insofar as they characterize her markings on the citations as "dispositions." Given this Court's acknowledgment that the proper interpretation of that phrase is a central ***legal*** issue in this case, employing the term in the factual rendition puts the proverbial rabbit in the hat.

reconsider its conclusion that, for purposes of judicial discipline, a "disposition" of a traffic citation can occur before the "ministerial act" of docket entry is executed.

But to prevent arbitrary enforcement that threatens judicial independence, such a construct ***must*** be properly cabined by clearly delineated limiting principles. Specifically, the formulation of "disposition" adopted in the March 12 Opinion is utterly unworkable and incoherent unless it is coupled with an element of intent. Applying a scienter overlay would strike the proper balance. On the one hand, the Court can avoid adopting what it apparently regards as a hyper-technical definition of "disposition," but it would also avoid punishing innocuous conduct. In terms of its practical application, an intent requirement here would mean that markings on judicial documents that have not been reduced to a final appealable order may be construed as a disposition if—and ***only*** if—the jurist intended such markings to be a final judicial act that disposes of the matter at issue. Stated differently, under a rubric that incorporates intent, a disposition can be found, unless the Board is able to establish that, in annotating the document, a judge did not contemplate taking any further judicial action relative to that matter. Where, however, a jurist takes certain steps toward a final decision on a matter, but does not intend for a disposition to occur unless and until some other condition is satisfied, no disposition should be found.

In this respect, it bears noting that, although Rule 2.5(A) does not expressly prescribe a scienter standard, courts construing standards applicable to judicial

discipline—including this one—have routinely inferred such a requirement.[4] That is particularly true where, as here, the absence of some element of intent could result in imposition of discipline for routine and innocuous conduct.[5]

Assessing Judge Brumbach's conduct within the framework described above, this Court should have little difficult in concluding that—under the facts of this case—no "disposition" occurred. Specifically, Judge Brumbach's markings were made pursuant to a contingency plan she developed for the January 7, 2022 citations. As aptly relayed in the Court's Findings of Fact, "Judge Brumbach developed a plan for those cases ***IF*** there was no coverage for that courtroom and ***IF*** court was open despite the expected snow." Finding of Fact, ¶ 11 (emphasis and

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[4] *See, e.g.*, *In re Muth*, 237 A.3d 635, 642 (Pa. Ct. Jud. Disc. 2018) (agreeing that a violation of the Statewide Judiciary's policy against sexual harassment required a showing of intent, despite absence of any language indicating the same, but holding that the requirement was satisfied); *In re Arnold*, 51 A.3d 931, 939 (Pa. Ct. Jud. Disc. 2012) (holding that, to sustain a finding of acting to prejudice the proper administration of justice, the Board must establish that the judge acted "with knowledge and intent"); *In re Whittaker*, 948 A.2d 279, 302 (Pa. Ct. Jud. Disc. 2008) (incorporating scienter requirement despite the absence of any discussion of intent or state of mind, albeit in the context of rules governing the minor judiciary); *In re Crahalla*, 747 A.2d 980, 983 (Pa. Ct. Jud. Disc. 2000) (same, but with regard to a differ rule governing the minor judiciary), *aff'd*, 792 A.2d 1244 (Pa. 2000). The Supreme Court has also held that an element of intent is implicit in the analogous context of attorney discipline. *See, e.g.*, *Office of Disciplinary Counsel v. Surrick*, 749 A.2d 441 (Pa. 2000); *Office of Disciplinary Counsel v. Anonymous Attorney A*, 714 A.2d 402 (Pa. 1998).

Moreover, decisions from other jurisdictions are to the same effect. *See, e.g.*, *In re Bell*, 894 S.W. 2d 119 (Tex. 1995) (holding that discipline is unwarranted unless judge acts with a "specific intent to use the powers of office to accomplish an end, which the judge knew or should have known was beyond the legitimate exercise of authority"); *In re King*, 399 S.E. 2d 888 (W. Va. 1990) (noting that "the ***deliberate*** failure to follow mandatory criminal procedures constitutes a violation of the Judicial Code of Ethics" (emphasis added)).

[5] *In re Whittaker*, 948 A.2d at 302-306; *In re Crahalla*, 747 A.2d at 983-86.

capitalization in original). Moreover, as this Court further emphasized, not only did "Judge Brumbach advised her staff to call her while she was in Florida on January 7, 2022 and advise of the status of the cases[,]" but she also made clear that her markings of guilty or not guilty in absentia were to be implemented ***"only*** for defendants who did not appear[,]" and "[i]f any defendant appeared for court, their case was to be continued to another date." Finding of Fact, ¶ 11(d); *see also* Op., at 19 ("The plan was only to be used for cases in which defendants failed to appear.").

As the Court's own findings of fact make clear, the requisite intent is simply not present here, as Judge Brumbach made clear to her staff that the markings on each of the 95 citations were entirely provision and should not be "released" as final dispositions unless and until clear instructions to do so were received from Judge Brumbach. Moreover, each and every one of the 95 citations was subject to change, as Judge Brumbach had no way of predicting which of the ticketholders may appear. In short, despite having marked the 95 citations with her preliminary assessment of the proper outcome, Judge Brumbach did not intend for those notations to be her final judicial act on those matters.

B. Regardless of whether they can properly be characterized as "dispositions," Judge Brumbach's markings on the 95 citations do not implicate her competence or diligence and, thus, cannot form the basis for a violation of Rule 2.5(A).

The definitional contours of "disposition" notwithstanding, the Court's conclusion that Judge Brumbach violated Rule 2.5(A) is unsustainable for an even more rudimentary reason. Simply put, Judge Brumbach 's markings on the 95 citations—whatever their effect and intent may have been—had no bearing on her

competence or diligence, which are the twin duties imposed by Rule 2.5(A). In this regard, it is important to note that, despite relying on that provision, the March 12 Opinion does not explain—even with the most basic degree of particularity—how exactly Judge Brumbach exhibited a lack of competence or diligence. Indeed, aside from quoting the text of Rule 2.5(A) in its introductory and concluding paragraphs, the Court neglects to even explain what precisely is required under that provision.

Nevertheless, based on a comprehensive survey of decisions from various other jurisdictions and a review of the scholarly commentary on the requirements of competence and diligence, it is readily apparent that Judge Brumbach's markings on the 95 citations—whether dispositional in nature or not—cannot amount to a violation of Rule 2.5(A).

1. Because Judge Brumbach's knowledge and skill is not in serious dispute, she did not violate her duty of competence.

As an initial matter, even assuming *arguendo* Judge Brumbach disposed of the 95 citations, such conduct was not a breach of her duty of competence. Specifically, as it relates to the competent performance of judicial duties, the first comment accompanying Rule 2.5(A) explains that, "[c]ompetence in the performance of judicial duties requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a judge's responsibilities of judicial office." Rule 2.5(A), *cmt.* [1]. Notably, Pennsylvania caselaw on this issue appears to be sparse (if not altogether nonexistent). But decisions from other jurisdictions make clear that a violation of this duty is found only in circumstances the judge does not understand rudimentary legal principles, or fails obtain training and knowledge

required for the position.[6] Similarly, judges may be subject to discipline for incompetence when they fail to stay abreast of important developments in the relevant legal field,[7] or are deficient in completing required judicial education for prolonged periods of time.[8] In short, courts generally do not find incompetent in performance of judicial duties absent a clear showing of a judge's inability to grasp basic law.

Against this backdrop, Judge Brumbach's actions relative to the citations (even if they were dispositions) do not evince anything approaching a lack of competence that would justify finding a violation of Rule 2.5(A). Indeed, the record is utterly bereft of any indication that her actions exhibited a lack of legal knowledge or acumen. To the contrary, as this Court expressly emphasized on multiple occasions, Judge Brumbach acted in a manner that was entirely consistent

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[6] See, e.g., *In re Fletcher*, 15-125 (Ariz. Comm'n on Jud. Conduct 2015) (holding that a judge's entry of judgment for the defendant, while simultaneously dismissing the case "without prejudice" reflected a lack of knowledge of the law, as the two concepts are utterly irreconcilable); *In re Burke* (N.Y. Comm'n on Jud. Conduct 2014) (holding judge who continued to issue fines in excess of clearly established the statutory maximum, despite having been warned of the same by the clerk of court, failed to maintain a professional competence in the law); *In re Williams*, 987 S.W.2d 837, 840 (Tenn. 1998) ("Judge Williams' repeated violations in trying felony offenses without jurisdiction, and failing to advise those before the court of their most basic constitutional rights, went beyond mere legal error and established a failure to maintain professional competence.").

[7] *See, e.g., Disciplinary Couns. v. Karto*, 760 N.E.2d 412, 418 (Ohio 2002) (holding judge violated duty of competence when he failed to consult updated statute and sentenced a criminal defendant under a prior version of a criminal provision).

[8] *In re Duncan*, CJC No. 05-0254-MU (Tex. Comm'n on Jud. Conduct 2006) (judge publicly admonished for entirely neglecting to complete required judicial education credits for over two years).

with the not only the commonly accepted practice in Philadelphia Municipal Court, but also Rule of Criminal Procedure 1002, *see* Pa.R.Crim.P. 1002(D), which specifically governs proceedings before that Court. In this regard, the March 12 Opinion does, however, suggests Rule of Criminal Procedure 1002, in practice, may give rise to connotational concerns. But having been duly promulgated and adopted by Order of the Pennsylvania Supreme Court, Rule 1002 is presumptively valid unless and until it is either replead or invalidated. Thus, even if this Court's constitutional analysis might well be legitimate, jurists should not be required to share in those concerns on pain of being found incompetent.

Next, to the extent the violation of Rule 2.5(A) pertains to Judge Brumbach's purported failure exercise her administrative responsibilities competently, such a finding similarly cannot withstand scrutiny. To illuminate, that duty generally centers on a jurist's handling and management of court personnel, calendars, dockets etc. *See, e.g.*, Rule 2.5(A), *cmt* [2] ("A judge should seek the necessary docket time, court staff, expertise, and resources to discharge all adjudicative and administrative responsibilities.").[9] In essence, as long as a judge's courtroom generally operates smoothly, a breach of a duty of competence in administration will not be found.

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[9] *Mississippi Comm'n on Jud. Performance v. Underwood*, 644 So. 2d 458, 460 (Miss. 1994) ("[Judge's] failure to properly maintain his docket and to know what was required before he could change the terms of the judgment revealed a failure to discharge his administrative duties and a failure to maintain professional competence in violation of Canon 3(b)."); Marla N. Greenstein, *The Ethical Administration of Justice More Than A Matter of Timely Decisions*, Judges' J., No. 1, 49 Judges' J. 40 (2020).

Here, nothing in the record, suggests that Judge Brumbach came up short in this regard. Quite the opposite. This Court's March 12 Opinion shows that Judge Brumbach has handled her administrative duties ably by, among other things, keeping an open line of communication with her staff, setting proper expectations for her court room, consulting with the attorneys to ascertain ways of promoting efficiency, and attempting "[t]o be of assistance to the president judge for court scheduling." Op. at 18. None of this bespeaks incompetent administration.

2. Judge Brumbach did not violate her obligation to diligently perform of duties, as her actions were time, the diligence requirement has never been interpreted as prohibiting allegedly early action and, in any event, discipline for lack of diligence is only appropriate upon a showing of a pattern of misconduct.

Turning to the second component of Rule 2.5(A), noting in the January 12 Opinion supports the conclusion that Judge Brumbach evidenced a lack of diligence. As it pertains to a judge's performance of judicial duties, the duty of diligence requires that substantive matters be handled in a prompt and expeditious manner, without undue delay and unnecessary cost. *See* Rule 2.5(A), *cmt.* [3] ("Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to take reasonable measures to ensure that court officials, litigants, and their lawyers cooperate with the judge to that end."). While there is no formulaic test for determining whether a judge has failed to act with the requisite degree of diligence to justify discipline depends on a number of factors, the one common theme that appears to be universal in the authorities across the

country is delay, tardiness, and lack of punctuality.[10] That is, a violation of this prescription is found when a judge acts too late. Indeed, after a comprehensive survey of the caselaw, Judge Brumbach has not been able any instance in which a jurist was found to have lacked diligence for acting on a matter too early. Thus, whatever the Court's view may be of Judge Brumbach's actions relative to the 95 citations, her conduct in this respect cannot be fairly characterized as a lack of diligence.

Moreover, even if this Court is inclined to turn the concept of "diligence" on its head and hold that it may be applied to judges that act too *quickly*, as opposed to too slowly, finding a violation in this instance would still be inappropriate, as the conduct at issue (which, in any event, was entirely appropriate), was a single isolated incident.

Finally, although judges must also act diligently in performance of their administrative duties, that aspect of Rule 2.5(A) is plainly not implicated. This requirement generally refers to a jurist's obligation to timely file any reports mandated by statute or rule, transfer money deposited into a court's account

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[10] *In re Keaton*, 11-201, 11-206, 11-265 (Ark. Jud. Disc. & Disability Comm'n 2012; *In re Kirihara* (Cal. Comm'n on Jud. Performance 2012); *In re Allawas*, 906 So. 2d 1052 (Fla. 2005); *In re Holmes*, Jud-11-1 (Me. Sup. Jud. Ct. 2011); *Disc. Counsel v. Sargeant*, 889 N.E. 2d 96 (Ohio 2008); *In re Hudson*, 690 S.E. 2d 72 (S.C. 2010); *In re Rich* (Tenn. Ct. of the Judiciary 2009); *In re Dobbs*, (Cal. Comm'n on Jud. Performance 2009); *In re Weeks*, 658 P. 2d 174 (Ariz. 1983); *In re Long*, 772 P. 2d 814 (Kan. 1989); *Miss. Comm'n on Jud. Performance v. U.U.*, 875 So. 2d 1083 (Miss. 2004).

without delay, transmit or return records to their proper destination, etc.[11] Failure to perform administrative duties diligently is, therefore, not seriously at issue.

IV. CONCLUSION.

In sum, this Court should sustain Judge Brumbach's Objections to the Conclusions of Law contained in Paragraphs One and Two for two discrete reasons. First, because Judge Brumbach did not act with the intent to render a final decision on the 95 citations, no disposition occurred. Second, irrespective of whether this Court is inclined to stand by its characterization of Judge Brumbach's actions as a "disposition," this Court's factual findings, examined in conjunction with settled legal principles, simply cannot sustain the conclusion that Judge Brumbach failed to act competently or diligently with regard to any of her duties.

Dated: March 29, 2024

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[11] In re Braun, 883 P. 2d 996 (Ariz. 1994); In re Carstensen, 316 N.W. 2d 889 (Iowa 1982); *In re Seitz*, 495 N.W. 2d 559 (Mich. 1993); *In re Anderson*, 412 So. 2d 743 (Miss. 1982) (judge failed to keep accurate record of public money received and willfully and fraudulently made false entries in monthly reports); *In re Corning*, 741 N.E. 2d 117 (N.Y. 2000); *In re Sanders*, 564 S.E. 2d 670 (S.C. 2002).

CERTIFICATE OF SERVICE

I, Matthew H. Haverstick, hereby certify that on February 12, 2024, I caused a true and correct copy of the attached Respondent's Proposed Findings of Fact and Conclusions of Law to be served on the following via email:

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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 require filing confidential information and documents differently than non-confidential information and documents.

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