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**COMMONWEALTH OF PENNSYLVANIA
COURT OF JUDICIAL DISCIPLINE**

IN RE: MICHAEL R. MUTH : No. 2 JD 17
MAGISTERIAL DISTRICT JUDGE :
MAGISTERIAL DISTRICT 43-2-02 :
43RD JUDICIAL DISTRICT :
MONROE COUNTY :

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JUDICIAL DISCIPLINE
OF PENNSYLVANIA

OBJECTIONS OF JUDICIAL OFFICER

Pursuant to C.J.D.R.P. No. 503(B), Magisterial District Judge Michael R. Muth, and through undersigned counsel, Lamb McErlane PC, hereby files Objections to the Findings of Fact and Conclusions of Law set forth by the Court of Judicial Discipline in its October 31, 2018 Decision and Order.

I. Objections

1. The Court erred as a matter of law by concluding that the Board established by clear and convincing evidence that MDJ Muth violated Rule 2(A) of the Old R.G.S.C.M.D.J., (Conclusion of Law No. 1), and Rule 4(C) of the R.G.S.C.M.D.J (Conclusion of Law No. 3).

2. The Court erred as a matter of law by concluding that the Board established by clear and convincing evidence that MDJ Muth violated Rule 2(A) of the Old R.G.S.C.M.D.J. by violating the Unified Judicial System Policy on Non-Discrimination and Equal Employment Opportunity (Conclusion of Law No. 2), and consequently erred as a matter of law in concluding that MDJ Muth thereby violated PA. CONST., art. V, § 18(d)(1), (Conclusion of Law No. 6).

3. The Court erred as a matter of law and/or abused its discretion by admitting into evidence, over MDJ Muth's objection, Board Exhibits 2, 3 and 4.

4. The Court erred as a matter of law by concluding that the Board established by clear and convincing evidence that MDJ Muth violated Rule 3(B) of the Old R.G.S.C.M.D.J., (Conclusion of Law No. 4), and consequently erred as a matter of law in concluding that MDJ Muth thereby violated PA. CONST., art. V, § 17(b), (Conclusion of Law No. 5), and PA. CONST., art. V, § 18(d)(1), (Conclusion of Law No. 6).

II. Argument in Support of Objections

1. **The Court erred as a matter of law and/or abused its discretion in finding that MDJ Muth violated Rule 2A of the Old Rules Governing Standards of Conduct of Magisterial District Judges.**

The findings of fact that this Court adopted in its Opinion dated October 31, 2018, do not support the Court's conclusion that MDJ Muth violated Rule 2A of the Old R.G.S.C.M.D.J.

Rule 2A states in pertinent part:

Magisterial district judges shall respect and comply with the law and shall conduct themselves at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

In order for this Court to conclude that MDJ Muth violated Rule 2A, this Court must find that he engaged in "illegal" or "criminal" conduct, whether or not related to the judicial decision-making process. In re Carney, 79 A.3d 490 (Pa. 2013); see e.g. In re Ballentine, 121 A.3d 611 (Pa. Ct. Jud. Disc. 2015), aff'd, 132 A.3d 454 (Pa. 2016) (MDJ's failure to timely file individual income taxes in violation of federal and state law, and judge's continuing conduct in failing to file prior tax returns and remit collected sales tax violated Rule 2A); In re Shaner, 142 A.3d 1051 (Pa. Ct. Jud. Disc. 2016) (MDJ charged with criminal perjury and obstructing justice committed misconduct by dismissing a criminal complaint filed against the nephew of an assistant district attorney and by misleading Board in violation of Rule 2A); In re Kelly, 757 A.2d 456 (Pa. Ct.

Jud. Disc. 2000) (MDJ requested favorable treatment for a friend from another magisterial district judge in connection with a traffic violation).

This Court did not find that MDJ Muth committed illegal or criminal conduct. Instead, the Court's finding that MDJ Muth violated Rule 2A is based on the subjective opinion or belief that "[n]o judge behaving within standards of normal propriety should view sexually provocative materials at work where his staff or others may inadvertently stumble across them." *Opinion dated October 31, 2018 p. 6.*

A finding of mere indiscretions or offensive acts, such as the Court found in this instance, does not constitute a violation of Rule 2A. See e.g. In re Nakoski, 742 A.2d 260 (Pa. Ct. Jud. Disc. 1999), aff'd, 758 A.2d 1155 (Pa. 2000) (MDJ did not violate Rule 2A by answering "yes" to continuing education instructor's question as to whether it was unlawful or illegal to be a black man, and explaining response with apparent statement that "They're all in jail. They're the ones doing all the robberies and burglaries"); In re Brown, 907 A.2d 684 (Pa. Ct. Jud. Disc. 2006) (MDJ's demeaning treatment of female employees, including the use of derogatory terms such as "PMS," "senile," and "dumb blond" and use of racially and ethnically insensitive and inappropriate terms in referring to minority members of the community and judge's use of such terms in the presence of members of law enforcement did not violate Rule 2A).

Without a finding of illegal or criminal activity, there can be no finding that MDJ Muth violated Rule 2A.

Not only was there no criminal conduct at issue here, but the testimony from the witnesses at the June 5, 2018 Hearing demonstrates that there was *no* lack of public confidence in the integrity and impartiality of the Judge Muth. To the contrary, the testimony established

that viewing the photographs did not impact Judge Muth's integrity or impartiality as a jurist. (N.T. 37, 122, 152, 153, 157, 158, 163-165.)

Consequently, the Court erred as a matter of law and/or abused its discretion in finding that MDJ Muth violated Rule 2A of the Old Rules Governing Standards of Conduct of Magisterial District Judges as there was no finding of illegal or criminal behavior, and no testimony to support a lack of public confidence in Judge Muth's integrity or impartiality.

2. The Court erred as a matter of law and/or abused its discretion in finding that Judge Muth violated the UJS Policy Prohibiting Sexual Harassment.

MDJ Muth's conduct as set forth in this Court's findings of fact in the October 31, 2018 Opinion do not constitute a violation of the Unified Judicial System Policy against sexual harassment. The UJS Policy, promulgated by the Supreme Court of Pennsylvania, prohibits all discrimination and harassment in a Court Facility. Sexual harassment is defined in the UJS Policy as follows:

Sexual harassment is sex discrimination. Equal Employment Opportunity Commission (EEOC) guidelines define sexual harassment as unwelcome sexual attention, sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature where...

3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Examples of sexual harassment may include "display of sexually suggestive...pictures."

This Court erred in finding that Judge Muth sexually harassed members of his staff. A finding of intentional sexual harassment is not supported by the facts this Court adopted in the October 31, 2018 Opinion. Further, such a finding expands the plain definition of sexual harassment as set forth in the UJS Policy. Even the testimony from staff members does not

support a conclusion that Judge Muth sexually harassed them pursuant to the definitions in the UJS Policy.

Sexual harassment requires an intent or purposeful engagement by the offending party. *Hoy v. Angelone*, 456 Pa.Super. 596, (Pa. Super. 1997). The Court explicitly recognized that there was no such intent in this matter. *Opinion dated October 31, 2018 p. 8* (“Judge Muth did not encourage his employees to view the pictures...” “It would certainly be a more serious violation if Judge Muth intentionally caused his employees to view such images...”). The Court recognized that MDJ Muth did not intentionally display¹ any of the photos at issue to the staff, he did not ask them to look at the photos nor did he send the photos to any staff member. *Opinion p. 2 No. 14*.

In fact, this Court points out that this matter is easily distinguishable from cases of intentional harassment in which the offending party purposely displayed pornographic photographs to staff including the case of In re Berkhimer, 877 A.2d 579 (Pa.Ct.Jud.Disc. 2005) (See *Opinion p. 8*.) In that case, on approximately five (5) occasions, MDJ Berkhimer summoned his female staff back to his office without explanation and stated words to the effect: "Come here and look at this." On those occasions MDJ Berkhimer would show pictures of naked adult females to his female staff. In fact, staff members quit their jobs because of Berkhimer's vulgarity. *Id.*

It is undisputed that MDJ Muth committed no such intentional act here. He did not intend that the photos at issue be viewed by *any* audience and took no intentional steps to have anyone else view the photos. *Opinion p. 2 No. 14, p. 3 No. 17*. (“At no time did Judge Muth receive or

¹ Display is defined as making “a prominent exhibition of something in a place where it can be easily seen; to exhibit; to show”

forward to others, images of naked or partially naked women via email, the internet or other means.” “To his personal knowledge, Judge Muth’s conduct of viewing images of naked and partially naked adult females on his personal computer in his judicial chambers was not observed by any member of the public or any lawyers or parties appearing before him in Court.”) None of the staff members who inadvertently viewed the photos resigned or even asked to be reassigned. (N.T. at 37, 63, 103.) Such conduct does not establish intentional sexual harassment as defined by the UJS Policy.

In finding that the facts of this case establish that MDJ Muth sexually harassed his female staff, this Court is expanding the definitions set forth in the UJS Policy itself and the well-established principles of what constitutes sexual harassment. Sexual harassment involves pervasive, intentional conduct directed toward specific individual(s). For example, in the case of In re Cicchetti, 697 A.2d 297 (Ct.Jud.Disc.Pa. 1997), Cicchetti persistently endeavored to coerce a female member of his staff to engage in a sexual relationship with him and her persistent refusal to do so resulted in Cicchetti making the complainant’s job performance difficult. Cicchetti advised the complainant that he could change things if she agreed to get together. Cicchetti further told the complainant that that he could have her father fired from his job with PennDot, and suggested that he would do so unless she agreed to get together. Such intentional, pervasive conduct certainly constitutes a violation of the UJS Policy prohibiting sexual harassment. MDJ Muth’s conduct does not.

This Court inappropriately compares this matter to In re Eakin, 150 A.3d 1042 (Pa. Ct. Jud. Disc. 2016) but MDJ Muth did not intentionally direct his conduct to even one individual.. Although Eakin did not intend improper material to be viewed outside a small audience, he nonetheless still expected it to be viewed by an audience and took intentional steps to show the

material to an audience other than himself. This Court recognizes that, unlike In re Eakin, “at no time did Judge Muth receive or forward to others, images of naked or partially naked women via email, the internet or other means.” *See Opinion dated October 31, 2018 p.2 No. 14.* In re Eakin is further distinguishable from the instant matter because although that case did involve Rule 2A, In re Eakin did not involve a claim for sexual harassment. There was no analysis as to whether Justice Eakin violated the UJS Policy regarding sexual harassment. Thus, this Court’s reliance on In re Eakin to establish that MDJ Muth violated the UJS Policy against sexual harassment is misplaced.

Even the testimony of MDJ Muth’s staff who inadvertently viewed the photos does not support a finding that the staff members were sexually harassed. In order to find a violation of the UJS Policy, MDJ Muth’s conduct must have had the purpose or effect of unreasonably interfering with the staff’s work performance or created an intimidating, hostile, or offensive working environment as specifically set forth in the Policy itself and as demonstrated in the case of In re Cicchetti, *supra*.

There was no testimony at the hearing in this matter that would support this conclusion. To the contrary, none of the staff who saw the photos at issue testified that any such incident interfered with their work performance, and none testified that they believed they were working in an intimidating, hostile, or offensive working environment. Ms. Pelak-Rea testified she still felt comfortable around MDJ Muth after the one occasion that she saw one image. (N.T. 100.) None of them asked to be reassigned. (N.T. at 37, 63, 103) and there was no testimony that their work performance was affected in any manner. Each of the staff members worked with MDJ Muth for years after inadvertently viewing the images. (N.T. 17-18, 43, 55, 60, 100.) In

concluding this testimony and MDJ Muth's conduct establishes sexual harassment, this Court ignored the definitions and language of the Policy itself.

Without a showing that viewing the photos created a hostile work environment or unreasonably interfered with the staff members' work performance, this Court erred in finding that MDJ Muth violated the UJS Policy regarding sexual harassment.

Because the Court erred as a matter of law by concluding that the Board established by clear and convincing evidence that MDJ Muth violated the UJS Policy regarding sexual harassment, the Court consequently erred as a matter of law in concluding that MDJ Muth thereby violated PA CONST., art. V, §18(d)(1).

3. **The Court erred as a matter of law and/or abused its discretion in finding that Judge Muth violated Rule 4C of the Old Rules Governing Standards of Conduct of Magisterial District Judges.**

Rule 4C of the Old R.G.S.C.M.D.J. states in pertinent part that "Magisterial district judges shall be patient, dignified, and courteous...to others with whom they deal in their official capacities." There is no factual support for this Court's conclusion that MDJ Muth violated Rule 4C. Each of the staff members, Ms. Goida, Ms. Van Norman and Ms. Pelak-Rea, who inadvertently viewed the photos at issue were asked whether MDJ Muth conducted himself in a manner that was patient, dignified and courteous. Each uniformly and without equivocation testified that MDJ Muth was patient, dignified and courteous not only with each of them but with other staff as well. (N.T. at 36, 79, 103.) Once again, there is no factual support for this Court's conclusion that MDJ Muth violated Rule 4C.

4. **The Court erred as a matter of law and/or abused its discretion by admitting into evidence, over MDJ Muth's objection, Board Exhibits 2, 3 and 4**

MDJ Muth produced Board Exhibits 2, 3 and 4 in the course of discovery, only as representative examples of those photographs that were stored on his private computer. (Joint

Stipulation No. 19.) At the June 5, 2018 Hearing, the Board introduced Board Exhibits 2 and 3 into evidence during the testimony of Kathy Goida, and introduced Board Exhibit 4 into evidence during the testimony of Meredith Pelak-Rea, over MDJ Muth's objections.² (N.T. at 22-28, 42, 89-90, 106-07.) Ms. Goida testified that Board Exhibits 2 and 3 were "similar" to the photographs Ms. Goida testified to having seen in MDJ Muth's judicial chambers, (N.T. at 27, 28), and Ms. Pelak-Rea testified that Board Exhibit 4 was "similar" to the photographs Ms. Pelak-Rea testified to having seen in MDJ Muth's judicial chambers, (N.T. at 90). Thus, without testimony identifying which of the photographs Ms. Goida and Ms. Pelak-Rea actually viewed, the Court nevertheless allowed the Board to introduce into evidence photographs that Ms. Goida and Ms. Pelak-Rea did not testify they actually viewed, which photographs were prejudicial to MDJ Muth.

Moreover, and significantly, MDJ Muth prior to the hearing via Stipulation admitted he viewed photographs of naked and/or partially naked women in his judicial chambers. (Joint Stipulation Nos. 13, 15, 16, 17.) Thus, admission of Board Exhibits 2, 3 and 4 was unnecessary to prove this fact since it already was stipulated to by MDJ Muth.

Pursuant to Pa.R.E. 403, "[t]he Court may exclude relevant evidence if its probative value is outweighed by a danger of . . . : unfair prejudice . . ." The only result of the admission of Board Exhibits 2, 3 and 4 was to prejudice the Court, without any probative value. Accordingly, the Court erred as a matter of law and/or abused its discretion in allowing Board Exhibits 2, 3 and 4 to be introduced into evidence and MDJ Muth was prejudiced thereby.

² Prior to the hearing, MDJ Muth also filed a "Motion in Limine to Preclude the Photographs".

5. The Court erred as a matter of law by concluding that the Board established by clear and convincing evidence that MDJ Muth violated Rule 3(B) of the Old R.G.S.C.M.D.J., and consequently erred as a matter of law in concluding that MDJ Muth thereby violated PA. CONST., art. V, §§ 17(b) and 18(d)(1).

Old R.G.S.C.M.D.J. Rule 3(B), titled “Priority of Judicial Business” provides that: “A district justice shall not use or permit the use of the premises established for the disposition of his magisterial business for any other occupation, business, profession or gainful pursuit.” The Court concluded that that MDJ Muth violated Rule 3(B) by using his court staff to make photocopies and assist in the marking of tests related to MDJ Muth’s employment as a part-time assistant professor at East Stroudsburg University.

MDJ Muth taught criminal process, procedural criminal law, and constitutional criminal law at East Stroudsburg University. (N.T. 135.) Only when MDJ Muth’s clerks had down time in the judicial chambers, MDJ Muth would ask them to make copies of either exams or handouts for his classes—this was only done two times a semester, for a midterm and a final exam. (N.T. at 50.) From July 2013 until the time of the filing of the Board Complaint, the clerks were asked to make copies of examinations twice a year, one for the fall semester and one for the spring semester. (N.T. at 52.) For the semester there would be only around 100 total copies made. (N.T. at 72.) It took Amy VanNorman maybe ten minutes to do the requested photocopying. (N.T. at 61.) Judge Muth asked the clerks to mark the exams with the specific caveat that they do so only after the court-related functions were completed. (N.T. at 132.)

There was an answer key for exams that MDJ Muth would provide to clerks in the form of true/false or multiple choice in which the key was filled out so that they could correct the answers according to the key. (N.T. at 49.) Twice a semester, the clerks made copies of handouts and tests and marked the tests, which tests were approximately four pages, two double sided copies. (N.T. at 91-93.) The clerks would have to count the number of incorrect answers and

write the total number of incorrect answers on the first page. (N.T. at 54.) An hour or less for each of the two semesters would be expended on marking the exams. (N.T. at 131.)

In the beginning, MDJ Muth would bring the tests back to court and would specifically ask Meredith Pelak-Rea to mark the tests; however, as time went on, that task was undertaken by Amy VanNorman and then Melissa Barrara would also help. (N.T. at 94.) MDJ Muth asked the clerks to mark the exams with the specific caveat that they do so only after the court-related functions were completed. (N.T. at 132.) The photocopies took 15 minutes and it took about an hour, twice a semester, to mark the exams, with the clerks still being able to accomplish all judicial-related functions. (N.T. at 101-02.) There was never an occasion at any time where court-related work did not get done by staff or by clerks because they had to mark the exams. (N.T. at 133.)

MDJ Muth's use of court staff to make photocopies and assist in the grading of tests did not rise to the level of misconduct constituting a violation of Rule 3(B), because the time taken by court staff to complete such tasks, as set forth above, clearly was *de minimus*. As set forth in the R.G.S.C.M.D.J.:

[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.

R.G.S.C.M.D.J. *Preamble*.

Here, the evidence clearly showed that MDJ Muth's intent was that his staff only undertake tasks related to East Stroudsburg University during down times in the judicial chambers, when court-related functions had already been completed. The extremely minimal

amount of time it took office staff to complete the tasks, and the relative infrequency of the activities, reduce the seriousness of any violation of Rule 3(B) by MDJ Muth, and show the conduct was not pervasive and did not constitute a serious pattern of activity. Importantly, there was no negative effect on staff or on the judicial system, as there was never an occasion at any time where court-related work did not get done by staff or by clerks because they were making copies or marking exams. Discipline for MDJ Muth's *de minimus* violation of Rule 3(B) is inappropriate.

The cases cited by the Court, *In re Berkhimer*, 877 A.2d 579 (Pa.Ct.Jud.Disc. 2005), *aff'd* 930 A.2d 1255 (Pa.Ct.Jud.Disc. 2007), and *In re Berry*, 979 A.2d 991 (Pa.Ct.Jud.Disc. 2009), involve frequent and pervasive conduct, dissimilar from the conduct of MDJ Muth at issue here. In *Berkhimer*, "Respondent had instituted a practice in his office whereby his office staff would review the local weekly newspaper to discover if any of Respondent's constituents were mentioned for some achievement or other and then, if they were, his staff would prepare a 'Quickie Note' for Respondent congratulating the constituent for his or her success." *Berkhimer*, 877 A.2d at 584. In *Berry*, "[f]rom January 1997 through April 2007, Respondent used his judicial office and judicial resources ... to assist him in the day-to-operations concerning his [investment purpose] properties." *Berry*, 979 A.2d at 995-96. The weekly activities in *Berkhimer* and the pervasive conduct in *Berry* are clearly distinguishable from the relatively infrequent activities of MDJ Muth's office staff related to East Stroudsburg University.

Furthermore, Code of Judicial Conduct Canon 3.1 provides that:

[A] judge shall not: (E) make use of court premises, staff, stationery, equipment, or other resources, **except for incidental use for activities that concern the law, the legal system, or the administration of justice**, or unless such additional use is permitted by law.

III. Conclusion

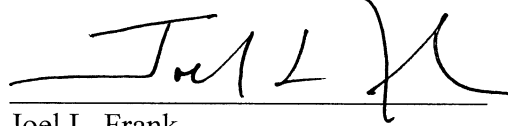
Wherefore, Magisterial District Judge Michael R. Muth, respectfully requests that the Court of Judicial Discipline DISMISS Counts 1, 2, 4, 6 and 8, or, in the alternative, DISMISS Count 4 and ORDER a NEW TRIAL on Counts 1, 2, 6 and 8.

Respectfully submitted,

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Dated: November 12, 2018

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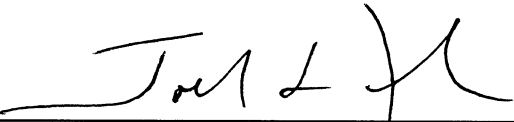
CERTIFICATE OF SERVICE

This is to certify that complete copies of all papers contained in the foregoing *pleading* has been served upon the following persons, by the following means and on the date stated:

<u>Name</u>	<u>Means of Service</u>	<u>Date of Service</u>
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