

The Supreme Court of Ohio

CASE ANNOUNCEMENTS

July 13, 2012

[Cite as *07/13/2012 Case Announcements #2, 2012-Ohio-3187.*]

MISCELLANEOUS ORDERS

BEFORE THE COMMISSION OF FIVE JUDGES APPOINTED BY THE SUPREME COURT OF OHIO

In re Judicial Campaign Complaint
Against Michael.

Case No. 2012-0876

ORDER OF THE COMMISSION OF JUDGES.

This matter came to be reviewed by a commission of five judges appointed by the Supreme Court of Ohio pursuant to Gov.Jud.R. II(5)(D)(1) and R.C. 2701.11. The commission members are Judge Scott Krichbaum, Chair, Judge Deborah Alspach, Judge Jan Michael Long, Judge Nancy McDonnell, and Judge Dana S. Preisse.

The complainant in this matter is Michael B. Chadsey. At the time the complaint was filed, respondent Kathryn A. Michael was a judge on the Akron Municipal Court and a candidate in the November 6, 2012 general election for the Summit County Common Pleas Court.

The complainant filed a judicial-campaign grievance with the Secretary of the Board of Commissioners on Grievances and Discipline (“board”) on March 28, 2012. The complainant alleged, inter alia, that respondent violated Jud.Cond.R. 4.4(J)(1) by accepting monetary contributions in excess of the allowed limits; Jud.Cond.R. 4.4(B) by allowing a public employee under her direction or control to solicit and/or receive campaign contributions in a February 29, 2012

advertisement for a campaign fundraiser; and Jud.Cond.R. 4.3(C) by using the title “Judge” in a manner that implied she held the office of judge of the common pleas court.

A probable-cause panel of the board was appointed to review the grievance, and, upon finding probable cause, the panel ordered the secretary of the board to prepare and file a formal complaint based on the complainant’s grievance. On April 19, 2012, the secretary filed a formal complaint alleging in Count I that respondent’s December 15, 2011 Campaign Finance Report showed that the former spouse of respondent, Robert Boyce, loaned \$25,000 to her campaign committee on October 3, 2011, in violation of Jud.Cond.R. 4.4(J)(1); in Count II, that respondent allowed a public employee subject to her direction and control to serve as an organizer and primary contact for fundraisers and, as such, to solicit contributions in violation of Jud.Cond.R. 4.4(B); and in Count III that respondent circulated campaign materials during the 2012 campaign that read “Vote Judge Kathryn Michael for Common Pleas Court” without referring to her current office in violation of Jud.Cond.R. 4.3(C).

The board convened a three-member panel that conducted a hearing on the formal complaint on May 14, 2012. On May 21, 2012, the hearing panel issued its Report of Findings and Recommendations. The hearing panel found by clear and convincing evidence that respondent had violated Jud.Cond.R. 4.4(J)(1) and 4.3(C) in Counts I and Counts III of the complaint. The hearing panel dismissed Count II of the complaint.

The hearing panel recommended that respondent be ordered to cease and desist from the complained-of misconduct and pay the costs of the proceedings. No sanction or fine was recommended by the panel.

On May 29, 2012, the Supreme Court appointed this five-judge commission to review the report of the hearing panel pursuant to Gov.Jud.R. II(5)(D)(1). The commission was provided with the record certified by the board, including a transcript of the proceedings before the hearing panel and the exhibits admitted into evidence. On June 6, 2012, the commission issued a cease-and-desist order to respondent as recommended by the hearing panel. On June 15, 2012, the commission conducted a telephone conference to review for final consideration the hearing panel’s report.

Pursuant to Gov.Jud.R. II(5)(D)(1), the commission is required to consider whether the record supports the hearing panel’s finding that a violation of Canon 4 has occurred and whether the panel abused its discretion. The commission unanimously concludes that the record supports the findings of the hearing panel that violations of Canon 4 have occurred and that the panel did not abuse its discretion.

Count I

The commission agrees with the hearing panel that respondent received a contribution in excess of the allowable amounts from a person not meeting the qualifications of immediate family in Jud.Cond.R. 4.4(J)(1). Robert Boyce is respondent's former spouse. Their marital relationship ended in divorce. The attempt by respondent to equate her relationship with Boyce as a domestic partner and therefore an immediate family member as set forth in Jud.Cond.R. 4.6(C) strains credibility. Respondent incorrectly relied upon a shared-parenting arrangement, joint access to homes, and joint family events, despite a nonsexual relationship with Boyce, as proof of her domestic partnership. The commission, like the hearing panel, was not persuaded by respondent's argument.

The term "domestic partner" in the code is subject to a common-sense meaning. The term in the code is used in the same context as spouse, without the structure of a legal marriage. The panel was correct in concluding that the common-sense meaning of the term is of two unmarried individuals who live in a romantic, marital type of relationship.

However, the commission is mindful that modern relationships often take on several nontraditional characteristics. Consequently, the commission would encourage the court to consider inclusion of a clear definition of "domestic partner" in the Code of Judicial Conduct.

We agree with the finding of the panel that respondent and Boyce were not domestic partners and that respondent violated Jud.Cond.R. 4.4(A)(1) by accepting a campaign contribution from her former spouse in excess of the amounts allowed by Jud.Cond.R. 4.4(A)(1).

Count II

While Count II was dismissed by the hearing panel, the commission believes it is important for judicial candidates to always remain vigilant that the public employees subject to their direction and control are not engaged in direct or indirect campaign solicitation efforts. Respondent incorrectly argued that a person under her direction and control may participate in all campaign activities. While participation by employees as campaign volunteers is expressly permitted, Jud.Cond.R. 4.4(B) clearly forbids staff to be involved in the receipt or solicitation of campaign funds. "Canon [4] guards against actual or apparent bias by restricting the political and fund-raising activity of judges, shielding judicial candidates and the public alike from dangers inherent in the direct solicitation of campaign funds." *Disciplinary Counsel v. O'Neill*, 2004-Ohio-4704, 103 Ohio St.3d 204, ¶ 44 (judge sanctioned for violation of prohibition against using employees to solicit campaign funds on his or her behalf). A reasonable person receiving the advertisement at issue may have concluded that respondent's employee was also receiving funds in exchange for tickets to the event. More importantly, the use of an employee by a

judge in any phase of the receipt of solicitation of campaign funds conveys an appearance of influence by the judicial candidate. The Supreme Court and five-judge commissions have consistently emphasized that judicial candidates must independently measure the propriety of their actions against the requirements contained in Canon 4. *In re Judicial Campaign Complaint Against Burick* (1999), 95 Ohio Misc.2d 1, 705 N.E.2d 422. The ultimate responsibility for the content of the advertisement is respondent's, and not that of her employee or campaign committee.

Count III

The commission agrees with the hearing panel that respondent did not correctly include her current office as a municipal-court judge in her campaign materials as required by Jud.Cond.R. 4.3(C) and explained by Comment [2]. Specifically, the commission agrees with the panel that the wording chosen by respondent is in reckless disregard of both the rule and comment. The commission in *In re Judicial Campaign Complaint Against Carr* cited the following standard to distinguish between “knowingly” and “recklessly” as follows:

“If the result is probable, the person acts ‘knowingly’; if it is not probable, but only possible, the person acts ‘recklessly’ if he chooses to ignore the risk.”

74 Ohio Misc.2d 81, 88 (1995), quoting *State v. Edwards*, 83 Ohio App.3d 357, 361 (1992).

Respondent argued before the panel that she did not knowingly violate the canon. However, respondent's prior experience as a candidate on four separate occasions and her attendance at the mandatory judicial-candidate seminars underscore the hearing panel's conclusion that she acted recklessly. We agree.

Sanctions

The commission has traditionally applied a standard that a judicial candidate violating Canon 4 should receive a sanction that is commensurate with the seriousness of the violations. Sanctions should be imposed in order to punish the violator and deter similar violations by candidates in the future. *In re Judicial Campaign Complaint Against Morris*, 81 Ohio Misc.2d 54 (1997).

Respondent's violation of Jud.Cond.R. 4.4(J) is a case of first impression for the commission. Respondent's receipt of a \$25,000 loan from her ex-spouse was available to respondent during the election and possibly had an impact on the election results. Since the funds were ill-gotten, but not reported until several days before the election, it would have been difficult for her opponent to effectively act upon this information. In one sense, respondent was able to benefit from the receipt of the funds, while her opponent who lost the election suffered the

inevitable consequences. This is an egregious violation of the canon that calls for a monetary sanction

In mitigation, respondent took steps to correct the conduct that gave rise to the grievance before the board complaint was filed. After her election, she repaid the loan her ex-husband made to her campaign. In addition, she took steps to prevent her employees from soliciting or receiving campaign funds and corrected all campaign literature to reflect her current status as a municipal judge.

Respondent's improper and misleading use of the title "Judge" in violation of Jud.Cond.R. 4.2(C) is admitted by respondent and is a clear violation of both the letter and the spirit of the rule. Such conduct is inexcusable given respondent's history of multiple prior judicial candidacies and attendances at judicial seminars.

The commission concludes that the conduct of respondent is serious enough to warrant a collective fine with respect to all violations of Canon 4 found by the hearing panel. Accordingly, it is the order of the commission that respondent shall be fined \$2,500. In addition, the commission orders respondent to pay the complainant \$2,500 in attorney fees and to pay the costs of all proceedings before the hearing panel. Payment of the fine and costs shall be made within 30 days of this date.

The secretary shall issue a statement of costs before this commission and instructions regarding the payment of the fine and costs. The opinion shall be published by the Supreme Court Reporter in the manner prescribed by Gov.Bar R. V(8)(D)(2).

So ordered.

/s/ Scott Krichbaum
Judge R. Scott Krichbaum, Chair

/s/ Deborah Alspach
Judge Deborah Alspach

/s/ Jan Michael Long
Judge Jan Michael Long

/s/ Nancy McDonnell
Judge Nancy McDonnell

/s/ Dana Prieis
Judge Dana Prieis