

The Supreme Court of Ohio

CASE ANNOUNCEMENTS

October 24, 2012

[Cite as *10/24/2012 Case Announcements #2, 2012-Ohio-4920.*]

MISCELLANEOUS ORDERS

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

In re Judicial Campaign Complaint
Against Colleen Mary O'Toole

Case No. 2012-1653

ORDER

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 on October 3, 2012, pursuant to Gov.Jud.R. II(5)(D)(1) and R.C. 2701.11. The commission members are Judge Peggy L. Bryant, chair; Judge Richard K. Warren; Judge David A. Ellwood; Judge R. Scott Krichbaum; and Judge Mark K. Wiest.

The complainant, James Davis, filed a complaint with the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio alleging that the respondent, Colleen Mary O'Toole, had violated various provisions of Canon 4 of the Code of Judicial Conduct. The respondent served on the Eleventh District Court of Appeals for a six-year term ending in 2010 and is now running for judicial office on the same court. Following a review by a probable-cause panel of the board pursuant to Gov.Jud.R. II(5)(B), the secretary of the board filed a formal complaint alleging that the respondent, during the course of a judicial campaign, committed violations of Jud.Cond.R. 4.3(A) (a judicial

candidate shall not knowingly or with reckless disregard distribute information concerning the judicial candidate that would be deceiving or misleading to a reasonable person) and 4.3(F) (a judicial candidate shall not misrepresent his or her identity, qualifications, present position, or other fact or the identity, qualifications, present position, or other fact of an opponent).

The formal complaint was heard by a hearing panel of the Board of Commissioners on Grievances and Discipline on September 18, 2012, and the hearing panel issued a report of its findings, conclusions, and recommendations on October 1, 2012. In the report, the hearing panel dismissed Count I of the complaint, but found clear and convincing evidence that the respondent had violated Jud.Cond.R. 4.3(A) as alleged in Counts II and III of the complaint by giving the false impression that she is currently a sitting judge by (1) failing to include her dates of service as a judge and identifying herself as “Judge O’Toole” on her website and (2) wearing a name badge in public that reads “Colleen Mary O’Toole, Judge, 11th District Court of Appeals.” In light of these violations, the hearing panel recommended that the respondent pay a fine of \$1,000, pay the costs of the proceedings, and pay \$2,500 of the complainant’s reasonable and necessary attorney fees in bringing the grievance and prosecuting the formal complaint.

The hearing panel also recommended that the five-judge commission issue a cease-and-desist order to cause the respondent to (1) include the dates of her service as judge and remove any reference of herself as “Judge O’Toole” on her website and (2) cease wearing the name badge that identifies her as judge. On October 5, 2012, the five-judge commission issued a cease-and-desist order that incorporated the recommendations of the hearing panel. The five-judge commission also required the respondent to file an affidavit of compliance. The respondent filed her affidavit on October 10, 2012. On October 17, 2012, the complainant filed a motion for the commission to amend its cease-and-desist order. We denied the motion on October 22, 2012, as this commission may only issue a cease-and-desist order based upon the findings of the hearing panel.

This commission convened by telephone conference on October 18, 2012, to review this matter. We were provided with the record certified by the board and a transcript of the September 18, 2012 proceedings before the hearing panel.

Pursuant to Gov.Jud.R. II(5)(D)(1), we are charged with reviewing the record to determine whether it supports the findings of the hearing panel and that there has been no abuse of discretion. We unanimously hold that there was no abuse of discretion by the panel and that the respondent violated Jud.Cond. R. 4.3(A) as alleged in Counts II and III of the complaint.

This commission has recently reviewed cases involving campaign advertisements that misrepresented the judicial candidate’s present position and potentially misled the public. In *In re Judicial Campaign Complaint Against Moll*,

132 Ohio St.3d 1505, 2012-Ohio-3952, 973 N.E.2d 273, we found that the candidate's use of a picture of herself in a judicial robe without an accurate notation as to her current position and dates of service as a former magistrate created the impression that she held judicial office. Similarly, in *In re Judicial Campaign Complaint Against Lilly*, 131 Ohio St.3d 1515, 2012-Ohio-1720, 965 N.E.2d 315, the lack of a statement by the candidate that she was a "former judge" to accompany a picture of her in a judicial robe led to finding a violation of Jud.Cond.R. 4.3(D).

In the instant case, we are reviewing the panel's findings that the respondent's Internet website and name badge misrepresent the respondent's present position. We agree with the panel that a reasonable person would be deceived or misled into believing that the respondent is currently a sitting judge. The respondent's testimony, together with her wearing the name badge in question to the hearing in this matter, leave little doubt that she intended the public to believe that she is a judge, when she is not. Unlike in *Moll* and *Lilly*, we believe that the respondent's conduct here is more than simply the omission of key facts in her campaign materials or the ignorance of our prior holdings. Instead, her conduct demonstrates that she is deliberately flouting the very rules that govern judges and candidates alike.

The respondent filed her objections to the hearing panel's report on October 10, 2012. The complainant filed his answer brief on October 15, 2012. The respondent raised three separate objections to the hearing panel's report, including a facial and as-applied challenge to the constitutionality of Jud.Cond.R. 4.3(A) based on the First and Fourteenth Amendments to the United States Constitution. The hearing panel dismissed a similar motion filed by the respondent before the hearing. The respondent relies on a recent decision of the 13-judge commission in *O'Neill v. Crawford*, 132 Ohio St.3d 1472, 2012-Ohio-3223, 970 N.E.2d 973, to support her objection. The *O'Neill* commission dismissed a complaint alleging a Jud.Cond.R. 4.3(C) violation based on a recent decision of the United States Supreme Court that invalidated the Stolen Valor Act. *United States v. Alvarez*, ___U.S. ___, 132 S.Ct. 2536, 183 L.Ed.2d 574 (2012). The respondent's objections are not well taken. *O'Neill* is factually distinguishable from the case at hand, and the numerous other cases cited by the respondent do not involve judicial-conduct rules similar to Jud.Cond.R. 4.3(A).

In addition to adopting all the sanctions recommended by the hearing panel, this commission also finds that the respondent should be publicly reprimanded. The disciplinary process for judicial-campaign complaints serves many important purposes: punishing behavior that is contrary to the Code of Judicial Conduct, informing the legal and judicial communities of the appropriate standards governing judicial-campaign conduct, and deterring similar violations by judicial

candidates in future elections. *See In re Judicial Campaign Complaint Against Morris*, 81 Ohio Misc.2d 64, 675 N.E.2d 580 (1997); *In re Judicial Campaign Complaint Against Burick*, 95 Ohio Misc.2d 1, 705 N.E.2d 422 (1999); and *In re Judicial Campaign Complaint Against Brigner*, 89 Ohio St.3d 1460, 732 N.E.2d 994 (2000). The record here is replete with testimony offered by the respondent that she believes she may continue to use the title “judge” because she once served in that office, despite the fact that she does not currently hold the office and that such conduct is in direct contravention of Jud.Cond.R. 4.3(A). Canon 4 of the Code of Judicial Conduct does not permit judicial candidates to identify themselves as judge or magistrate if they do not currently hold the public office. Maintaining the integrity of judicial elections requires us to impose a public reprimand in this case.

It is the unanimous conclusion of this five-judge commission that the respondent be publicly reprimanded for her violations of Jud.Cond.R. 4.3(A) of the Code of Judicial Conduct and that she be fined \$1,000. We additionally order the respondent to pay the costs of these proceedings and the complainant’s reasonable and necessary attorney fees and expenses in the amount of \$2,500.

The secretary shall issue a statement of costs before this commission and instructions regarding payment of the monetary sanctions. Payment of all monetary sanctions shall be made on or before November 15, 2012. This opinion shall be published by the Supreme Court Reporter in the manner prescribed by Gov.Bar R. V(8)(D)(2).

SO ORDERED.

/s/ Peggy L. Bryant
Judge Peggy L. Bryant, Chair

/s/R. Scott Krichbaum
Judge R. Scott Krichbaum

/s/ David A. Ellwood
Judge David A. Ellwood

/s/ Mark K. Wiest
Judge Mark K. Wiest

/s/ Richard K. Warren
Judge Richard K. Warren

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O R D E R

On October 23, 2012, the respondent, by and through counsel, filed a request for oral argument.

This matter having been fully briefed by the parties, it is hereby ordered by the five-judge commission that the request is denied.

BY ORDER OF THE COMMISSION.

Steven C. Hollon, Secretary of the Commission