

The Supreme Court of Ohio

CASE ANNOUNCEMENTS

October 31, 2012

[Cite as *10/31/2012 Case Announcements #2*, 2012-Ohio-5054.]

MISCELLANEOUS ORDERS

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

In re Judicial Campaign Complaint

Case No. 2012-1721

Against Kathryn A. Michael.

O R D E R

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 16, 2012, pursuant to Gov.Jud.R. II(5)(D)(1) and R.C. 2701.11. The commission members are Judge Peter M. Handwork, chair; Judge Deborah A. Alspach; Judge John P. Bessey; Judge Cheryl S. Karner; and Judge Jan Michael Long.

The complainant, Debbie Walsh, filed a grievance with the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio alleging that the respondent, Kathryn A. Michael, a judge on the Akron Municipal Court and a candidate for the Summit County Court of Common Pleas, had violated various provisions of Canons 1, 2, and 4 of the Code of Judicial Conduct. The complainant's grievance included a hearing transcript documenting the respondent's dialogue with a defendant appearing in her courtroom that could be construed as the respondent's approving a plea agreement in exchange for the defendant's support for her election to public office. The transcript also revealed

that the respondent told the defendant not to worry about the imposition of jail time, immediately after she had asked for the defendant's support in the upcoming election. The grievance also raised concerns over the respondent's campaign literature and website, which state that her opponent had not earned his judicial office, since he had not been elected but instead had been appointed to the office.

After 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 containing two separate counts against the respondent. Count I alleged that the respondent had committed violations of Jud.Cond.R. 1.2 (a judge shall act in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary), 2.2 (a judge shall perform the duties of judicial office fairly and impartially), 4.1(A)(6) (a judge shall not make any statement that would reasonably be expected to affect the outcome or impair the fairness of a pending matter), and 4.2(A)(1) (a judicial candidate shall act in a manner consistent with the independence, integrity, and impartiality of the judiciary). Count II alleged violations of Jud.Cond.R. 4.3(A) (a candidate shall not knowingly or with reckless disregard publish or distribute false information concerning an opponent) and 4.3(F) (a candidate shall not knowingly or with reckless disregard misrepresent the qualifications, position, or other fact of an opponent).

The formal complaint was heard by a hearing panel of the board on October 4, 2012, and the panel issued a report of its findings, conclusions, and recommendations on October 11, 2012. In the report, the hearing panel dismissed Count II of the complaint in its entirety. The hearing panel also dismissed the alleged violations of Jud.Cond.R. 2.2 and 4.2(A)(1) in Count I, but found clear and convincing evidence that the respondent had violated Jud.Cond.R. 1.2 and 4.1(A)(6). Specifically, the hearing panel found that the respondent had violated Jud.Cond.R. 1.2 and 4.1(A)(6) in her courtroom dialogue with the defendant. The hearing panel recommended that the respondent be publicly reprimanded and be ordered to pay the costs of these proceedings.

This commission convened by telephone conference on October 23, 2012, to review this matter. We were provided with the record certified by the board and a transcript of the October 4, 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 hearing panel and that the record supports the findings that the respondent violated Jud.Cond.R. 1.2 and 4.1(A)(6) as alleged in Count I of the complaint.

Judges are subject to the highest standards of ethical conduct. *Disciplinary Counsel v. Russo*, 124 Ohio St.3d 437, 2010-Ohio-605, 923 N.E.2d 144. By

violating the duties set forth in Canon 1 and Canon 4 of the Code of Judicial Conduct, the respondent diminished public confidence in the judiciary. The respondent's dialogue with the defendant created an appearance of impropriety in violation of Jud.Cond.R. 1.2. The test for the appearance of impropriety is whether reasonable minds would conclude that the respondent's conduct is prejudicial to public confidence in the judiciary. When the defendant had apparently concluded that the respondent had "helped [him] out," the respondent acknowledged the perceived assistance by stating, "Well, I'm glad to be able," and "I don't get a thank you very often, so thank you for that. I appreciate you very much." However, a later unprompted statement by the respondent asking for the defendant's support in the upcoming election undermines any suggestion by the respondent during her testimony that her statement was "off the cuff" or sarcastic. This conduct is clearly prejudicial to public confidence in the judiciary.

We also agree with the hearing panel that the same courtroom dialogue violates Jud.Cond.R. 4.1(A)(6). The respondent's telling the defendant that he did not need to worry about jail time if he stayed out of trouble then immediately requesting his personal and familial support for her election might reasonably be construed as a statement affecting the outcome of an impending matter before the court. *See Disciplinary Counsel v. Gaul*, 127 Ohio St.3d 16, 2010-Ohio-4831, 936 N.E.2d 28 (applying former Canon 3(B)(9) of the Code of Judicial Conduct to statements made from the bench). *See also* Jud.Cond.R. 2.10(A).

The respondent was previously sanctioned in the current election cycle for violating Jud.Cond.R. 4.4(J)(1) by receiving a contribution in excess of the allowable amounts and Jud.Cond.R. 4.3(C) by using the title "Judge" in her campaign materials in a manner that incorrectly implied that she held the office of judge of the common pleas court. *In re Judicial Campaign Complaint Against Michael*, 132 Ohio St.3d 1469, 2012-Ohio-3187, 970 N.E.2d 970. The respondent was fined \$2,500 and ordered to pay \$2,500 in attorney fees and to pay the costs of the proceedings. *Id.* The hearing panel recommends that the respondent now be publicly reprimanded since this is a second finding of violations of the Ohio Code of Judicial Conduct in the same election cycle. We agree with the recommendation. The five-judge commission has imposed a public reprimand in many cases in which it determined that a fine was not an adequate deterrent. *See In re Judicial Campaign Complaint Against Lilly*, 131 Ohio St.3d 1515, 2012-Ohio-1720, 965 N.E.2d 315 ("a public reprimand is appropriate since the candidate has violated similar canons on two separate occasions over the course of two campaigns"); *In re Judicial Campaign Complaint Against Morris*, 81 Ohio Misc.2d 64, 675 N.E.2d 580 (1997) (to sanction serious misconduct with merely a fine could "create a campaign environment in which judicial candidates may determine to engage in known violations of the judicial code, including in their campaign

budgets a calculation of fines to be paid as a ‘cost of doing business’ ”); *In re Judicial Complaint Against Davis*, 130 Ohio St.3d 1513, 2011-Ohio-6800, 959 N.E.2d 9 (“the actions of the respondent in this matter warrant additional sanctions to address the severity of his conduct and deter similar violations in the future by the respondent and other candidates”). This is the first case before a five-judge commission in which a respondent has had two complaints filed within the same election cycle. In addition to the reasons cited in *Lilly*, *Morris*, and *Davis*, the temporal proximity of the two violations in this case supports the imposition of a public reprimand.

We also believe that the seriousness of the respondent’s most recent violations, coupled with the fact that this case is in response to a second set of violations by this respondent in the same election cycle, warrants the imposition of a fine of \$5,000.

It is the unanimous holding of this five-judge commission that the respondent be publicly reprimanded for her violations of Jud.Cond.R. 1.2 and 4.1(A)(6) and ordered to pay a fine of \$5,000. We additionally order the respondent to pay the costs of these proceedings.

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 December 3, 2012. The respondent’s public reprimand shall be published by the Supreme Court Reporter of Decisions in the manner prescribed in Gov.Bar R. V(8)(D)(2).

SO ORDERED.

/s/ Peter M. Handwork
Judge Peter M. Handwork, Chair

/s/ Deborah A. Alspach
Judge Deborah A. Alspach

/s/ John P. Bessey
Judge John P. Bessey

/s/ Cheryl S. Karner
Judge Cheryl S. Karner

/s/ Jan Michael Long
Judge Jan Michael Long

Dated: October 31, 2012.