

The Supreme Court of Ohio

CASE ANNOUNCEMENTS

April 10, 2020

[Cite as *04/10/2020 Case Announcements*, 2020-Ohio-1413.]

MISCELLANEOUS ORDERS

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

In re Judicial Campaign Complaint
Against Karen Kopich Falter



Case No. 2020-0407

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 March 27, 2020, in accordance with Gov.Jud.R. II(5)(D)(1) and R.C. 2701.11. The commission members are Judge Mark Wiest, Chair, Judge Craig Baldwin, Judge Kathleen Giesler, Judge Linda Warner, and Judge Gary Yost.

Procedural History

Complainant, Curt C. Hartman, a judicial candidate running in the Republican primary election to be placed on the upcoming general-election ballot for a Hamilton County Court of Common Pleas judgeship, filed a judicial-campaign grievance with the Board of Professional Conduct against respondent Karen Kopich Falter, his opponent. After a review by a probable-cause panel of the Board, pursuant to Gov.Jud.R. II(5)(B), the director of the board filed a formal two-count complaint on March 9, 2020.

The complaint alleged that respondent twice violated Jud.Cond.R. 4.3(A) when she stated, “either knowing the information to be false or with a reckless disregard of whether or not it was false,” that the complainant moved to Hamilton County in 2017 (Count I) to accept a judicial

appointment that year from then-Governor John Kasich (Count II) in a campaign letter disseminated to 202 would-be voters who had requested Republican primary absentee ballots.

The formal complaint was heard by a panel of the board on March 16, 2020; the hearing panel issued a report of its findings, conclusions, and recommendation on March 20, 2020. The hearing panel found by clear and convincing evidence that respondent violated Jud.Cond.R. 4.3(A) as alleged in Counts I and II of the complaint by falsely stating in a campaign letter (Resp. Ex. D and Comp. Ex. 4) that “[h]er opponent moved to Hamilton County 3 years ago to take a judicial appointment from Governor John Kasich in March, 2017 * * *” and did so with reckless disregard of whether or not the statement was false. The hearing panel recommended that respondent be publicly reprimanded and pay a fine of \$1,000 and the costs of the proceeding for her violations of Jud.Cond.R. 4.3(A).

The commission was provided with a copy of the record certified by the board, including a transcript of the March 16, 2020 proceedings before the hearing panel, exhibits, and the panel’s March 20, 2020 findings of fact, conclusions of law, and recommendation.

The commission also reviewed respondent’s objections to the hearing panel’s findings of fact, conclusions of law, and recommendation (filed March 30, 2020); respondent’s amended objections to the hearing panel’s findings of fact, conclusions of law, and recommendation (filed April 1, 2020); and complainant’s response to respondent’s objections (filed April 3, 2020).

On April 6, 2020, the commission conducted a telephone conference during which it deliberated on this matter. Upon review of the entire record, the commission unanimously agreed with the panel’s findings of fact, conclusions of law, and recommendation.

Commission Opinion

Pursuant to Gov.Jud.R. II(5)(D)(1), the commission is 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 by that panel. Based upon review of the record certified by the hearing panel and the report issued by the hearing panel, the commission unanimously holds that there was no abuse of discretion by the hearing panel and that the record supports the panel’s findings that respondent violated Jud.Cond.R. 4.3(A) as alleged in Counts I and II of the complaint.

Jud.Cond.R. 4.3(A) states:

During the course of any campaign for nomination or election to judicial office, a *judicial candidate*, by means of campaign materials, including sample ballots, advertisements on radio or television or in a newspaper or periodical, electronic communications, a public speech, press release, or otherwise, shall not *knowingly* or with reckless disregard * * *

(A) Post, publish, broadcast, transmit, circulate, or distribute information concerning the *judicial candidate* or an opponent, either *knowing* the information to be false or with a reckless disregard of whether or not it was false * * *.

(Italics sic.)

To establish a violation by respondent requires a finding that respondent acted “knowingly” or “with reckless disregard.” The meanings of these terms are established by the Code of Judicial Conduct and case law. Specifically, Jud.Cond.R. 4.6(G) defines “knowingly” as meaning “actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.” A judicial candidate “acts ‘recklessly’ if the result is possible and the candidate chooses to ignore the risk.” *In re Judicial Campaign Complaint Against Moll*, 135 Ohio St.3d 156, 2012-Ohio-5674, 985 N.E.2d 436, ¶ 11.

It is not disputed that respondent knowingly distributed the letter containing the false statement. It was written by her and her mother and mailed to 202 persons who had requested absentee ballots for the Republican primary. The issue for the hearing panel was whether she mailed the letter with reckless disregard of whether or not the statement about her opponent was false.

Respondent argues that the Ohio Supreme Court and a number of federal courts have adopted the *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) standard in determining whether a judicial candidate has acted with “reckless disregard.” The hearing panel rejected this argument, as does the commission.

Evidence adduced at the hearing established that the statements made by respondent in the letter were false and that she opted to believe courthouse gossip regarding complainant without verifying its truthfulness. The panel found that a cursory search of public records would have revealed to respondent that the claims she intended to make about complainant were demonstrably untrue.

Respondent also testified that she relied on her campaign consultants to verify the accuracy of the statements, but one of the consultants claimed that he only made grammatical alterations to the letter and did not contract with respondent to provide any fact-checking services.

The commission notes, as the panel did in its findings of fact, conclusions of law, and recommendation, that Jud.Cond.R. 4.2(A)(2) requires a judicial candidate to review and approve the content of all campaign statements and materials produced by the judicial candidate or his or her campaign committee before their dissemination. The panel’s observation, in ¶ 42, that permitting a candidate to rely on campaign consultants or others to determine the truthfulness of campaign materials “would [eviscerate Jud.Cond.R. 4.2(A)(2)] from the Code because any judicial candidate could make any false statement about an election opponent * * * so long as they were not told the statement was false, or they relied upon the statements of others without confirming the accuracy of [the statements],” particularly resonated with the commission.

The commission believes a judicial candidate who violates Canon 4 should receive a sanction proportionate to the seriousness of the violation. Sanctions are imposed to punish the violator and to deter similar violations by judicial candidates in the future. *In re Judicial Campaign Complaint Against Morris*, 81 Ohio Misc.2d 64, 65, 675 N.E.2d 580 (1997).

A public reprimand has been determined to be an appropriate sanction where judicial candidates have made false statements about their opponent. *In re Judicial Complaint Against Davis*, 130 Ohio St.3d 1513, 2011-Ohio-6800, 959 N.E.2d 9, citing *In re Judicial Complaint Against Kienzle*, 96 Ohio Misc.2d 31, 708 N.E.2d 800 (1999). The commission agrees with the hearing panel that sanctioning respondent with only a fine and costs would not serve the deterrence purpose of a sanction.

The commission also consulted materials provided to judicial candidates at a two-hour course regarding campaign practices, finance, and ethics, mandated by Jud.Cond.R. 4.2(A)(4). To comply with the mandate, respondent would have had to attend the course offered on one of the following dates: 12/4/19, 1/30/20, or 2/5/20. One PowerPoint slide from the course, titled “Campaign Grievance Lessons,” is especially germane to the facts at hand, stating, “[i]f in doubt, ask for guidance because the candidate is responsible for all campaign activity * * * [b]e wary of * * * outside consultants with little or no judicial campaign experience * * * [a]ccuracy is essential.” As established, the facts before the commission illustrate that respondent did not follow these crucial principles explicitly outlined to judicial candidates.

It should not be a surprise to a judicial candidate that there are consequences, including a public reprimand, for violating Canon 4. The Judicial Candidate Handbook provided to candidates attending the course includes a brief summary of Canon 4 commission cases from July 1995 to December 2019.

Accordingly, the commission finds that clear and convincing evidence supports the findings of fact, conclusions of law, and recommendation issued on March 20, 2020, by the hearing panel of the board. Furthermore, the commission finds that there has been no abuse of discretion by that panel.

The commission concurs with the recommendation of the hearing panel that respondent be publicly reprimanded and required to pay a fine of \$1,000 for her violations of Jud.Cond.R. 4.3(A), as well as the costs of the proceedings.

The secretary is directed to issue a statement of costs before the commission, as well as instructions regarding the payment of the fines and costs. Payment of all monetary sanctions must be made by the respondent on or before June 12, 2020. This opinion is to be published by the Supreme Court Reporter.

So Ordered.

/s/ Mark Wiest
Judge Mark Wiest, Chair

/s/ Craig Baldwin
Judge Craig Baldwin

/s/ Kathleen Giesler
Judge Kathleen Giesler

/s/ Linda Warner
Judge Linda Warner

/s/ Gary Yost
Judge Gary Yost