OA 10.6.98

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUL 23 1998
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

AN INQUIRY CONCERNING
JUDGE DEBORAH FORD-KAUS,
NO. 97-74

CASE NO. 91,232

_____/

JUDGE DEBORAH FORD-KAUS' REPLY TO FLORIDA JUDICIAL QUALIFICATIONS COMMISSION ANSWER BRIEF

Respondent, **JUDGE DEBORAH FORD-KAUS**, by counsel, files this Response to the JQC's Answer Brief and states:

Argument

I. THE JQC ERRED IN FINDING JUDGE FORD-KAUS COMMITTED OFFENSES REQUIRING REMOVAL BECAUSE ITS DISPUTED MATERIAL FINDINGS OF FACT WERE NOT PROVEN BY CLEAR AND CONVINCING EVIDENCE.

Judge Ford-Kaus admitted to the accurate charges, but denied those that were inaccurate. The JQC's Answer Brief,[1] however, argued the Hearing Panel "found her testimony to entirely lack credibility." (Answer Brief at 6). To demonstrate the flaw in that statement and the Panel's conclusion, Judge Ford-Kaus responds to the material, disputed Findings.

Finding 1: *Accepting the McBee Appeal*. The JQC found Judge Ford-Kaus, as an attorney, "knew or should have known" she would not have adequate time to devote to the McBee appeal in the midst of a judicial campaign. (Findings at 2, 24). The JQC produced no witnesses to testify about how a lawyer should plan for a first-time run at elected office, no documents advising candidates

[1] In an especially ironic development for this case, the JQC's brief was filed late in clear violation of this Court's June 3, 1998, Order to Show Cause. Five of the fifteen charges against Judge Ford-Kaus mention her filing the McBee brief late.

regarding time management, no list of Attorney Ford-Kaus' pending case load when she accepted the McBee case, and no testimony on how long the McBee appeal should have taken. The JQC's Finding was not supported by any evidence, much less clear and convincing evidence.

The JQC found Attorney Ford-Kaus "knew" she was not qualified to prosecute the appeal. (Findings at 2, 24). The support for this Finding was Attorney Ford-Kaus' limited prior appellate experience. Every appellate lawyer started with his or her first few cases. That inexperience did not mean he or she was not qualified, nor did it mean Attorney Ford-Kaus "knew" she was not qualified. The JQC's Finding was not supported by clear and convincing evidence.

Finding 2: *Representing McBee*. The JQC found Attorney Ford-Kaus "knew or should have known" that if she were elected circuit judge, due to normal briefing and oral argument scheduling she would not be available to make the oral argument.[2] The JQC produced no evidence of how Attorney Ford-Kaus was to have that knowledge, no evidence of the actual briefing and oral argument calendar at the Second District Court of Appeal, and no evidence of how Attorney Ford-Kaus was supposed to know in June 1996 that she would win hotly contested primary and general elections. The JQC's Finding was not supported by clear and convincing evidence.

---

[2] This Finding is inconsistent with Finding One, which concluded Attorney Ford-Kaus did not know enough about appellate practice to handle the McBee appeal, while this second Finding concluded she knew the intricacies of an appellate court's briefing and oral argument schedule. This was the first of many catch-22s into which the JQC placed Judge Ford-Kaus.

Finding 5: *Untimely Withdrawal*. The JQC found Judge Ford-Kaus "did not seek to withdraw" from the McBee representation until twenty-two days after she ascended to the bench. (Findings at 5, 24). This Finding was not supported by clear and convincing evidence and was erroneous.

The JQC's own evidence demonstrated Judge-elect Ford-Kaus notified McBee on December 12, 1996, she had been elected to the bench and was prohibited from representing McBee after she took office in January. (JQC 26). That same letter suggested Linda Griffin should be considered to assume McBee's representation. (Id.). Both McBee and Judge Ford-Kaus thought Griffin took over the case once Ford-Kaus took office. (Response at 21, 22). Accordingly, Judge Ford-Kaus saw no need to "seek to withdraw from the case." She assumed Griffin would either file a notice of appearance or substitute in as counsel. (Id.). Only when Griffin notified McBee *two weeks later* that she would not handle her case, did Judge Ford-Kaus learn she needed to withdraw, which she did promptly. (Id.).

The JQC did not argue in its Answer Brief any evidence contrary that discussed above. Even discounting Judge Ford-Kaus' testimony, as the JQC preferred to do on all material issues, the testimony of its two witnesses, McBee and Griffin, was "indecisive, confused, and contradictory." Davey, 645 So.2d at 405. Accordingly, it was a "far cry from the level of proof required to establish a fact by clear and convincing evidence." Id. Once again, the JQC's

Findings were not supported by clear and convincing evidence.

Finding 6: *Notifying McBee About the Motions*.

The JQC found Judge-elect Ford-Kaus, in the December 12, 1996, letter, did not tell McBee that motions to dismiss and strike had been filed by opposing counsel on December 2, 1996. (Findings at 5, 24). This Finding was not supported by clear and convincing evidence, because it assumed Ford-Kaus knew about the motions.

Judge Ford-Kaus testified she never received the motions. (Response at 18). Opposing counsel could not confirm that he sent copies of the motions to Judge-elect Ford-Kaus, although he testified regarding his standard business practice in serving documents. (T 45:10-17). The motions bore a certificate of service date of December 2, 1996. (Response at 18). Without more evidence, the above facts might meet a clear and convincing standard to support the JQC's Finding, including, as they do, not only witness testimony but also some other corroborating evidence. See In re Boyd, 308 So.2d 13, 21 (Fla. 1975). Additional *undisputed* evidence, however, lends credence to Judge Ford-Kaus' testimony: she called opposing counsel on December 12, 1996, to inquire whether he was filing an Answer Brief; she was told he had filed a motion to dismiss, but not a motion to strike; his office faxed her a copy of the motion to dismiss, but not the motion to strike; Judge-elect Ford-Kaus filed a response opposing the motion to dismiss, stating she had not received the motion until calling his office; she did

not file any responsive pleading regarding the motion to strike; opposing counsel sent a letter on January 9, 1997[3], to Judge Ford-Kaus acknowledging it was "unclear" whether his assistant had faxed a copy of the motion to strike, so he was enclosing that motion as well as another copy of the motion to dismiss. See generally Response at 18; T 46:20 - 48:3. Despite this voluminous evidence supporting Judge Ford-Kaus' version of events, the JQC chose to rely on opposing counsel's testimony and the certificate of service on the two motions. In so relying, the JQC selectively ignored--without explanation--substantial other evidence. The only way to conclude "without hesitation" that Judge-elect Ford-Kaus knew of the motion to strike on December 12, 1996, was to willfully disregard undisputed record evidence. Such action cannot support a finding of clear and convincing evidence.

---

[3] Importantly, this was six days after Judge-elect Ford-Kaus' meeting with McBee and Griffin on January 3, 1997, during which the JQC found Ford-Kaus lied about not knowing of the pending motion to strike. See Findings at 5, 24.

Finding 12: *Truthfulness at the 6(b) Hearing*. The JQC found Judge Ford-Kaus was untruthful in three specific statements at the 6(b) hearing held on July 25, 1997. The JQC failed to prove this conclusion by clear and convincing evidence.

Judge Ford-Kaus did not tell different stories in her deposition and the 6(b) hearing. In her deposition, she candidly admitted she did not perform the work stated on the bills for November 6, 7, and 8. (T 532:16-22). At her 6(b) hearing, she was not asked about the work stated on the bills, but whether she worked 24 hours on those three days, to which she candidly replied she did not. (T 532:2-8). There was no inconsistency between those two statements.

In its Answer Brief, the JQC erroneously included testimony from the final hearing in its quote from the deposition. Cf. Answer Brief at 20 and T 532:16-24. Only by this undoubtedly unintentional splicing of testimony was the JQC able to create an inconsistency.

The second allegedly untruthful testimony contained a critical addition to the actual testimony: "You testified that a secretary prepared the bills *containing these time entries*, when in fact, you prepared them yourself and you did not have a secretary at that time." (Findings at 8, 24) (emphasis added). The actual testimony was cited both in the Response and in the JQC's Answer Brief. See Response at 30, Answer Brief at 19. At best, the question-and-answer exchange demonstrated a breakdown of communication. At

worst, it demonstrated a less-than-specific interrogation. Had Commissioner Tate asked, "Who prepared *that* bill?" as opposed to "Who prepared *your bills*?" then the exchange would have been different. The JQC erred, however, by recommending punishment for Judge Ford-Kaus for directly and honestly answering a question asked, and for not answering a question not asked.

The final specific allegation of "untruthfulness" involved Judge Ford-Kaus' testimony about the McBee-Griffin relationship. (Findings at 8). Neither Griffin nor McBee testified specifically about the matters charged. (Response at 31, 32). Each testified around the edges of the charge, but such imprecise testimony cannot serve as a foundation for clear and convincing evidence.

Therefore, by failing to support all three of its alleged Findings of untruthfulness with clear and convincing evidence, the JQC's conclusions about Judge Ford-Kaus' testimony at the 6(b) hearing must fall.[4]

Charge 13: *"Backdating" the Brief*. This Finding was perhaps the most serious one given that it involved truthfulness to a court and, therefore, went directly to the administration of justice. The JQC found Attorney Ford-Kaus learned she missed the due date for

---

[4] Moreover, each of these three instances fail the third prong of the analysis required from Davey, 645 So.2d at 406, 407. That prong required any misrepresentations to be "knowing and willfull" and "material." The JQC failed to prove any knowing and willfull intent to be untruthful, and none of the specific issues is terribly material. They are all collateral issues, and the alleged inconsistencies are nit-picking, at best.

the brief, "backdated the brief and falsely certified that [she] mailed it on November 10."[5] (Findings at 9, 24). The JQC also found she included the letter to the clerk dated November 10, 1996, "to make it appear as though your brief was timely filed with the Second District, when it was late." (Id.).

Although extensively argued by Judge Ford-Kaus and the JQC, see Response at 11-16, 37-39; Answer Brief at 22-24, this Finding suffered a fatal inconsistency. It stated Attorney Ford-Kaus' motivation for backdating the brief--an action Judge Ford-Kaus vehemently denied ever occurred--was to timely file the brief on November 10, 1996. It was undisputed, however, the brief was due on November *8*, 1996. Thus, the foundation supporting the Finding was fatally weak. At no point in its investigation, prosecution, or Findings did the JQC offer an explanation as to why Attorney Ford-Kaus would "backdate" a brief so it would *still* be late.

Notwithstanding that impossible Finding which was without any record support, the JQC was clearly confused regarding the brief. The JQC found the handwritten dates were "extremely confusing" and the number "8th" was written over "and the number '10th' or possibly '18th' superimposed." (Findings at 15). The JQC concluded, "it is most likely that the '8th' was initially written and then changed to the '10th'." (Id.).

---

[5] "Backdating" a brief and "falsely certifying" the date of service to an earlier date than actual service are two ways of saying the same thing. Thus, this charge was unduly repetitious.

Yet, in its Answer Brief, the JQC wrote, "The brief, which was served on the 18th not only bore a service date of the 10th, but the zero was superimposed over an eight." (Answer Brief at 10) (emphasis in original). That statement is contrary to the JQC's own Findings. Granted, it is a much more damning statement, because a zero written over an eight would imply a change from "18th" to "10th." This latter event would have seemed much more like backdating than the actual facts; perhaps that was why the JQC asserted these unfounded facts in its Answer Brief. Perhaps that was also why the assertion lacked a citation to the record. (See Answer Brief at 10).

The JQC asserted, "the only issue in dispute on this charge was whether the Judge's conduct was intentional." (Answer Brief at 22). That statement was also inaccurate and not supported by the record. Judge Ford-Kaus denied not only intending to mislead the court or opposing counsel, but also backdating the brief at all. (Response 11-16; 37-39). To reach its conclusion of "backdating," the JQC engaged in impermissible inference stacking: (1) inferring she did not write "10th" on November 10 (rejecting her testimony with no other testimony upon which to rely); (2) inferring that because she did not write "10th" on November 10 she must have written "10th" on November 18; and (3) inferring that because she wrote "10th" on November 18 she intended to mislead the appellate court and counsel. These inferences stack up, but they do not add up. Accordingly, they are impermissible and the conclusion they

reach must be rejected.

II. THE CHAIR ERRED BY ALLOWING OPINION TESTIMONY REGARDING THE CERTIFICATE OF SERVICE.

The JQC's Answer Brief demonstrated why the Chair erred by allowing Jane Kreusler-Walsh, Esq., to opine that the brief was backdated. The JQC argued Kreusler-Walsh was well-qualified "to render opinions on appellate practice and procedure." (Answer Brief at 29). The JQC then concluded she properly was allowed to opine that "the date inscribed on the certificate of service was not the date that the certificate was signed." (Answer Brief at 29). The JQC did not explain how Kreusler-Walsh came by this particular soothsaying, nor how her expertise in appellate practice and procedure qualified her to reach such an incredible conclusion. Clearly, her testimony should not have been allowed, causing the last weak pillar underlying the "backdating" Finding to crumble.

III. THE SPECIAL COUNSEL VIOLATED THE FLORIDA CONSTITUTION BY INCLUDING AN INVESTIGATIVE DOCUMENT THAT WAS NOT PART OF THE RECORD BELOW IN HER PUBLICLY FILED BRIEF WITH THIS COURT AND SHOULD BE SANCTIONED APPROPRIATELY.

A. The Florida Constitution, JQC Rules, and this Court's precedent clearly require a confidential procedure for investigating judicial conduct.

The Judicial Qualifications Commission ("JQC") derives its authority to investigate and recommend discipline for Florida judges from Article V, Section 12, of the Florida Constitution. Section 12(a)(4) provides "all proceedings by or before the commission shall be confidential" until formal charges against a judge are filed by the JQC's investigative panel with the clerk of the supreme court of Florida. Fla. Const. art. V, § 12(a)(4). Once such formal charges are filed, then all further proceedings before the commission are public. Id.

The JQC's Rules implement the constitutional mandate of confidential investigations. ("FJQCR"). See FJQCR 23(a), (b).

This Court has noted confidentiality serves two important purposes: (1) it allows the JQC to process complaints efficiently while protecting complainants and sources and, (2) and *it protects "the judicial officer from unsubstantiated charges."* In re Graziano, 696 So.2d 744, 751 (Fla. 1997) (citation omitted) (emphasis added). Confidentiality of investigations is sufficiently important that if a breach of confidentiality prejudices the fairness of a hearing, then the accused judge's due process rights are implicated. Graziano, 696 So.2d at 752. Thus, the constitution,

JQC rules, and this Court clearly require and recognize the importance of confidentiality during investigations.

B. The Commission's authority is limited by the Florida Constitution.

The constitution divides the Commission into an Investigative Panel and a Hearing Panel, each with specific duties and limited jurisdiction. Fla. Const. art. V, § 12(5)(b). The Investigative Panel has jurisdiction "to receive or initiate complaints, conduct investigations" and submit charges to the Hearing Panel. Id. The Hearing Panel has jurisdiction "to receive and hear formal charges from the Investigative Panel" and to recommend removal or other discipline. Id. The Hearing Panel has no constitutional authority to do the investigative work of the Investigative Panel.

C. The Special Counsel's authority derives from the Commission's constitutional authority and Rules.

Rule 6(f) requires the Investigative Panel to designate a Special Counsel after formal charges are filed. FJQCR 6(f).[6] The Rule requires the Special Counsel to "prepare appropriate papers and pleadings, gather and present evidence before the Hearing Panel *with respect to the charges* against the judge, and otherwise act as counsel in connection *with the prosecution of the charges* against a judge . . . ." Id. (emphasis added).

Thus, when a Special Counsel acts under the authority of an

---

[6] The notice of formal charges must specify the charges in "ordinary and concise language" and must state "the essential facts" upon which the charges are based. FJQCR 6(g).

Investigative Panel, his or her authority is limited by the limited jurisdiction of that body: to gather and present evidence to the Investigative Panel about complaints, conduct, or investigations regarding a judge. These proceedings are confidential. FJQCR 23(a). Similarly, when a Special Counsel acts under the authority of a Hearing Panel, his or her authority is also constrained by definition the limited jurisdiction of this latter body: to gather and present evidence *regarding the formal charges* and to prosecute those charges. These proceedings are public. FJQCR 23(a).

D. FJQCR 18, allowing the Hearing Panel to hear additional evidence, must be read in conjunction with its constitutional authority.

FJQCR 18 provides the Hearing Panel "may order a hearing for the taking of additional evidence at any time while a matter is pending before it." In her Answer Brief, the special counsel purported to try to travel under this rule to submit a post-hearing affidavit to the Hearing Panel. (Answer Brief at 4, 5, 36, 37). Her motion was properly denied by the Hearing Panel (although neither the motion or the order denying it are part of the record before this Court). She did not cross appeal the denial of this ruling.

Instead, in a serious abuse of power, the JQC Rules, and the Florida Constitution, the special counsel both attached the alleged affidavit and quoted from it at length in the Answer Brief. Without question, this action was improper. Rule 18 cannot stand alone to allow evidence that had not been submitted to a 6(b) hearing and a

determination of probable cause to be placed before a Hearing Panel, this Court, or the public. Were that the result, then the rules of confidentiality and the constitutional provision regarding confidential investigations would be rendered meaningless. Thus, the "additional evidence" contemplated in Rule 18 must be evidence supporting the essential facts of a specifically charged offense.

This Court has cautioned the JQC once before about inappropriate disclosure of confidential, investigative information. See Graziano, 696 So.2d at 752 ("[T]he JQC must provide reasonable safeguards against any breaches of the confidentiality requirements by itself, its staff, and its counsel."). That admonition has not been heeded. The publication to this Court of a hearsay, non-record document constitutes a taint upon this case and the JQC's performance.

IV. THE SPECIAL COUNSEL SHOULD ADMIT THE JQC FAILED TO MEET ITS BURDEN AND ADVISE THIS COURT DIRECTLY, RATHER THAN THROUGH A LAST-DITCH EFFORT TO KEEP JURISDICTION.

By improperly submitting the investigative document, the special counsel suggested remand for a hearing on further evidence would be an appropriate remedy. (Answer Brief at 36). This suggestion, however, has no merit. If the special counsel now realizes she has overreached in asking for removal, she is obligated to tell this Court of that fact directly and not in this oblique fashion that includes flashing a constitutionally confidential document before the Court's--and the public's--eyes. Such obligation has clearly arisen here, and the her duty is clear.

Respectfully submitted this 23rd day of July, 1998.

RICHARD C. MCFARLAIN
Fla. Bar No. 052803
ROBERT A. MCNEELY
Florida Bar No. 042994
McFARLAIN, WILEY, CASSEDY & JONES, P.A.
215 South Monroe Street, Suite 600 (32301)
P.O. Box 2174
Tallahassee, Florida 32316-2174
(850) 222-2107
(850) 222-8475 (fax)

DONALD A. SMITH, JR.
Fla. Bar No. 0265101
SMITH AND TOZIAN, P.A.
109 North Brush Street
Suite 150
Tampa, Florida 33602
(813) 273-0063

Attorneys for Judge Deborah Ford-Kaus

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing has been filed this 23rd day of July, 1998, with the Honorable Sid J. White, Clerk of the Supreme Court of Florida, 500 S. Duval Street, Tallahassee, Florida 32399, with a copy by Hand Delivery to: Brooke Kennerly, Executive Director, Florida Judicial Qualifications Commission, Room 102, The Historic Capitol, Tallahassee, Florida 32399; and John Beranek, Counsel to the JQC Hearing Panel, Ausley & McMullen, 227 South Calhoun Street, Tallahassee, Florida 32301; and by U.S. Mail to: Thomas C. MacDonald, General Counsel, Florida Judicial Qualifications Commission, 100 Tampa Street, Suite 2100, Tampa, Florida 33602; Lauri Waldman Ross, Special Prosecutor for JQC, Ross & Tilghman, P.A., Two Datran Center, Suite 1705, 9130 South Dadeland Blvd., Miami, Florida 33158; and Timothy W. Ross, Ross & Burger, P.A., Special Counsel for JQC, 2900 Southwest 28th Terrace, Miami, Florida 33133.

Robert A. McNeely