ORIGINAL

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

In re: Judicial Campaign Complaint against: Mark Davis 2535 Underhill Toledo, Ohio 43615 RESPONDENT Ron Rothenbuhler Lucas County Democratic Party Toledo, Ohio GRIEVANT	)	Judicial Case No. 2011-1855 Reply as to Grievant's Answer Brief

FILED
NOV 28 2011
CLERK OF COURT
SUPREME COURT OF OHIO

I. Introduction

In reply, kindly note that the Grievant omitted several key new facts, including a persuasive decision by the Board of Elections. Furthermore, this Reply points out several inconsistencies in the Answer Brief.

II. Key New Facts

A. <u>The Board of Elections found for Respondent upon the same issue</u>

In this dispute, the Grievant filed the same complaint before the Board of Elections as before this Board of Commissioners. *See* Reply Exhibit 1. Because the Board of Elections' Panel of Five Commissioners ruled upon the very same issue, this Court may find this ruling to be persuasive authority.

RECEIVED
NOV 28 2011
CLERK OF COURT
SUPREME COURT OF OHIO

The Board of Commissioners held a hearing across two days whereby the five

Commissioners heard evidence from both sides as to whether Respondent misled voters with his claims of six degrees in his campaign material.

In a 3-2 decision, three Commissioners agreed with Respondent that both the minor degrees and the Certificate in International Trade and Development fall within the definition of a degree and that the reasonable reader would understand them to be degrees. Accordingly, the Grievant's complaint filed before the Board of Elections was dismissed.

Interestingly enough, the Board of Elections Comissioners openly debated the matter prior to rendering their decision and several board members noted from their own personal experience that minor degrees were regularly referenced as degrees by job applicants.

While the Board of Commissioner's decision is obviously not binding, it serves as strong evidence and persuasive authority that Respondent did not misrepresent himself to voters.

B. Grievant prematurely used this Court's decision to win the election.

Before this Commission of Five Judges could rule, the Grievant used the Three Panel of Judges Decision, just days before the election, to hold a press conference before all the news, media, and television outlets to ridicule the Respondent for having claimed multiple degrees.

Using the initial ruling of the Panel of Three Judges in a press conference caused incredible, irreparable damage to Respondent's judge campaign. As a result, Grievant's relatively unknown candidate, newcomer Michelle Wagner, won in a dramatic landslide. This was particularly devastating to Respondent, who narrowly lost the 2010 Common Pleas election by only a few percentage points, and was long predicted as the front runner in the 2011 race.

C. Voters not harmed

The Grievant alleges harm to the voting public, but the landslide win by Michelle Wagner shows that the statements made by the undersigned Respondent did him much more harm than good. It appears the only harm done was self-inflicted by the undersigned Respondent, who cost himself the election for stupidly not being more specific in his advertising.

III. Law and Argument

A. The Grievant fails to define a degree.

In the Answer Brief, the Grievant offers no definition of his own as to a the meaning of a degree. At best, the reference to the Higher Learning Commission actually supports the Respondent's position as shown below.

Instead, the Grievant attempts to show the *dictionary* definition offered by the Respondent is an absurdity. The standard dictionary definition of a degree is a "title conferred on students by a college, university, or professional school on completion of a program of study." According to the Grievant, "taking this definition to an absurd end, a person could claim that each three hour class completed is a college degree." Answer Brief, p.5.

Grivant's analogy is grossly incorrect because a single class does not give rise to a "title" conferred by the university. Nor is a single class a "program." Thus, the Grievant fails to undermine the dictionary definition of a degree as absurd. Accordingly, the proper definition as set forth by Respondent is that offered by any dictionary.

Following that definition, a Minor Degree in French is a "title" conferred by Miami University for completion of a program of study. As such, it is a degree and there is no evidence offered to the contrary.

B. The Grievant agrees that 30 semester hours may constitute a degree.

On the fifth page of his Answer Brief, the Grievant states that an additional 30 hours beyond the bachelor's constitutes a degree and cites to the Higher Learning Commission ("The institution conforms to commonly accepted minimum program length ... 120 semester hours credits for bachelor's degrees, 30 semester credits beyond the bachelor's for master's degrees, 30 semester credits beyond the master's degree for doctorates...").

Thus, if an 30 additional hours may constitute a degree according to Grievant, then it

is interesting to note that the law school requires an additional 30 semester hours to earn the Certificate of International Trade and Development. Thus, under the Grievant's definition, Respondent's graduate certificate does qualify as a degree.

Even so, the provision cited by the Grievant excludes other types of degrees, such as associates degrees, and therefore cannot be considered an exclusive definition. Either way, the Grievant's position supports a finding that minor degrees, and the Certificate, can be considered as degrees.

C. Grievant offers no evidence that Respondent does not have multiple degrees.

Other than Grievant's own opinion, he offers no actual evidence as to whether a minor degree, or a graduate certificate, is a degree. There is no testimony from any higher institution or independent expert to support the Grievant's contention. Thus, the Grievant has no substantative evidence to offer this Court.

In contrast, the Respondent submitted multiple documents showing that the universities themselves consider a "minor degree" to be a degree. Respondent also submitted documentation showing that professionals regularly claim minor degrees as degrees on their resumes and biographies. Grievant offers no contrary evidence.

D. Reasonable readers consider minor degrees to be degrees.

The only evidence presented, that of Respondents, shows that reasonable readers consider minor degrees to be a degree. The Grievant's view, that a reasonable reader would only consider a 4 year program to be a degree (brief, p.3), is not supported by a shred of evidence and is simply not appropriate to Toledo Ohio.

Toledo is home to one of the America's largest community colleges, Owens Community College, which offers associates degrees. Toledo also has a host of other community

colleges including Statzenberger, Herzing, Mercy College of NW Ohio, and Davis College (no relation).

The many tens of thousands of graduates of these Toledo institutions certainly consider their associates degree to be a degree. Thus, the Grievant's personal opinion that a degree is limited to a four year program is not shared by the reasonable reader in Toledo Ohio.

Although the Grievant offers no evidence as to the reasonable reader, the Respondent offers many pages of documentation to show that a reasonable reader considers a minor degree to be a degree. The most recent evidence is that the Ohio Board of Elections agrees.

E. Respondent substantially complied with the Cease and Desist Order.

The ridicule from the press conference, broadcast all throughout Toledo, was so harmful to Respondent's campaign that Respondent made every effort, on his own, to avoid any reference to his education.

Any reference to Respondent's education could only hurt his campaign. For example, running the television commercial highlighting the degrees would only remind the public of Respondent's apparent folly. Any voter seeing that commercial would think, "hey, isn't he the guy that overstated his degrees?" Thus, any and every reference to the Respondent's degrees would only poison the Respondent's campaign further. It would pour salt into the wound and extend the negativity.

Accordingly, before this Court's cease and desist order, the Respondent had every incentive to remove any reference to his education from his campaign materials. In fact, in advance of the Order, Respondent had already pulled all his television ads. He then spent most of a day creating a brand new commercial. Similarly, Respondent immediately stopped his door-to-door distribution of the flyers. The Order of this Court only emphasized and finalized the extreme motivation felt by Respondent to quickly right his campaign ship by eliminating any references to

his education.

In a panic to correct the mainstay of his campaign, the television and door to door, Respondent overlooked his seldom used Facebook page and website. Indeed, the Facebook page had been a leftover from the past campaign which basically maintained the same supporters as before. Respondent posted only around 6 times in the sixty or more days before the election (between September 1 through November 7). Finally, "Facebook" never entered into Respondent's mind as a "campaign material" referenced in the Court's order and was therefore inadvertently overlooked.

Thus, while the Grievant is technically correct, that Respondent did not timely correct his Facebook page and website, it was merely an inadvertent oversight when Respondent had every incentive to do so.

F. As to possible penalties, the instant case does not arise to the level of *Cuckler*.

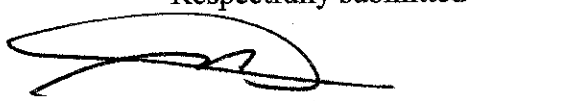
In its Answer Brief, Grievant suggests a public reprimand upon the case of *Disciplinary Counsel v. Cuckler*, (2004) 101 Ohio St. 3d 318. In *Cuckler*, the candidate claimed to be an attorney during times when he was not.

Claiming to be an attorney, when one is not, as *Cuckler* did, is a very serious offense. The instant case, however, comes down to the definition of a degree and whether or not Respondent stretched that definition. The Board of Elections found that Respondent did not. Even if this Court does find in favor of Grievant in this dispute of semantics, it is a far cry from *Cuckler*. As such, this honorable Court may find that the loss of the election, and Respondent's reputation, to be sufficient punishment and to decline the suggestion for a public reprimand.

As to the issue of attorney fees requested by Grievant, Respondent notes that $9,635.50 appears excessive for a 2 hour hearing and the Answer Brief. As such, if this Court does consider any attorney fees, and Respondent prays that it does not not, then it would be proper and just for the submission of time sheets for said fees and an opportunity to challenge them. It may simply be more

appropriate to decline an award of attorney fees in this close case.

Respectfully submitted

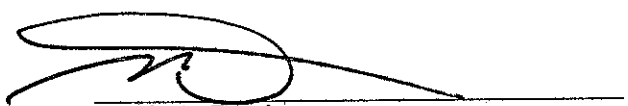


Mark A. Davis (0070983)
The Davis Law Office
500 Madison Avenue, Ste 340
Toledo, Ohio 43604
Tel: (419) 297-5088
Fax: (419) 710-0008

Certification

The undersigned hereby certifies that he has forwarded a copy of the foregoing by first class US Mail on this 25th day of November, 2011 to

Donald J. McTigue
545 East Town Street
Columbus, Ohio 43215
Fax: (614) 263-7078
Counsel for Grievant



Mark A. Davis

BEFORE THE OHIO ELECTIONS COMMISSION

Lucas County Democratic Party
Ron Rothenbuhler, Chair
1817 Madison Avenue
Toledo, Ohio, 43604

CASE NO. 2011E-037

EXHIBIT: A

Complainant

v.

Mark Davis
2535 Underhill Road
Toledo, Ohio 43615

and

Citizens for Davis
Melissa Matchinski, treasurer
2276 Ruthanne Drive
Toledo, Ohio 43611

Respondents

RECEIVED
OCT 17 2011
OHIO ELECTIONS COMMISSION

COMPLAINT

Lucas County,
/s
State of Ohio

I, Ron Rothenbuhler, having been duly sworn hereby state upon personal knowledge that:

1. I am the Chair of the Lucas County Democratic Party and file this Complaint on behalf of the Party.

2. Respondent Mark Davis is a candidate at the November 8, 2011 general election for the office of Judge of the Toledo Municipal Court. Respondent Citizens for Davis is the authorized campaign committee of Respondent Mark Davis.

3. For the purpose of promoting the election of Respondent Mark Davis, Respondents are distributing printed campaign material which falsely states that he "graduated with honors from Miami University with degrees in Finance, Economics, French and German" and that "In fact, he has graduated with honors in degrees in Law, International Law, Finance, Economics, French and German." Respondents are also broadcasting a television commercial promoting the election of Respondent Mark Davis that falsely states, "As a scholar and valedictorian he [Mark Davis] has earned six college degrees in 7 years." A copy of the printed campaign material is attached hereto as Exhibit A and a copy of the television ad as Exhibit B.

4. In truth Respondent Mark Davis has only two college degrees, an undergraduate Bachelor of Science in Business Degree from Miami University and a Juris Doctorate Degree from The Ohio State University Moritz School of Law. His undergraduate studies at Miami University included majoring in Finance and Business Economics and minoring in French and German, but only a single degree, as shown by the attached Exhibit C. He also apparently has a Certificate [not a degree] in International Trade and Development, as he stated in the attached Exhibit D. The television commercial is also false in that it states that as a "valedictorian" Mark Davis earned six college degrees. He was apparently a high school valedictorian, but not a college valedictorian. See, Exhibit A.

5. These false statements have been made knowingly by Respondents or with reckless disregard of the truth for the purpose of influencing the voters and the outcome of the election in violation of Ohio Revised Code 3517.21(B)(2) and (10).

Further affiant sayeth naught.

Ron Rothenbuhler

Ron Rothenbuhler

Sworn to and subscribed before me this 16 day of October 2011.

Karen J Poore

Notary Public

NOTARY PUBLIC STATE OF OHIO

KAREN J. POORE
Notary Public, State of Ohio
My Commission Expires Aug. 24, 2016