

ORIGINAL

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
)
) Respondent's Response in Opposition to
) The Motion of the Complainant Seeking to
) Amend the Order of October 5, 2012

On October 8, 2012, the Complainant, through privately retained counsel, filed a Motion asking this Panel to amend its Order of October 5, 2012, by which the Respondent was ordered to: (a) cease and desist referring to herself as "Judge O'Toole" on her website; (b) amend that website to add the date upon which her service as an appellate judge ended; (c) desist from wearing a name tag that identifies her as a judge, and; (d) file an affidavit evidencing her compliance with these orders by October 9, 2012.¹

The Complainant moves the Panel to require the Respondent to run a newspaper advertisement, which he has drafted, and which appears as Exhibit D to his Motion, correcting an erroneous line in a voter guide published by the League of Women Voters, in which the "occupation" of the Respondent is listed as "Judge 11th District Court of Appeals."

The Complainant, (Memorandum, at 2) wants the retraction to run in the two newspapers which carried the voter guide in question. The stated basis for this request is twofold.

First, the Complainant (at 3) alleges that the mistake (and, as demonstrated below, it was an unintentional mistake) at issue is "yet another example" of a deliberate campaign on the part of the Respondent to misrepresent herself as a sitting judge.

The Respondent has complied with these mandates and prohibitions, as evidenced by the Affidavit of Compliance she filed with the Clerk of the Supreme Court on October 9, 2012.

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SUPREME COURT OF OHIO

Second, the Complaint (at 3-4) takes issue with the manner in which the Respondent discussed her belief that the Hearing Panel erred in finding against her, and that she is exposed to the threat of sanctions for what she believes is expression protected by the First Amendment.

Those remarks – which are solidly grounded upon the theory espoused in her Objections to the Findings and Recommendations of the Hearing Panel, and which are themselves wholly protected by the First Amendment – are, to the Complainant (at 4) “evidence [of] Respondent’s disdain for the Court and its Rules.” In fact, they are nothing of the sort.

– Facts –

The League of Women Voters (“the League”) provides a valuable public service in canvassing candidates as to their credentials and views, and making that information available to the public through its local affiliates, and in newspapers.

The Respondent, who was formerly a judge on the Eleventh District Court of Appeals, and is again running for that position, responded to a survey distributed to the League, one of more than a dozen such requests by various groups to which she has responded this campaign season.² She dictated and drafted various narrative responses, including those submitted to the League, and delegated the completion and the submission of the formed to a volunteer, one of several who assist her campaign.³ Unfortunately, the volunteer erroneously answered the questionnaire by indicating the position which the Respondent was seeking, and thus her intended occupation, as if it were her current occupation, and submitted it to the League with that error.⁴

²See Exhibit A, Affidavit of Colleen M. O’Toole, at ¶¶ 8-12. Respondent has also made over 150 campaign appearances, including fifteen hosted by the League, this election. *Id.* at ¶¶ 7, 13.

³See *Id.*, at ¶ 6.

⁴See *Id.*, at ¶¶ 6, 14.

It was posted to the League website on August 20, 2012.⁵

The Respondent became aware of the erroneous posting when Nena Hankins, who chairs the voter guide program for the League locally, notified her that the League had received a complaint to that effect on October 24, 2012.⁶ Ms. Hankins sent an email to the Respondent advising her of the complaint on October 26, 2012. The Respondent called her the same day, and by the end of the day, the erroneous information had been corrected on both the website run by the League, and in an email sent to five local chapters of the League.⁷

The error, while unfortunate, was not deliberate, and was corrected by the Respondent as soon as she became aware of it. In no sense, on these facts, can it be called a knowing or even reckless statement by the Respondent regarding her credentials. At worst, it represents the improper delegation of a ministerial task to a volunteer.

The strenuous efforts of the Complainant (at 3) to characterize this error as “yet another example of the Respondent’s public dissemination of false, deceptive and misleading information in an effort to portray herself as an incumbent judge” is dramatic, but in this light, it is also out of step with the more mundane facts.

The Complainant endeavors to spin what is essentially an administrative oversight into what he characterizes as a pattern-and-practice of misconduct. He is doing so to bring that event – which was not charged in his original grievance, never considered by the Probable Cause Panel, not part of the three-count Complaint filed by Secretary Dove, and not part of the alleged misconduct considered by the Hearing Panel in this case – within the purview of this Commission.

⁵See Exhibit B, Affidavit of Nena Hankins, of the League, at ¶ 5.

⁶See Id., at ¶ 9; O’Toole Affidavit, at ¶ 15.

⁷See Id., at ¶¶ 10-12.

But the clear mandate of the Commission is limited to review of the matters decided below, and its defined power does not include the relief Complainant is seeking.

– Law and Argument –

This Commission is not a free-roving panel charged with monitoring and correcting every campaign statement made by the Respondent, or any other judicial candidate. It is not a truth commission, with the plenary power to compel her, or anyone else, to publish statements that the Complainant – and the judicial candidate on whose behalf he is admittedly acting – deems fit.⁸

Rather, the Commission is a quasi-judicial body with a defined task, to wit, reviewing and acting upon the determination of the Hearing Panel below.

The commission shall expedite its consideration of the report and may make its determination from the report of the hearing panel, permit or require the filing of briefs, conduct oral argument, or order the hearing panel to take additional evidence. If the commission concludes the record supports the hearing panel's finding that a violation of Canon 4 has occurred and there has been no abuse of discretion by the hearing panel, the commission may enter an order that includes one or more of the following

OHIO R. GOV. JUD. II, SECT. 5(D)(1)(WEST 2012).

Nor are the powers of this Commission plenary. It is limited to taking action based upon the determinations of the hearing panel. Again, if it finds no abuse of discretion by that Panel (which, we note, it has not yet done) “ the commission may enter an order that includes one or more of the following:”

⁸It is no secret that the Complainant has, since the outset of this case, been acting on behalf of Mary Jane Trapp, the sitting appellate judge against whom the Respondent is running in November. The Complainant, Mr. Davis, testified before the Hearing Panel on September 18, 2012. On cross examination, he admitted that the grievance that initiated this matter was drafted by the Trapp campaign, that he signed it at the request of Judge Trapp and her husband, that the campaign selected attorneys, including his present counsel, to prosecute that claim, and that he expects those attorneys to be paid by the Trapp campaign. (Tr. at 190-91).

- (a) A disciplinary sanction against the respondent;
- (b) An order enforceable by contempt of court that the respondent cease and desist from engaging in the conduct that **was found to be in violation** of Canon 4;
- (c) A fine imposed against the respondent;
- (d) An assessment against the respondent of the costs of the proceeding;
- (e) An assessment against the respondent of the reasonable and necessary attorneys fees incurred by the complainant in prosecuting the grievance.

OHIO R. GOV. JUD. II, SECT. 5(D)(1)(A)-(E)(WEST 2012)(emphasis added).

The interim cease and desist order issued by the Commission on October 5, 2012, of course, is what the Complainant is asking the Commission to expand.

But the power of the Commission to issue that Order in the first place, and a fortiori its power to subsequently modify that Order, is also strictly delimited by rule.

Upon recommendation of the hearing panel, motion of the complainant or sua sponte, the commission may enter an interim cease and desist order as it finds reasonable and necessary prior to making the determination required by division (D)(1) of this section. **The interim order shall be based on the commission's preliminary review of the report and recommendation of the hearing panel and any record made before the commission.**

OHIO R. GOV. JUD. II, SECT. 5(D)(2)(WEST 2012)(emphasis added).

The conduct alleged in the motion at bar was not addressed in the Report and Recommendation of the Hearing Panel, was not a part of the record made before that panel, and was not alleged in the Complaint considered by that panel. It was not supported by testimony subject to cross examination and, in short, is not a part of this case. Considering, much less acting upon the allegations contained in the motion sub judice would be beyond the purview of this Commission.

Even if the Commission were to consider the statement included in the League's voter guide, it should not compel its retraction, because the statement does not violate Rule 4.3 on its face.

The Complainant (Answer Brief to Respondent's Objections, at 4-5) has taken the position that Rule 4.3 is narrowly tailored – unlike similar judicial canons invalidated in Georgia, Alabama and Michigan – because it affords breathing space for negligent misstatements made by candidates during the course of a campaign, and only punishes knowing and reckless misstatements.⁹

We have argued (Objections, at 6) that he is incorrect, and we maintain that position here. But the Complainant wants to have it both ways. He claims (Answer to Objections, 4-5) that Rule 4.3 punishes only culpably – and not negligently – false and misleading statements.

And yet now he asks the Commission to compel the Respondent to print the retraction he has drafted despite there being absolutely no evidence to support the contention that she willfully or recklessly misinformed the League.¹⁰

⁹We believe, and if afforded the opportunity will convincingly demonstrate, that his efforts to distinguish *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002), *Butler v. Alabama Judicial Inquiry Commission*, 11 F.Supp.2d 1224 (M.D. Ala. 2000) and *In Re Chmura*, 608 N.W.2d 31 (Mich. 2000) on this basis are wholly without merit. This is especially so given the manner in which the Supreme Court in *United States v. Alvarez*, 132 S.Ct. 2536, 2545-48 (2012) refused to read its own *dicta* in *Brown v. Hartlage*, 456 U.S. 45 (1982) to create a categorical rule permitting the punishment of false political speech, provided liability was not imposed without the sort of fault established in the constitutional libel cases, starting with *New York Times v. Sullivan*, 376 U.S. 254, 271-72 (1964). The notion that the imposition of an actual malice standard would have saved the canons invalidated in *Weaver*, *Butler* and *Chmura* cannot distinguish Rule 4.3 from the canons invalidated in those cases for two reasons: (a) because Rule 4.3 imposes liability for both true and false statements, and; (b) because in *Alvarez*, the Supreme Court made clear that the actual malice standard announced *Sullivan* – which it created as a shield to protect speech at the edge of veracity – may not be used by the government as a sword to justify restrictions on even false speech.

¹⁰The fulminations and the speculation of the Complainant (Motion at 3-4) regarding what he calls the disdain of the Respondent for the Ohio Supreme Court, and its rules, are not evidence. They are, however, the sum total of what he offers as proof of willful or reckless intent here.

The attached affidavits, which are the only evidence of intent before the Commission, establish that misinformation was provided to the League through an oversight.

Of course, for the reasons set forth in our Objections to the Findings and Recommendations of the Hearing Panel, we contend that Rule 4.3 is unconstitutional to the extent that it prohibits even false political speech, and certainly unconstitutional to the extent that it prohibits or allows punishment for misleading speech, whether intentionally, recklessly or negligently made.

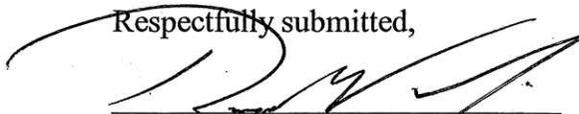
For those reasons, which we incorporate by reference here, granting the motion at bar would in itself violate the First Amendment.

It would also be an egregious violation of the First Amendment to punish the Respondent for the statements she made in the press regarding the Hearing Panel, its determination, her rights under the First Amendment and her intention to appeal. Her positions are grounded in the arguments she has presented to the Hearing Panel and to this Commission.

They are based upon a reasoned consideration of both the decision in *Crawford v. O'Neill*, 132 Ohio St.3d 1472 (2012), the recent decision in *Alvarez*, and the line of cases in which canons similar to Rule 4.3 have been invalidated. And they are her informed opinion, on a matter of law, to which she is entitled. To punish her for articulating her opinion would be to punish her for criticizing an agency of the state, the archetypical First Amendment violation.

The Motion to Amend should be denied.

Respectfully submitted,



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Telecopier: 216-781-8207

Counsel for the Respondent

- Exhibit A -

STATE OF OHIO)
) SS
COUNTY OF LAKE)

AFFIDAVIT

NOW COMES COLLEEN MARY O'TOOLE, and having been first duly sworn and cautioned, avers and states as follows:

1. I am an attorney at law, licensed to practice in the State of Ohio, with offices in Concord Township, Lake County, Ohio, practicing part-time.
2. I have personal knowledge of the matters testified to herein.
3. I am CEO of On Demand Interpretation Services, LLC.
4. I am an adjunct professor at Kent State University, Trumbull Campus.
5. I am a candidate for the Ohio Court of Appeals, Eleventh Appellate District in the upcoming general election.
6. As a candidate for the Eleventh Appellate District, my campaign has no paid or professional staff, but consists entirely of unpaid volunteers family members and myself. The volunteers assist in the campaign by responding to surveys, and attending speaking engagements as well as other traditional campaign activities. Most of the surveys contain standard questions and answers which are routinely cut and pasted into electronic forms on line by said volunteers. All surveys have timelines, all are due approximately at the same time.
7. The Eleventh Appellate District is a daunting and challenging race comprises five counties; is some 3,000 square miles in extent; and, has some 650,000

persons resident in it. I have attended over 165 campaign events, five county fairs since May..

8. As a candidate for the Eleventh Appellate District, my campaign has filled out questionnaires submitted by, and or had interviews with, five newspapers, including *The Plain Dealer*, *News Herald*, *The Vindicator*, *The Geauga County Maple Leaf*, and *The Tribune Chronicle*.
9. As a candidate for the Eleventh Appellate District, my campaign has submitted candidate surveys and attended forums hosted by, the Tea Parties of Portage, Lake and Geauga counties amongst others.
10. As a candidate for the Eleventh Appellate District, my campaign has responded to questionnaires prepared by the bar associations of, Lake, and Geauga counties.
11. As a candidate for the Eleventh Appellate District, my campaign has responded to questionnaires submitted by COPE, the Telephone Consumer Rights Bar Association, and AFSCME Power In Action and The United Auto workers.
12. As a candidate for the Eleventh Appellate District, my campaign has filled out forms submitted by the League of Women Voters for Ashtabula, Lake, Geauga, and Trumbull Counties.
13. As a candidate for the Eleventh Appellate District, I have attended forums hosted by the League of Women Voters on over 15 occasions.

14. On September 26 2012 I was made aware that the electronic survey of the Kent League of Women Voter, contained an unintentional error in regard to my occupation submitted by a volunteer.
15. On September 26 , 2012 I was made aware of the error described I requested that the Kent League of Women Voters correct it, I spoke to Neena Hankins who assured me the error was corrected, I later learned that some electronic copies of the uncorrected version had already been printed. All other printed and electronic media went forward without incident. There was no deliberate attempt to supply erroneous information.

FURTHER AFFIANT SAYETH NAUGHT.


COLLEEN MARY O'TOOLE

SWORN TO BEFORE ME AND SUBSCRIBED in my presence this 16th day
of October, 2012.


NOTARY PUBLIC

BRIAN S. SCHICK, ATTORNEY
NOTARY PUBLIC – STATE OF OHIO
MY COMMISSION DOES NOT EXPIRE

- Exhibit B -

STATE OF OHIO)
) SS
COUNTY OF PORTAGE)

AFFIDAVIT

NOW COMES NENA HANKINS, and first being duly sworn and cautioned, deposes and states as follows:

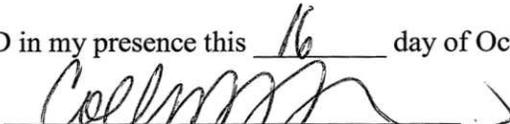
1. I have personal knowledge of the matters testified to herein.
2. I am Voter Guide Chairperson for the League of Women Voters of Kent, Ohio.
3. This is an accurate log of communications made with Colleen M. O'Toole regarding the listing of her occupation with the League of Women Voters for the upcoming election.
4. 7/27/12 E-mail: Candidate was invited to participate in vote411 and post biographical information and answers to questions.
5. 8/20/12: Candidate posted to vote411.
6. 9/1/12 E-mail: Candidates were notified that responses would be sent on September 4, 2012 to other Local Leagues to be included in their Voters' Guides.
7. Responses were sent to other Local Leagues on September 4, 2012.
8. 9/24/12: Received e-mail stating that O'Toole's occupation is not Judge of the 11th District Court of Appeals.
9. 9/26/12: Sent the following e-mail to Colleen O'Toole: "Ms. O'Toole: I received an inquiry about your posting on vote411 for the Voter Guide prepared by the League of Women Voters of Kent. Your occupation is listed as Judge of the 11th Court of Appeals. Since you last served in 2011, would you like to change that to your current occupation? I can make the change for you. I will be extracting the information tomorrow to send to the Record Courier to be published in the newspaper.
10. 9/26/12: Received a telephone call from Ms. O'Toole. She gave me the information to correct the occupation.
11. 9/26/12: Occupation was corrected on the vote411 website.
12. 9/26/12: Email was sent to Local Leagues with corrections to Voter Guide.

FURTHER AFFIANT SAYETH NAUGHT.



NENA HANKINS

SWORN TO BEFORE ME AND SUBSCRIBED in my presence this 16 day of October, 2012.


NOTARY PUBLIC

Notary Public
State of Ohio
Colleen M. O'Toole
Attorney No Expiration Date

STATE OF OHIO)
) SS
COUNTY OF PORTAGE)

AFFIDAVIT

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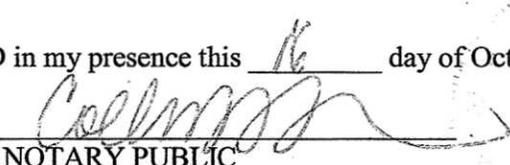
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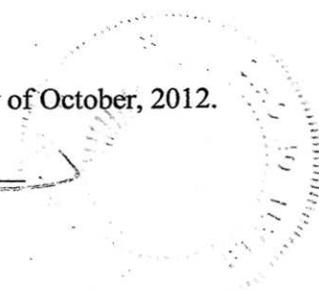


NENA HANKINS

SWORN TO BEFORE ME AND SUBSCRIBED in my presence this 16 day of October, 2012.


NOTARY PUBLIC

Notary Public
State of Ohio
Colleen M. O'Toole
Attorney No Expiration Date



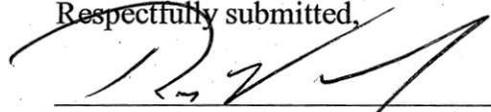
– Certificate of Service –

True and accurate copies of the *foregoing Respondent's Response in Opposition to The Motion of the Complainant Seeking to Amend the Order of October 5, 2012* were served today, October 16, 2012, upon each of the following via Federal Express next morning service:

Mary Cibella, Esq.
614 West Superior Avenue,
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Steven C. Hollon, Esq.
Administrative Director
Allen Asbury,
Administrative Counsel
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65 South Front Street
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Respectfully submitted,



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