

IN THE SUPREME COURT OF OHIO

Disciplinary Counsel	:	Case No. 2013-1623
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Relator,	:	
	:	
v.	:	
	:	
Judge Joy Malek Oldfield (0073065)	:	
	:	
Respondent.	:	
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**RESPONDENT'S RESPONSE TO RELATOR'S OBJECTIONS  
TO THE BOARD OF COMMISSIONERS ON GRIEVANCES AND  
DISCIPLINE'S FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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*Respondent*

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This case came before a Panel of the Board of Commissioners on Grievances and Discipline for hearing on Relator's one count complaint. The Panel issued recommendations, which the Board of Commissioners on Grievances and Discipline adopted. Relator's single count complaint contained four separate alleged violations, only one of which is now before the Court on Relator's Objections. Relator does not object to any of the Board's findings of fact. Relator solely objects to the Board's decision to dismiss the alleged violation of Jud. Cond. R. 1.3., finding Relator failed to prove, by clear and convincing evidence, that Respondent attempted to use her judicial office or title to prevent the arrest of Catherine Loya.

Before addressing the flaws in Relator's legal arguments, a review of the parties' stipulations and the Board's findings of fact is necessary. Although Relator does not

object to any of the Board's findings of fact, Relator misconstrues the facts throughout its Objections.

**Review of the Findings of Fact as Set Forth by the Board**

The initial facts have never been in dispute. During the evening of Sunday, February 5, 2012, Respondent and her husband attended two social engagements. Stipulations, ¶6. After spending approximately two hours at the first party, Respondent and her husband arrived at the second party shortly before 11:00 p.m. *Id.* at ¶7. Attorney Catherine Loya also attended this second party, arriving approximately one half hour after Respondent and her husband arrived. *Id.* at ¶8. Around midnight, Respondent's husband left the party, and Respondent stayed at the party. *Id.* at ¶9. At Respondent's husband's request, Ms. Loya agreed to drive Respondent home. *Id.* at ¶10.

Sometime between 1:00 and 1:30 a.m., Respondent and Ms. Loya left the party in Ms. Loya's car. *Id.* at ¶11. At approximately 1:45 a.m. Copley Police Officer Tom Ballinger observed a car in the Ridgewood shopping plaza parking lot. *Id.* at ¶12. Officer Ballinger pulled his police car around behind the vehicle, turned on his spot light, but did not activate his overhead lights. *Id.* at ¶12. What happened after Officer Ballinger arrived on scene has been disputed throughout this case.

Relator alleged in the complaint and argued at the hearing that Officer Ballinger found Respondent and Ms. Loya involved in a sexual encounter in the car. The Board found, however, that such activity was not established by the evidence and "specifically excluded this evidence from its analysis and from the findings of fact, conclusions of law, and recommendations contained in [it's] report." Findings of Fact, Conclusions of Law, and Recommendation ("Findings of Fact"), ¶14. Despite not objecting to any of the

Board's findings of fact, Relator's Objections continue to refer to the alleged sexual activity. As there is no objection regarding the Board's finding on this point, these discredited allegations are irrelevant and should not have been raised in this forum.

What is relevant is what happened after Officer Ballinger arrived in the parking lot and what happened soon thereafter. As the Board found:

Upon his initial approach to the car, Officer Ballinger asked for and received identifying information from Loya and Respondent and then returned to his cruiser to advise his dispatcher and to "start running their information." At this time, two other officers of the Copley Police Department, Officer Darrell Garner and Officer Brian Price, arrived on the scene. The three of them returned to the Loya vehicle. At this time, Loya was sitting in the front driver's seat and Respondent in the front passenger seat. Loya was asked to exit the car. She complied but refused to perform a field sobriety test. Loya was then placed under arrest. Findings of Fact, ¶15 (internal citations omitted).

The parties agreed in their stipulations that at some point during discussions with the police officers, Respondent indicated she was a judge. Stipulation, ¶23. However, that is where the agreement ended. Respondent adamantly denied she offered up this information voluntarily.

In its Objections, Relator sets out its version of events—what it argued Respondent allegedly said to the police officers regarding her position as a judge. This version of events is not what the Board actually found.

First, Relator mischaracterizes the evidence related to what was said by Respondent in the parking lot. The Board's findings are summarized as follows:

Officer Ballinger testified that when he began handcuffing Loya, Respondent said "Oh don't do that. I'm the one that's been drinking. Will it help if I tell you I'm a judge?" Findings of Fact, ¶16, citing Transcript ("Tr."), p. 53-55. No other witness heard Respondent say this, and Respondent denied it. *Id.* Relator subpoenaed Officer Garner

to testify at the hearing but did not call him as a witness. Thus, the Panel never had an opportunity to assess his credibility. In a report, Officer Garner wrote that Respondent said something altogether different: “Do you know who I am? It was me who was drinking.” *Id.* at ¶17, citing Joint Exhibit 1, page 4. Again, Respondent denies she said this. *Id.* And Officer Ballinger, Officer Price, and Loya testified they never heard Respondent say this. *Id.* citing Tr. 112, 162-163, 317. Interestingly, evidence at the hearing established that under either Officer Ballinger’s rendition of events or Officer Garner’s rendition of events, they heard the judge make her purported statements while standing on the other side of the car. Officers Ballinger and Garner were on the driver’s side of the vehicle, by Ms. Loya. Only Officer Price was on the judge’s side of the vehicle, and he testified he never heard Respondent make either of the statements alleged by the other officers.

Respondent testified that she only said she was a judge in response to a direct question from Officer Garner.<sup>1</sup> Ms. Loya was refusing to take the field sobriety tests. Respondent repeatedly told the officers that it was she, not Ms. Loya, who had been drinking. When Officer Garner asked Respondent why Ms. Loya would not take the field sobriety tests, Respondent attempted to explain that the tests are not always reliable, at which point Officer Garner responded, “What are you, some kind of lawyer?” As the Board noted, “Respondent honestly replied: ‘Yeah, actually I’ve been an attorney for some time, and now I’m a judge.’” *Id.* at ¶19, citing Tr. 193-194.

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<sup>1</sup> Initially, when asked for identification, Respondent did not want to provide it for this very reason: “I did not want to identify who I was. I thought we were in Fairlawn, which is my own jurisdiction, and I didn’t want to say my name. I thought he would recognize it.” Tr. 188.

Relator further mischaracterizes Respondent's interactions with Officer Price following Ms. Loya's arrest. Officer Price testified that in the parking lot, Respondent said she was embarrassed because she was a judge:

She mentioned this was very embarrassing. I said, "Yes, ma'am. I understand that." She goes, "Well, you don't understand. I'm a judge, so it's really embarrassing." I said, "Yes ma'am, I imagine it would be." Tr. at 142.

Relator argues that while in the cruiser, Respondent "repeatedly told Price she was embarrassed, *especially since she was a judge.*" Objections, p. 3. That was not Officer Price's testimony. He testified that on one occasion she said, "I'm a judge, so it's really embarrassing." Tr. 142. Otherwise, Officer Price said she "just kept reiterating it was very embarrassing." Tr. at 148. She did not continually mention she was a judge.

Relator also alleges that Respondent "repeatedly" told Officer Price, "I'm not trying to use my position as a judge, I just want to know if there is anything I can do." Price testified she said this "one time." Tr. at 148. Officer Price confirmed again on cross-examination that Respondent said it once:

She just said once, "Is there anything you can do? I don't want my – I don't want you to think that me being a judge" – something to that effect. "I don't want you to think just because I'm a judge\*\*\*." Tr. 164.

Officer Price—who Respondent had far more contact with than either of the other officers—testified immediately following this that he "never got that feeling that she was trying to use her judgeship to get Ms. Loya out of anything: "To me, it came across as she was concerned for her friend, she wanted to know if there was anything she could or anything we can do, you know, you make it easier." Tr. 164.

Respondent's testimony paralleled that of Officer Price. She qualified her question to Officer Price but only because she felt she had to. Respondent testified that after responding to Officer Garner's initial question, "what are you, some kind of lawyer," he hammered her on her title:

[E]very single time he (Officer Garner) addressed me after he learned I was a judge was sarcastic and rude. "Oh, okay, Judge." "You want to know how this works, Judge." "Judge we don't unarrest people." I said, "Is this really an arrest?" "You ought to know what an arrest is, Judge." Tr. at 403.

Officer Garner put Respondent in the exact position Relator is complaining about. He forced her, by his tone and his constant reference to her a judge, to qualify that she did not want any special treatment because she was a judge. Relator claims Respondent "repeatedly stat[ed] she was a judge, and qualif[ied] the statement by stating that she did not want any special treatment." Objection, p. 6. But Relator's contention is directly contrary to Respondent's testimony and that of Relator's own witness, Officer Price's testimony. Respondent did not repeatedly state she was a judge, but once it was out, Officer Garner made such an issue about it that Respondent felt she had to make clear that she did not want special treatment:

I went through a few minutes of not wanting him (Officer Garner) to know who I was in the first place. And then an angst-filled moment of, God, I got to admit it now. And then what seemed like an eternity of correcting this idea, you – you know, you're a judge, you're a judge, and constantly saying, "You don't have to call me that. I'm – I'm a person here. Don't do any" – like I said, you know, yesterday, when Officer Price said – I said, "Can I talk to her when we get back?" He said, "I can't let you back in the booking room." And I said, "Oh, okay. Yeah. Don't – Don't let me do anything I'm not allowed to do. \* \* \* [H]e wasn't rude about it, but it was just a constant correcting because I wanted to make sure after Officer Garner's, you know, nasty remarks to me that nobody thought I was doing that. I didn't know how else to ask for what I thought I wanted to know unless I prefaced it with I'm not doing this because of who I am. Because Officer Garner make it sound like that was the only thing that was important, who I am. Tr. at 404-405.

Relator mischaracterizes the evidence and the Board's findings by asserting that Respondent repeatedly informed the Copley police officers she was a judge. But she *only* identified herself as a judge after she was asked a pointed question. Any reference thereafter to not wanting special treatment was a reaction to Officer Garner's incessant and antagonistic use of the word "judge" and Respondent's lack of knowledge regarding what—as a citizen, not a judge—she was permitted to do in order to help her friend.

With the facts as the Board found them put into perspective, Respondent can address the real question before this Court—did Respondent attempt to use the prestige of her office to gain personal advantage or deferential treatment for Ms. Loya. The Board correctly found she did not.

### **Response to Relator's Legal Argument**

Contrary to Relator's contention, nowhere in Rule 1.3 or the comments to the rule does it state the rule "demands an objective standard." Objection, p. 4. In fact, reading the rule itself indicates otherwise. The rule states, "A judge shall not abuse the prestige of judicial office **to advance the personal or economic interests of the judge or others**, or allow others to do so." The comment to the rule says it is improper to use or attempt to use a judge's title to gain personal advantage or deferential treatment. As written, there must be some intent to gain personal advantage or deferential treatment. Without that intent, there can be no violation of the rule. Thus, the judge's subjective intent, whether she intended to use her title to gain an advantage or deferential treatment, is directly at issue.

Relator spends a fair amount of time arguing "the rule focuses on the attempt, not the result." (Objection, p. 5.) But this argument does not support Relator's assertion

that the rule requires application of an objective standard. The definition of the word “attempt” requires intent: “An overt act that is done with the intent to commit a crime but that falls short of completing the crime.” *Black’s Law Dictionary*, (2<sup>nd</sup> Ed. 2009). In other “attempt” situations, intent is a required element. See, e.g., *State v. Brown*, 8th Dist. No. 92814, 2010 Ohio 661, ¶52, citing *State v. Clark*, 101 Ohio App.3d 389, 405, 655 N.E.2d 795 (8th Dist.1995) (holding that “in order to convict a person of attempted murder, the state must prove that the defendant acted purposefully in attempting to take the life of another. This court previously has held that a jury may find intent to kill where the natural and probable consequence of a defendant’s act is to produce death, and the surrounding circumstances support a conclusion that a defendant had a specific intention to kill.”) For a rule violation to have occurred, an attempt must still be undertaken in an effort “to advance the personal or *economic interests* of the judge or others.” There must be intent, so a subjective standard must apply.

There are practical reasons why a subjective standard must be used as well. If an objective standard is applied, the simple act of a judge speaking his or her title in certain contexts would constitute a violation. For example, if a judge were asked during a traffic stop, “what do you do for a living?”, the judge would have to refuse to answer. Giving a truthful answer would, under Relator’s proposed objective standard, constitute a violation. Similarly, if a judge were in court, as a witness or a party, she could not answer a question that would elicit a response that disclosed the fact that she is a judge. Such a standard is completely unworkable; it puts a prohibition on the judge that focuses solely on the use of the title and ignores the second half of the rule, which requires the judicial title be used to gain personal advantage or deferential treatment.

Relator's proposed objective standard reads these requirements out of the rule and instead, imposes a blanket prohibition against a judge ever stating her title, even in response to a question.

**A. Under either standard, Respondent did not intend to advance the personal or economic interests of herself or anyone else.**

The evidence at the hearing was clear—Respondent did not use or intend to use her judicial title to her advantage or to receive deferential treatment for Ms. Loya. As set forth above, Respondent did not even want to identify herself by name, let alone title. Tr. 188. When she did, it was only because it was the honest response to Officer Garner's question, "what are you, some kind of lawyer." Tr. 194.

Beyond that, Respondent was in a new situation. She had never been arrested or in an arrest situation before. Tr. 401. She had only been a judge for approximately one month. She did not know what she, or any other citizen, was allowed to do to help her friend in this situation. She wanted to help her friend, but "only within the bounds of what [she was] obviously allowed to do, but just as a person, because [she] knew [Ms. Loya] hadn't been drinking." Tr. 404.

As the Board noted, the evidence showed that Respondent continually asked Officer Garner not to call her judge, in response to the fact he "repeatedly and sometimes mockingly referred to Respondent by her judicial title." Findings of Fact, ¶20. In fact, Officer Price, testified Respondent told him she did not want any special treatment because she was a judge or for any other reason. Tr. 164. Officer Price further testified he "never got that feeling that she was trying to use her judgeship to get Ms. Loya out of anything." Tr. 164. To him, it came across as though she was concerned for her friend. *Id.*

Relator contends the Board's reliance on Officer Price's testimony shows the Board was applying a subjective standard. But the focus under the Rule is an attempt to influence – which necessarily involves the Respondent's intent. Officer Price's perception is relevant evidence of Respondent's subjective intent. And Officer Price believed that Respondent was not intending to use her judicial title to receive favorable treatment.

The Board found this evidence compelling and, taking the evidence as a whole, properly determined Relator failed to establish by clear and convincing evidence that Respondent used or alluded to her judicial status to gain favorable treatment. Findings of Fact, ¶22. There simply was no evidence, much less clear and convincing evidence, that Respondent hoped or intended to receive deferential treatment because she was a judge.

**B. The New York cases cited by Relator are not analogous to this case.**

Relator cites two New York cases that it contends support its argument that Respondent used or attempted to use her judicial status to gain preferential treatment for Ms. Loya. Relator's comparison is flawed.

Both cases involve a judge "gratuitously" providing his title with the clear intent to sway the officers from arresting the judge. In *Werner*, the judge was pulled over and, in response to the officer's request for identification, he handed the officer his driver's license *and his judicial identification card*. The New York Commission on Judicial Conduct found that in doing so, the judge "gratuitously interjected his judicial status into the incident, which was inappropriate." *In re the Matter of Jeffrey Werner*, 2002 WL 31267501, at p. 4 (N.Y.Com.Jud.Cond. October 1, 2002).

In *Hensley*, again the judge was found to have “made two gratuitous references to his judicial status, conveying an appearance that he was asserting his judicial position to obtain special treatment.” *In re the Matter of Paul M. Hensley*, 2012 WL 2786178 (N.Y.Com.Jud.Cond. June 22, 2012). When asked for identification by a police officer during an arrest situation, the judge provided his judicial identification card, asked to speak to someone in charge, again referred to his judicial office, and volunteered that he had just been re-elected to the bench.

Unlike the judges in the New York cases, Respondent did not even want to identify herself when first asked by the officers. She did not gratuitously interject her title into the situation; she withheld that information until she felt it would be dishonest of her not to in response to a direct question by Officer Garner. The facts of the New York cases make clear those judges intended to use their judicial title to gain favorable treatment. Why else would the judges have provided the information in the manner in which they were found to have done so? Respondent’s actions here contrast sharply with the actions of the judges in the New York cases. The cases Relator cites are clearly not analogous to this case.

### **Conclusion**

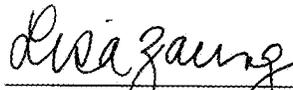
Respondent did not interject her title into the situation in the parking lot. She did not gratuitously tell the officers she was a judge. Respondent answered a direct question from a police officer with a direct answer. It is easy to sit in review, after the fact, and say she should have said something else when asked if she was an attorney. But in the moment, her answer was honest and direct. It was late at night, and she found herself in a situation she never dreamed she would be in. She did not want to lie to the officer, so

she answered honestly. And then everything changed. Officer Garner's repeated use of the word judge, in a mocking and antagonistic manner, changed the situation.

Respondent's comments after disclosing the fact that she was a judge were not made with any intent to persuade the officers to give her or Ms. Loya preferential treatment. She repeatedly asked the officers not to refer to her by her title. She only asked for permission to do what any other individual in that situation could do—no more, no less. She testified she did not want preferential treatment and Officer Price—the only person who dealt with her beyond the parking lot—testified he did not believe she was seeking preferential treatment.

Relator had the burden to establish by clear and convincing evidence that Respondent attempted to use her judicial office or title to prevent the arrest of Catherine Loya in violation of Jud. Cond. R. 1.3. Relator was unable to meet that burden, and its objection should be overruled.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I served a copy of the foregoing by First-Class U.S. Mail, postage prepaid, on this 16<sup>th</sup> day of December, 2013, upon:

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