

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

In re: Judicial Campaign Complaint
Against Elizabeth Burick

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Case No. 98-2266

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 pursuant to Gov. Jud. R II, Section 5(E)(1) and R.C. 2701.11. The commission members are: Judges Peggy Bryant, Ann Marie Tracey, Richard K. Warren, Frederick C. Hany II, and Charles E. Henry, Chair.

On September 28, 1998, the complainant, Charles E. Brown, filed a complaint with the Board of Commissioners on Grievances and Discipline of the Supreme Court. The complaint alleged that the respondent, Elizabeth Burick, had violated various provisions of Canon 7 of the Code of Judicial Conduct by disseminating campaign advertisements and other materials that contained false or misleading information about her opponent or that contained pledges or promises of conduct in office other than the faithful and impartial performance of judicial duties. Following a review by a probable cause panel of the Board pursuant to Gov. Jud. R. II, Section 5(C)(1)(a) and based on instructions from that panel, the Secretary of the Board filed a formal complaint alleging that the respondent, during the course of a judicial campaign, committed four separate violations of Canon 7 of the Code of Judicial Conduct:

- Knowingly misrepresented certain facts in campaign communications concerning her opponent, Judge Sara Lioi; namely, stating that, “Less than one year ago, the political bosses appointed a new judge to our courts.” This statement was alleged to constitute a violation of Canon 7(B)(2)(f) and (E)(1). [Count I.]
- Made, in writing and in television advertisements, pledges and promises of conduct in office regarding use of the death penalty; namely, “Elizabeth Burick will be a tough Judge that supports the death penalty and isn’t afraid to use it,” and “Burick favors the death penalty for convicted murderers.” These statements were alleged to constitute violations of Canon 7(B)(2)(c) and (d). [Count II.]
- Authorized her campaign committee or others working on her behalf to make false and misleading statements regarding a criminal case pending on the docket of Judge Sara Lioi; namely referring to a criminal defendant, sentenced by Judge Lioi, as a rapist and alleging that this individual received a lenient sentence, when in fact the defendant pleaded guilty to a charge of sexual battery and received the maximum sentence. These statements were alleged to be in violation of Canon 7(B)(2)(e) and (f), (E)(1), and (F). [Count III.]

- Disseminated a campaign letter dated July 13, 1998 and other campaign material that falsely implied she held the position of judge, contained misleading statements regarding sentencing practices, and falsely stated that she had received labor union and Fraternal Order of Police endorsements. These statements were alleged to constitute violations of Canon 7(B)(2)(f), (D)(1) and (10), (E)(1), and (F). [Count IV.]

On October 23, 1998, a hearing panel appointed by the Board of Commissioners on Grievances and Discipline conducted a hearing on the allegations contained in the formal complaint. On October 26, 1998, the hearing panel issued its findings of fact, conclusions of law, and recommendations in this matter.¹ The hearing panel concluded that the communications and activity alleged in Counts I, II, and III of the formal complaint constituted violations of the referenced provisions of Canon 7. With regard to the violations alleged in Count IV, the hearing panel concluded that the respondent did not falsely imply that she currently held the position of judge, mislead the public with respect to her potential sentencing practices, or falsely state the nature of endorsements she received from labor unions and the Fraternal Order of Police.

In assessing the severity of the respondent's misconduct, the hearing panel found that the respondent failed to address these violations after they had been called to her attention and that she continued to broadcast and distribute the offending campaign advertisements and other materials through the date of the hearing. The hearing panel recommended sanctions including a public reprimand, a \$5,000 fine, and a cease and desist order. The panel further recommended that the respondent be ordered to pay the complainant's attorney fees and be assessed the costs of these proceedings.

Subsequent to the date the hearing panel's report was issued, the respondent filed three documents on October 27, 28, and 30, 1998. In these filings, the respondent certified that she had ceased and desisted from disseminating the statements found by the hearing panel to be in violation of Canon 7 and outlined the efforts, following the October 23 hearing, to withdraw campaign advertisements and literature containing these statements. The filings also contained statements to the effect that the respondent accepted responsibility for the violations found by the hearing panel and agreed to abide by and comply with the sanctions recommended by the hearing panel.

On October 27, 1998, the Supreme Court of Ohio appointed a five-judge commission to review the hearing panel's report pursuant to Gov. Jud. R. II, Section 5(E)(1). The commission was provided with the record certified by the Board of Commissioners on Grievances and Discipline, a complete transcript of the October 23, 1998 proceeding before the hearing panel, and the exhibits presented at that hearing.

The commission met by telephone conference on October 30 and November 30, 1998 and January 13, 1999. Following the initial telephone conference, the Commission issued an order allowing the parties the opportunity to file written briefs and requiring the respondent to cease and desist from further disseminating the statements found by the hearing panel to be in violation of Canon 7. Following the second telephone conference, the parties were ordered to submit information regarding the complainant's attorney fees and costs. The briefs and other materials

¹ The hearing panel's report is attached to this order as Appendix A.

filed by the parties were considered by the commission in reviewing the record and the hearing panel's report and recommendation.

Pursuant to Gov. Jud. R. II, Section 5(E)(1), we are charged with reviewing the report of the hearing panel and have discretion in establishing procedures used to conduct our review. However, the legal standard governing our review goes beyond the abuse of discretion standard argued by the respondent in her reply brief. Rather, Gov. Jud. R. II, Section 5(E)(1) requires that we independently review the record before us and ascertain whether clear and convincing evidence exists to support a determination that the respondent violated Canon 7.

The commission affirms the findings of fact and conclusions of law made by the hearing panel as they relate to Counts I, II, and III of the complaint. Respondent's advertisements alleging that her opponent was appointed by political bosses, when in fact the appointment was made by the Governor, was false and misled the public as to the process prescribed in Article IV, Section 13 of the Ohio Constitution for filling vacancies in judicial office. Attorneys, and especially those who are seeking election to judicial office, have an obligation to further, not obscure, the public's understanding of the law and legal system. While judicial candidates may point out that they or their opponents have benefited from the constitutional appointment process and acknowledge the role that politics plays in this process, statements in this regard should be accurate so as to enhance the public's understanding of the process. Statements such as those made by the respondent in this instance fail to satisfy this standard and constitute clear and convincing evidence of a violation of Canon 7(B)(2)(f) and (E)(1).

The commission also agrees with the hearing panel's conclusions that the respondent's statements regarding her support for and intended use of the death penalty constitute clear and convincing evidence of a violation of Canon 7(B)(2)(c) and (d). While these statements may be appropriate in nonjudicial elections, judicial candidates must guard against making statements in the course of their campaigns that adversely reflect on their impartiality. At the very least, the respondent's statements imply to a reasonable person that she will use the death penalty in a capital case, regardless of the evidence produced during the mitigation phase of trial and notwithstanding the statutory standards a judge or jury must consider in determining the appropriateness of the death penalty. As such, these statements are contrary to the prohibitions contained in Canon 7(B)(2)(c) and (d).

With regard to the statements concerning Judge Lioi's sentencing that are referenced in Count III of the complaint, we note that Canon 7(B)(2)(e) does not require us simply to ascertain whether the case on which respondent was commenting was pending on her opponent's docket. Rather the question is whether the case was pending on the docket of *any* judge at the time the statements were made. As noted in *John Ken Alzheimer's Ctr. v. Ohio Cert. of Need Review Bd.* (1989) 65 Ohio App.3d 134, 138, "[t]he Supreme Court of Ohio has previously defined the term 'pending' to include actions which a lower tribunal has finally adjudicated, but from which an appeal has not yet been taken. See *Hupp v. Hock-Hocking Oil & Natural Gas Co.* (1913), 88 Ohio St. 61, 66-71, * * * and *Bode v. Welch* (1875), 29 Ohio St. 19, 22. See also, *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 104 * * *.

Judge Lioi's judgment entry imposing sentence on the defendant was filed on August 21, 1998. The defendant had thirty days from that date to file a notice of appeal and did so on September 15, 1998. According to the testimony of the parties, the statements in question were made between these two dates. Using the Supreme Court's definition cited above, the case was pending during this period of time, and the respondent's statements were in violation of Canon 7(B)(2)(e).

We also find clear and convincing evidence that these statements violate Canon 7(B)(2)(f), (E)(1), and (F). The survey conducted on behalf of the respondent's campaign stated that the defendant "repeatedly raped" a minor victim for which he received a sentence of "only five years." The record indicates that the defendant did not plead guilty to and was not convicted of multiple rapes, but instead pleaded guilty to a single charge of sexual battery for which he was sentenced to the maximum term of incarceration allowed by law. These statements obviously convey false and misleading information regarding the disposition of the criminal case and misrepresent facts related to the trial judge's consideration and disposition of this case.

The hearing panel concluded that the statements referenced in Count IV of the complaint were not contrary to Canon 7(B)(2)(f), (D)(1) and (10), (E)(1), and (F). As required by Gov. Jud. R. II, Section 5(E)(1), we conducted an independent review of Count IV and reject, in part, the findings and recommendations of the hearing panel. We agree with the hearing panel that the respondent's statements relative to her intention to immediately punish offenders and make creative use of alternative sanctions do not violate the cited provisions of Canon 7. Similarly, the respondent's conditional use of the term "your Judge" and apparently inadvertent placement of the word "judge" on her letterhead do not constitute a violation of Canon 7.

The July 13 letter distributed by the respondent indicates that she is "proud to have received the Union endorsements." The respondent also broadcasted and distributed information stating that she had been "endorsed by Fraternal Order of Police." A judicial candidate may convey information regarding endorsements that the candidate has received during the course of the campaign, but must do so in a truthful and accurate manner. In *In re Judicial Elections Complaint Against Roberts* (1996), 81 Ohio Misc.2d 59, our colleagues reviewed campaign literature circulated by a candidate for the Seventh District Court of Appeals. That candidate stated in his literature that he was endorsed by the "legal community" in the district when, in fact, he had been endorsed by only one county bar association in the seven-county district. The judicial commission in *Roberts* concluded that this statement falsely stated the endorsement of an organization in violation of Canon 7(D)(10).

After reviewing the statements made by the respondent and the holding in *Roberts*, we conclude that the respondent's statement that she received "the Union endorsements" would lead a reasonable person to conclude that the respondent had received all of the union endorsements in the contested race, when in fact both candidates had received labor union endorsements. The record supports a finding by clear and convincing evidence that the respondent knowingly violated Canon 7(E)(1) by distributing information concerning her candidacy that, while technically true, was misleading and deceiving.

Similarly, the respondent's use of the phrase "endorsed by Fraternal Order of Police," while to some degree true is, at the same time, misleading and deceiving. The Fraternal Order of Police endorsement communicated by the respondent was the endorsement of one lodge of the Fraternal Order of Police. While the respondent's communication was truthful, her failure to identify more specifically the nature of the FOP endorsement, such as by including the name of the lodge that issued the endorsement, made the statement misleading and constitutes clear and convincing evidence that the respondent violated Canon 7(D)(10).

We are aware of respondent's contention that she had permission from officers of the Fraternal Order of Police to use the endorsement in this manner and the fact that the hearing panel relied on this evidence in concluding that the respondent's use of the endorsement was not contrary to Canon 7. However, a judicial candidate is not relieved from compliance with Canon 7 simply because a third party authorizes a particular type of campaign conduct or communication. To allow a defense such as that put forth by the respondent would allow a judicial candidate to disclaim responsibility for even the most egregious violations of Canon 7 simply by producing evidence that his or her conduct was sanctioned by a third party. The Supreme Court and previous five-judge commissions have made it clear that judicial candidates must independently measure the propriety of their actions against the standards contained in Canon 7 and will be held accountable should their conduct fall short of the required principles. See Canon 7(F) and *In re Judicial Elections Complaint Against Hildebrandt* (1997), 82 Ohio Misc.2d 1, 4.

Sanctions

As noted previously, the hearing panel recommended that the respondent be publicly reprimanded, fined \$5,000, and ordered to pay the complainant's reasonable and necessary attorney fees and the costs of these proceedings. For the reasons set forth below, we modify the sanctions recommended by the Board.

The processes provided for pursuant to Section 5(E)(1), Rule II, of the Supreme Court Rules for the Government of the Judiciary of Ohio serve dual purposes of punishing behavior in violation of the Ohio Code of Judicial Conduct and informing the legal and judicial communities of appropriate campaign conduct. *In re Judicial Elections Complaint Against Morris* (1997), 81 Ohio Misc.2d 64, 65. The statements disseminated by the respondent in violation of Canon 7 have lessened the public's understanding of the judicial system and damaged the reputation of her opponent as a jurist. When viewed in its entirety, respondent's conduct during this campaign is contrary to the overarching principle of Canon 7 that judicial candidates should conduct their elections campaigns in a dignified and appropriate manner.

Moreover, the respondent did not commit a single, isolated violation of Canon 7. Rather, we have found clear and convincing evidence of six separate violations involving ten different provisions of Canon 7. We also note the evidence in the record that indicates the respondent failed to take immediate and effective steps to withdraw her campaign advertisements and literature once the hearing concluded. Under these circumstances, we find a public reprimand coupled with a fine of \$7,500 to be a more appropriate sanction to serve the dual purposes of punishment and deterrence.

After considering the evidence related to attorney fees and expenses properly submitted by the parties and the factors contained in DR 2-106(B), we order the respondent to pay the complainant \$5,000 in attorney fees and expenses

Accordingly, it is the unanimous conclusion of the judicial commission that the respondent be publicly reprimanded and fined \$7,500 for her violations of Canon 7 of the Code of Judicial conduct. The respondent also shall pay the complainant's attorney fees and expenses totaling \$5,000 and the costs of these proceedings.

The Secretary shall issue a statement of costs before this commission and instructions regarding payment of all monetary sanctions. Payment of all monetary sanctions shall be made on or before May 24, 1999. The respondent's public reprimand shall be published by the Supreme Court Reporter in the manner prescribed in Rule V, Section 8(D)(2) of the Rules for the Government of the Bar of Ohio.

SO ORDERED.

Judge Charles E. Henry

Judge Peggy Bryant

Judge Ann Marie Tracey

Judge Richard K. Warren

Judge Frederick C. Hany II

Dated: January 22, 1999