STATE OF MICHIGAN
BEFORE THE MICHIGAN JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST

Formal Complaint No. 100

Hon. Byron J. Konschuh
40th Circuit Court
255 Clay Street
Lapeer, Michigan 48446

DISCIPLINARY COUNSEL'S REPLY TO RESPONDENT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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INTRODUCTION

Respondent's Proposed Findings of Fact and Conclusions of Law (R's Proposed Findings) are based on what he wishes the evidence was rather than what it is. To that end, he distorts, misconstrues, and in some instances outright misstates the record. He makes circular, flawed, and baseless arguments aimed at persuading the Master to disregard his long-term pattern of prosecutorial and judicial misconduct. These arguments were addressed in detail in the Disciplinary Counsel's Proposed Findings of Fact and Conclusions of Law (DC's Proposed Findings) filed on November 4, 2019. This reply does not intend to repeat the prior submission. Rather, it briefly addresses respondent's most egregious and/or false claims and provides a page/section reference to a full discussion of each such claim in the Disciplinary Counsel's Proposed Findings.

Staleness of the JTC's Charges

Respondent's argument that the charges against him are stale is an issue to be addressed by the Commission, not the Master. (R's Proposed Findings, ¶4) MCR 9.202(3)[1] provides:

> In deciding whether action with regard to a judge is warranted, the *commission* shall consider all the circumstances, including but not limited to the age of the allegations and the possibility of unfair prejudice to the judge because of the staleness of the allegations or unreasonable delay in pursuing the matter and whether respondent has corrected his behavior. (emphasis provided)

[1] Respondent cites MCR 9.205 in support of this argument. As of September 1, 2019, the court rule covering this issue is MCR 9.202(B)(3).

Existence/Awareness of the County's Policy

Respondent's arguments that there is no proof his actions violated a policy that was in effect at the relevant time (R's Proposed Findings, ¶130; ¶138), and that county controller John Biscoe admitted that the "Grants, Contracts, and Agreements" policy was not in effect in 2008 when respondent entered into the Heartland and Bounce Back contracts, are false. (R's Proposed Findings, ¶21; ¶130; ¶181) While Mr. Biscoe testified he was uncertain when the *written* "Grants, Contracts, Agreements" policy was adopted, he was certain it had always been the county's "practice" for all contracts to go "through the board." (p. 983)[2] The date of the *written* "Grants, Contracts, and Agreements" policy was clearly established by Mr. Biscoe's assistant, Evelyn Schroeder, who testified that the policy dated back to 1996. (p. 1914-1915)

Also false is respondent's claim that he was unaware of the policy. (R's Proposed Findings, ¶20) Mr. Turkelson testified that when he was respondent's chief assistant from 2001 until 2005, respondent "taught" him the policy when they "would be required to review contracts, grants, and the commission would be in charge of accepting those contracts." (p. 1211-1212) Respondent even admitted reviewing contracts submitted by other county departments, in accordance with the policy. (p. 172) In a November 15, 2017, deposition, he also admitted that at the time he entered into the contract with Bounce Back, he was aware the county had a policy to notify the board of commissioners about all contracts. (p. 174-175) (See DC's Proposed Findings, pages 12-21)

[2] Abbreviations used in this documents are as follows: (p…) refers to formal hearing transcript page; (R's Ans.) refers to respondent's Answer to the Amended Formal Complaint; (E's Exh….) refers to Examiner's Exhibit;

County's Awareness of the Bounce Back Contract

Respondent's claim that Mr. Biscoe and the Board of Commissioners were aware of the Bounce Back contract because of its publicity is without merit. (R's Proposed Findings, ¶23; ¶188) Mr. Biscoe testified that between 2001 and 2013 he was *not* aware that respondent entered into any contracts with either Heartland or Bounce Back. (p. 913-914) While Mr. Biscoe was aware that "there were efforts to deal with bad checks" (p. 915-916), he was not aware of any fees coming back to the LCPO. (p. 924) Respondent admitted he did not notify County Controller Biscoe, the Board of Commissioners, the Treasurer's Office, or the Finance Department of the Bounce Back contract or the funds coming into his former office. (p. 175-176; p. 231-237; p. 922-923; R's Ans. ¶53) He did not maintain any accounting ledgers and did not keep copies of the Bounce Back checks. (p. 256-260; p. 260-265; p. 277-278; p. 2339; E's Exh. 7b) While the program may have been publicized for the benefit of the Lapeer County merchants (E's Exh. 7b), no one outside of the LCPO was aware of the $5 fee from Bounce Back. (p. 2287) Even within the LCPO, no one knew respondent was depositing those funds into his personal bank accounts. (p. 1485; p. 1819-1921; p. 2339-2340) (See pages 17-21 of DC's Proposed Findings)

Respondent claims he did not lie when he denied telling office managers Cathy Strong and Leigh Hauxwell not to forward the Bounce Back checks to the county but to give those checks to him. (R's Proposed Findings, ¶190) That claim is false. It was also false in his Answer to the Amended Formal Complaint and in his formal hearing testimony before the Master. (p. 3142; R's Ans. ¶534) Respondent admitted receiving every Bounce Back check from his office managers. Ms. Strong and Ms. Hauxwell testified they delivered those checks to respondent pursuant to his directive. (p. 1820-1821; 2337-2338) They also testified they did not include copies of the Bounce Back checks in the book of deposits the LCPO maintained, as a policy, for all checks received and

forwarded to the Treasurer's Office. (p. 1783-1784; p. 2337-2339) It is implausible that both office managers would have decided on their own to ignore county policy and to do so only with respect to the Bounce Back checks.

Patricia Redlin

Respondent claims that Det/Sgt. Mark Pendergraff "lied" to Pat Redlin by telling her that respondent was accusing her of taking the $15 from the Ohenley Money Order. (R's Proposed Findings, ¶105) Respondent's accusation against Pendergraff is false. That is exactly what respondent accused Ms. Redlin of doing. In his Answer to the Amended Formal Complaint and during his testimony before the Master, respondent repeatedly asserted that he gave Ms. Redlin the entire $60.28. (p. 191-192; p. 194-195; p. 196; R's Ans. 73) He reiterates that in his proposed findings of fact, by claiming he gave "the full amount to his staff, in cash, to voucher to the appropriate parties." (R's Proposed Findings, ¶186; Ans. to FC, ¶526) These statements clearly insinuate that since Ms. Redlin received the full amount but vouchered only $45.28 to the county, she is responsible for the remaining $15. When shown several portions of respondent's testimony, Ms. Redlin herself came to the same conclusion. (p. 2076) Ms. Redlin testified that the only money respondent gave her was the $45.28 she forwarded to the Treasurer's Office. (p. 2034-2035; E's Exh. 6i)

Respondent compounds his false accusations against Ms. Redlin by stating that *she* deposited the Ohenley Money Order into his personal bank account. (R's Proposed Findings, ¶14; ¶135) It makes no sense that she would have done that, and respondent admitted that *he* was the one who cashed the money order and deposited the entire $60.28 into his personal account. (p. 188; R's Ans. ¶65; E's Exh. 6g) Respondent's effort to pass blame for the missing $15 to Ms.

Redlin, his clerk who simply followed his directions, is disgraceful and reveals his character. (See pages 13-16 of DC's Proposed Findings)

LEORTC & City of Lapeer

Respondent's contention that the Disciplinary Counsel did not produce proof of any law or regulation that his handling of the LEORTC and City of Lapeer funds was improper is outlandish. (R's Proposed Findings, ¶141; ¶151) Money earned by respondent's staff for doing trainings or handling city cases on county time was county money. (p. 932; p. 943) Respondent cannot take money earned by his staff on county time and deposit it into his personal accounts. That is embezzlement. He should be very familiar with those criminal statutes, both as the county prosecutor and as a defendant once charged with five counts of "Embezzlement by Public Official."

Respondent's claim that during his tenure as the Prosecuting Attorney he "maintained" flex time for his employees is false. (R's Proposed Findings, ¶39) Also false is his claim that APA Wilson did not have to use any vacation time when she taught at the 2011 and 2012 LEORTC corrections academies. (R's Proposed Findings, ¶39) APA Wilson testified she specifically asked respondent, "If I work late, can I, like, offset that on another day and accrue hours and not come on Friday or something like that?" (p. 1486) Respondent *denied* APA Wilson's request, advising her that the office did not have "anything like that." (p. 1486)

Further, if respondent was right that APA Wilson provided the 2011 and 2012 LEORTC trainings on her own time, he still had no right to those funds. She did. Likewise, if the APAs did city cases on their own time, respondent had no right to those funds. They did. Either his staff did the work on county time, in which case the money belonged to the county, or they did it on their

personal time, in which case the money belonged to the staff. In either case, respondent was *not* entitled to that money. (See pages 21-25 of DC's Proposed Findings)

Improper Expenditures/Reimbursements

Respondent's claim that he was using the Bounce Back, LEORTC, and City of Lapeer funds to reimburse himself for past expenses is false and misleading. (R's Proposed Findings, ¶11; ¶41) It is important to first note that respondent's claim to have incurred past expenses is largely beside the point. Even if he had incurred expenses for which he *could* have been reimbursed had he properly sought that, he was not entitled to simply take public money for that purpose, with no notice to the county, no records, and no attempt to identify any item to be reimbursed. Respondent was fully aware of the county's reimbursement procedure. He had previously submitted vouchers for items as small as a $2.70 parking fee. (E's Exh. 97i) He simply refused to follow that procedure with respect to the Bounce Back, LEORTC, and City of Lapeer funds. As he stated in the November 15, 2017, deposition, the county did not have the right to "fly strike [speck]" what he did in his former office. (p. 251)

In any event, many of the events/items he listed as past expenses are expenses for which he was not entitled to reimbursement in the first place. Public funds cannot be used for the staff's luncheons, donuts, or coffee. They also cannot be used for his investiture or for a child's back yard slide. They clearly cannot be used for charitable contributions.

Respondent claims he did not use the Bounce Back, LEORTC, and City of Lapeer funds to reimburse himself for charitable contributions. (R's Proposed Findings, ¶107) He also claims, and testified at the formal hearing before the Master, (p. 514), that the charitable contributions he included in Tab C of his July 2016 answers to the Commission (E's Exh. 95; E's Exh. 126) were

supposed to have been a part of a separate Tab K, were included in Tab C by mistake, and do not reflect any expenditures for which he had used the Bounce Back, LEORTC, and City of Lapeer funds. (R's Proposed Findings ¶p107; p. 514; E's Exh. 95; E's Exh. 126) Both claims are false. In his February 8, 2017, answers to the Commission's inquiries respondent was asked about several charitable contributions that he now claims were inadvertently included in Tab C. Respondent admitted to having used at least some portion of the Bounce Back and/or LEORTC funds to reimburse himself for those contributions. In his testimony before the Master, respondent admitted to giving those answers. (p. 516-520)

Respondent's claim that the staff holiday and secretary day luncheons and the donuts purchased by the on-call APAs, including those he was reimbursed for, had a "dual purpose" is false and deceptive. (R's Proposed Findings ¶43; ¶157) Also false is his claim that he was entitled to reimbursement for these expenditures. There was no dual purpose for the staff's holiday or secretary day luncheons (p. 640-642; p. 1478-1480; p. 1716-1718; p. 1789-1793; p. 2322) or the donuts purchased by the on-call APAs. (p. 1468; p. 1471-1472; p. 1725-1726; p. 1809-1813) As he told Det/Sgt Pendergraff when first questioned about these events, the luncheons were strictly social events that respondent intended as a reward for hard work, (p. 497; E's Exh. 90c-page 5; E's Exh. 90c-page 7; E's Exh. 90d-page 13; E's Exh. 90e-page 2; E's Exh. 90e-page 4) The donuts were clearly Friday morning refreshments for the staff. Public funds cannot be used for either of those items and respondent was therefore not entitled to reimbursement for them.

Respondent misrepresents Mr. Biscoe's testimony regarding the use of public funds. (R's Proposed Findings ¶199) Mr. Biscoe did not testify that purchasing items for the staff may be considered proper with county funds if there was another, public, purpose for those items. As the Michigan Department of Treasury audit manager Cary Vaughn stated, items intended for the staff

do not become public and reimbursable simply because occasionally, a member of the public is allowed to have a cup of coffee or a donut. (p. 1954) (See pages 25-34 of DC's Proposed Findings)

Samuel Oyster's Testimony

Respondent claims that Samuel Oyster admitted being "around the corner" in the kitchen of his mother's house and having difficulty hearing the conversation between his mother and respondent. (R's Proposed Findings, ¶70) Respondent is blatantly misstating the record in an effort to cast doubt on Samuel's statement that he heard respondent ask "who the fuck took my sign down." (p. 1164) Respondent quotes testimony from page 1165 in which Samuel stated, "It was very weak and shaky so I couldn't – at that point I couldn't hear. I was around the corner, but I could hear the voices talking, being loud." Respondent omits the question preceding that answer, which was "did you hear your mother's voice?" He quotes Samuel's testimony without the question, to make it appear that Samuel could not hear *respondent* when, in fact, he was testifying he could not hear *his mother*. Samuel Oyster testified that respondent's voice was "loud" and "boisterous" and what stuck in his mind was respondent asking "who the fuck took my sign down." (p. 1164) (See pages 34-36 of DC's Proposed Findings)

Everyone Else's Fault

Rather than accepting responsibility, respondent attempts to blame others for *his own* misconduct.

He blames County Controller Biscoe for not telling him that using the Bounce Back, LEORTC, and City of Lapeer funds for the "benefit of his office" was improper. (R's Proposed Findings, ¶1; ¶52) That argument is specious and misleading since it was respondent who kept

secret the contracts he was entering into, the funds those contracts were generating, and his practice of depositing those funds into his personal bank accounts. It is disingenuous for respondent to claim that Mr. Biscoe's lack of advice absolved him from any responsibility after he successfully concealed the material facts underlying his expenditures. Respondent never told Mr. Biscoe how he was spending those funds.

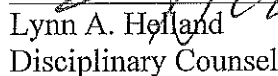
Respondent also blames Mr. Biscoe for not challenging each and every voucher respondent submitted for reimbursement. (R's Proposed Findings, ¶52) He contends that because Mr. Biscoe approved each voucher, he (respondent) had no way to obtain a ruling from the county board of commissioners on whether his accounting practices were improper. Respondent's argument is fallacious. He maintained *no accounting* of *any* kind and the vouchers were approved only because Mr. Biscoe trusted respondent's misrepresentations. (p. 956) As Mr. Biscoe testified, "If the chief law enforcement officer said it was training, I took his word for it." (p. 960) (See pages 34-3 of DC's Proposed Findings)

Respondent blames Hon. Nick Holowka for his failure to comply with MCR 2.003, because Judge Holowka denied respondent's suggestion that the county retain an ethics expert and because Judge Holowka made the court docket assignment that put him in a conflict situation. (R's Proposed Findings, ¶4; ¶88) In denying his request for an ethics expert, Judge Holowka specifically advised respondent to "carry out [his] statutory and ethical duties...in compliance with MCR 2.003 and the Michigan Code of Judicial Conduct." (E's Exh. 113) The disqualification/disclosure obligation was respondent's. If he was unsure about his ethical duties, he was free to consult with any other person. It is appalling that respondent would even attempt to blame Judge Holowka for his failure to comply with his own ethical obligations. (See pages 36-42 of DC's Proposed Findings)

CONCLUSION

Respondent claims this case is "at worst, an honest mistake." (R's Proposed Findings ¶1) Respondent's actions were neither honest nor a mistake. This was not a single instance but a long term pattern of dishonesty. He deliberately and repeatedly put money into his personal accounts that he received *because* he was the Lapeer County Prosecutor. His arguments regarding his financial improprieties include multifaceted attempts to justify taking money to which he was not entitled. He obtained reimbursements from the county by making false statements. His arguments regarding his behavior towards the Mrs. Oyster and her son, and his arguments regarding his failure to comply with MCR 2.003 and his ethical obligations, are false and without merit. In the course of various investigations into these improprieties, respondent made numerous false statements regarding his prosecutorial and judicial misconduct. His proposed findings are an attempt to perpetuate his false statements, both about his misconduct and about the formal hearing record.

Respectfully submitted,



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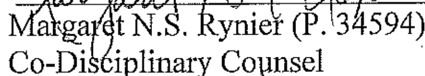

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