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STATE OF MICHIGAN

IN THE SUPREME COURT

COMPLAINT AGAINST:

Hon. Theresa M. Brennan
______________________________/

MSC Case No. 157930
Formal Complaint No. 99

REPLY TO RESPONDENT'S OBJECTION TO TENURE COMMISSION'S BILL OF COSTS

On July 30, 2019, respondent Hon. Theresa Brennan objected to the bill of costs the Judicial Tenure Commission submitted. In important respects her response rests on mistaken interpretations of the law and mistaken claims of fact. This reply addresses her main mistakes.

With respect to the law, respondent's analysis relies very heavily on the theories that:

1. MCR 9.205(B) only authorizes the Supreme Court to award, in judicial discipline cases, that which is authorized as "costs" in MCL 600.2405;
2. The Commission is not entitled to compensation for the expenses of the master, pursuant to MCL 600.2401 et seq. and 600.2501 et seq., and in any event compensation for the master is limited to $290 per day by MCL 600.226(c)(ii);
3. The reimbursable cost of transcripts is limited to $1.75 per original page and $.30 per copied page by MCL 600.2543; and
4. Costs of "electronic conversion" are not reimbursable because they did not produce "certified copies" as allowed by MCL 600.2549.

Every one of these arguments is wrong.

With respect to the first, MCR 9.205(B) authorizes the Court to award "costs, fees, and expenses." MCL 600.2405 only defines what may be taxed as "costs," and does so in the quite

different context of Supreme Court, circuit court, and district court proceedings. MCL 600.2401. MCL 600.2405 therefore has no application to the judicial discipline process. Even if it did, though, it only purports to define the "costs" portion of "costs, fees, and expenses." MCR 9.205(B) clearly states that in appropriate cases the Commission can recover "fees and expenses" in addition to "costs." Accordingly, the MCL 600.2405 definition of "costs" is not the limit of what MCR 9.205(B) authorizes. Every item the Commission submitted is a cost, a fee, or an expense of prosecuting the formal complaint.

With respect to respondent's second legal argument, the fees for the master are not set by MCL 600.226(c)(ii), which by its terms applies only to retired judges who "perform judicial duties in any court in the state." The Judicial Tenure Commission is not a court in the state, and its proceedings are not judicial proceedings. The fee for masters is determined by SCAO. SCAO has set the fee at $800 for a full day of hearing, $400 for a half day of hearing, and $100/hour for non-hearing time. The master's time was based on that fee schedule, and the Commission has no say in it. The master's fee is certainly a "fee and expense" of prosecuting the complaint, and hence recoverable.

With respect to respondent's third argument, regarding the cost of the court reporter, MCL 600.2543 is solely aimed at the expense of in-house court reporters in circuit court proceedings. Judicial Tenure Commission proceedings are obviously not circuit court proceedings. The reason MCL 600.2543 can set the limit it does for circuit court reporters is that those court reporters typically get a salary and benefits, in addition to what they are paid per page.

In contrast, the Commission is constrained to use a free-lance court reporter. The fees charged by the court reporter in this case were reasonable, market-based fees for the court reporter's daily attendance ($50/hour) and preparation of transcripts ($5/original page &

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$2/copied page). They were a "fee and expense" the Commission paid to prosecute the complaint, so are authorized for recovery under MCR 9.205(B).[1]

With respect to respondent's fourth argument, concerning the costs of electronic conversion, her first mistake is to assert that "electronic conversion" is the same as "copying." It was not. The Commission had to hire a contractor to convert hard copies of many pages of phone bills, which were in very fine print and not electronically searchable, into something that could be a meaningful exhibit at the hearing. That is something much more than "copying," even though part of the process did require "copying" the numbers, by hand, into a searchable database. The Commission also had to pay a contractor to have the entire record converted to PDF format for filing with this Court. Again, that is more than just "digital-speak for copying."

Respondent's second mistake in her electronic conversion argument is to assert that only the "copying" that is authorized by MCL 600.2549 is recoverable. Like the other statutes on which respondent relies, MCL 600.2549 is aimed at a specific circumstance quite different than a Commission proceeding. It determines when it is appropriate to charge a party for the cost of a deposition or a certified copy of a document. Converting hard copies of barely legible phone records to a usable exhibit, and converting the record for transmission to the Supreme Court, had nothing to do with creating certified copies. The statute on which respondent relies is inapposite. As with the other expenses mentioned above, the costs of electronic conversion were an "expense" the Commission incurred to prosecute the complaint, so are recoverable.

[1] Respondent speculates, without a scintilla of support, that the fee for the court reporter included payment for transcripts of her divorce, or of other proceedings before her. Respondent's baseless speculation is wrong. The court reporter fee claimed by the Commission did not include any transcript other than the transcripts of the hearing before the master. That means, for instance, that the fee listed in the Commission's affidavit of expenses does ***not*** include the $441 cost of transcribing the hearing before the Commission, because that cost was not known when the bill of costs was submitted to the Commission. It does not include the cost of transcribing several proceedings over which respondent had presided, which costs were incurred both before and after the formal complaint was filed, though those were also very much a fee and expense of prosecuting the complaint. The only reason the Commission did not claim those expenses in this case is because it has not traditionally done so.

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The Commission's memorandum of costs noted that one reason to allow recovery of the entire cost of prosecuting the complaint, rather than trying to parse the costs of prosecuting just the deceit, is that but for the deceit (and the significant consequences to respondent as a result), it may have been possible to resolve the case short of a formal complaint or short of a hearing. Respondent brushes this possibility aside with the claim that "[t]he Commission would never have agreed to anything less than Judge Brennan leaving the bench." (Respondent's Objection at p 10) Respondent offers no evidence to support this supposed "fact." There is none. Respondent has absolutely no foundation for her representation to this Court that in a different universe in which she was not deceitful, the Commission would nonetheless have insisted on her removal. The reality is that this would be a very, very different case if respondent had not tampered with evidence or lied repeatedly. She cannot make that reality disappear with a wave of her hand.

Respondent's discussion, at page 11 of her Objection, of the counts of the formal complaint in which deceit was factor, is confused and mistaken. Respondent accurately notes that of a total of seventeen counts, the Commission withdrew two (presenting no evidence concerning them), and those two had nothing to do with deceit. However, respondent's list of other counts that did not involve deceit omits Count VIII, which alleged that respondent was unfaithful to the law. The master and Commission made no finding with respect to that count. For these purposes, Count VIII does not matter. The evidence concerning it was identical to the evidence that supported Count IX, so the omission or inclusion of Count VIII has no impact on any calculation of what portion of the case concerned respondent's deceit.

More significantly, respondent's objection also misstates the counts the Commission identified as involving deceit. She represents that the Commission only identified seven of the

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fifteen disputed counts (i.e., those other than the two withdrawn counts) as involving deceit.[2] (Respondent's Objection at p 11). In fact, the Commission identified ten such counts.[3] The Commission's memorandum of costs notes that the fraction of total counts involving deceit is a particularly poor way to determine how much of the overall case involved deceit, but to the extent that fraction is a useful metric, deceit was a significant factor in ten of the fifteen disputed counts. Equally significant, several of those ten counts had subcounts, each of which were essentially separate counts. For example, Count XVII had sixteen subcounts alleging separate false statements.

Respondent argues that deceit must have constituted a small portion of the case because the Commission's brief to this Court only referred to 10% of the transcript to support the findings of deceit. (Respondent's Objection at p 11). This is a *non sequitur*. The references to deceit in the Commission's brief would have been meaningless absent their context. The Commission did not cite all that context in its brief to this Court, but the context was nonetheless central to understanding the deceit. That context consumed a great deal of the record.

Finally, the Commission's memorandum points out that among the reasons it is very difficult to apportion costs between the "deceit" and "other misconduct" parts of the case is that the master's fee was a significant part of the overall cost, and it is impossible to determine what portion of the master's time was devoted to questions of deceit. Respondent's Objection brushes this argument aside, claiming that because the master incorporated the findings of deceit that were summarized in the examiner's Appendix 2, he did not have to "parse the record or draft detailed findings" concerning deceit, and suggesting that respondent's deceit therefore did not

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[2] Respondent states that the Commission identified only counts I, II, IV, V, XI, XII, and XVI as implicating deceit.

[3] The Commission identified Counts I, II, IV, V, XI, XII, XIII, XIV, XVI, and XVII.

demand much of his time. (Respondent's Objection at p 11). This is yet another *non sequitur*. The master's adoption of Appendix 2 undoubtedly saved him drafting time, but it would not have saved him the time of parsing the record with respect to deceit. He had to do that to determine whether Appendix 2 was accurate. Adopting Appendix 2 also did not obviate his need to think about the evidence concerning deceit, quite apart from whatever time it would have taken him to write about it after having thought it through. The Commission's point stands: because respondent's deceit permeated the case, it is particularly hard to guess how much time the master would have needed to resolve the case had there been no deceit.

The Commission stands ready to provide the Court any additional information it needs. After reviewing respondent's Objection, the Commission renews its request that the Court provide such guidance as the Court considers would be useful regarding the scope of "costs, fees and expenses" within the meaning of MCR 9.205(B), and award all the costs, fees, and expenses of prosecuting the complaint.

Respectfully submitted,

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HON. MONTE BURMEISTER
Chairperson
Judicial Tenure Commission

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Dated: August 7, 2019

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