STATE OF MICHIGAN

BEFORE THE MICHIGAN JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

Hon. Theresa M. Brennan
53rd District Court
224 N. First Street
Brighton, MI 48116
_____/

Formal Complaint No. 99
Master: Hon. William J. Giovan

EXAMINERS' RESPONSE TO MOTION TO DISQUALIFY COMMISSION AND TO ADMINISTRATIVELY CLOSE CASE

Lynn Helland, Examiner, and Casimir J. Swastek, Associate Examiner, deny that there are grounds for any Commissioners to disqualify themselves. In opposition to respondent's motion, the Examiners state the following:

A. Motion to Disqualify

MCR 9.204 states that the criteria for disqualifying a member of the Commission are in MCR 2.003.[1] Nothing in MCR 2.003 suggests that any Commissioner should be disqualified.

In answer to respondent's "indisputable" facts, the Examiners state as follows:

1. The Examiners agree that on November 21, 2018, they filed a motion asking the Commission to file a petition with the Supreme Court to suspend

[1] The Examiners agree with respondent that MCR 9.204(A) incorporates MCR 2.003(C), even though it explicitly refers to MCR 2.003(B).

respondent and to put her pay into escrow, which petition included references to both testimony during the formal hearing and exhibits admitted at the hearing. The Examiners deny respondent's assertion that they asked for respondents' "removal" from the bench without waiting for review.

2. The Examiners agree that respondent answered the motion as she paraphrases in Paragraph 2, and in doing so offered her own view of the evidence cited in the Examiners' motion. The Examiners deny that they argued that respondent's "punishment" should not await de novo review. Rather, the Examiners' motion quite plainly sought only to suspend respondent pending the Commission's and Supreme Court's review of the evidence, and to place her pay into escrow during that time.

3. The Examiners agree that the Commission denied the Examiner's motion in an order dated December 11, 2018. The Examiners agree that the order did not provide the Commission's rationale for denying the motion. The Commission's next order concerning the motion was dated January 9, 2019. This is the "subsequent order" referred to by respondent. The Examiners deny that the subsequent order "agreed" with respondent that granting the motion would have created any risk of persuading the Master to rule against respondent. The Commission's January 9 order merely stated in relevant part:

a. That the Master had not issued his report when the motion was first denied;

b. The matter was reconsidered by the Commission after the Master issued the report;

c. At the time order was issued, the Commission was not expressing an opinion regarding the Master's report or the substance or merits of the motion for interim suspension; and

d. The Commission granted authority for the Examiner, in his capacity as Executive Director, to designate a Commission staff member to file the motion.

4. The Examiners agree with the allegations of paragraph 4 of respondent's motion.

5. The Examiners agree that after the Master issued his report, on January 7, 2019, the Commission *sua sponte* reconsidered its denial of the Examiners' motion. The Commission's January 7 order is discussed in paragraph 3, above. The Commission stated in the order that as the adjudicative body hearing argument on the Master's report, it would not file the motion, but it delegated authority to a staff member other than the Examiner to decide whether to petition the Supreme Court. The January 7 order was explicit that it did not express an opinion regarding the Master's report or the substance or merits of the petition. The Examiners disagree with respondent's allegation that the order stated that expressing an opinion would

be incompatible with the Commission's role as an adjudicative body. Rather, the order merely stated as the adjudicative body the Commission would not be filing the petition and it was not expressing an opinion as to the Master's report or the merits of the Examiner's motion.

6. The Examiners acknowledge that on January 15, 2019, the Commission's Deputy Executive Director filed a petition for interim suspension. The Examiners agree that the Deputy Executive Director exercised the authority he was granted to broaden the petition to include reference to some of respondent's misrepresentations.

7. The Examiners agree with the allegations of paragraph 7 of respondent's motion.[2]

8. The Examiners agree with the allegations of paragraph 8 of respondent's motion.

9. The Examiners deny that the allegations of paragraph 9 of respondent's motion are relevant to the question she raises in this motion. That said, the Examiners assert that they forwarded respondent's objections to the Master's report to counsel for the Commission on February 3, 2018. The Examiners further assert that they did not forward respondent's preliminary brief in support of her objections, for the

[2] Respondent's motion claims the Supreme Court "ordered" the Commission to express an opinion on merits of the petition. Motion at p 7. It is not clear how it would be relevant whether or not the Court had, but the Court did not.

reason that respondent had described it as "preliminary." The Examiners assert that they sent respondent's official brief in support of her objections to the chair and the counsel for the Commission the morning after respondent emailed them to the Examiners.

Law and Argument

Respondent argues that the Commission's petitioning for interim suspension after the hearing on the formal complaint means it has prejudged the merits of the case and can no longer do a fair de novo review. Respondent's argument is inconsistent with the court rules governing judicial discipline, and is also inconsistent with the widespread and accepted judicial practice of granting preliminary relief in other situations.

The law is clear that the Commission had authority to petition for respondent's suspension when it did. The Commission has authority to petition the Supreme Court for interim suspension either before a formal complaint is filed, per MCR 9.219(A)(2), or *after* it is filed, per MCR 9.219(A)(1). Nothing in the Michigan Court Rules suggests there is some point after a formal complaint is filed after which the Commission can no longer petition the Supreme Court for interim suspension.

The facts of this case demonstrate the wisdom of there being no deadline for filing a petition. The primary bases for the petition in this case were things that were unknown to the Commission at the time the formal complaint was filed: the evidence

that respondent deleted data from her cell phone and the fact that respondent was charged with three felonies. It would be a poor judicial discipline system that did not permit the Commission to continually consider the circumstances and, whenever appropriate, seek interim suspension.

Respondent complains that the Commission has expressed a level of confidence in the facts that are alleged in support of the petition. MCR 9.219(B) requires that the Commission's petition allege supporting facts. Of necessity, the Commission should only include allegations in a petition for interim suspension when it has confidence that the allegations are correct and when the Commission believes the allegations demonstrate serious misconduct. The alternative that respondent's theory of "prejudging" would require is that Rule 9.219(B) contemplates that the Commission proffers facts it does *not* believe to be true, or facts that do *not* demonstrate serious misconduct, either of which would be absurd.

Not only does the court rule support the Commission's authority to file a petition for interim suspension after the formal complaint, there is precedent for it to do so. In *In re Chrzanowski,* 465 Mich 468 (2001), the formal complaint was filed on April 14, 2000. Though there was no amendment to the complaint, the Commission filed a petition for interim suspension three months later, on July 10.

The Supreme Court granted the petition. *Id* at p 471-472; order issuing interim suspension at *In re Chrzanowski*, 463 Mich 1201 (2000).[3]

Chrzanowski differs from this case in that the hearing on the formal complaint had not yet taken place when the petition was filed, but that is a difference that does not matter. Respondent's concern is that the Commission's putting its imprimatur on the petition means that the Commission has improperly "prejudged" the ultimate question of misconduct. With respect to any prejudging, there is no meaningful difference between a petition filed before the formal complaint is issued; one filed simultaneously with the formal complaint; one filed between formal complaint and hearing, as in *Chrzanowski*; or one filed after the hearing, as in this case. In each variation, the Commission makes a preliminary assessment whether the evidence is strong enough and serious enough to warrant seeking interim suspension. In none of those variations does the Commission's preliminary assessment disqualify it from ultimately reviewing the case on the merits.

Nor is the Commission's making such a preliminary assessment concerning interim relief at all unusual in the judicial process. Judges routinely make preliminary decisions about facts, even though the judge will later need to decide whether to accept those same facts. For example, in civil proceedings a judge may

[3] Neither decision referred to the date the petition was filed, but it is contained in the Official Docket of the formal proceedings. (Attachment 1) The docket also confirms that there was no amendment to the formal complaint that would have precipitated the motion and that the formal hearing started in September 2000.

authorize a temporary restraining order or preliminary injunction, or make preliminary decisions regarding temporary custody or support in divorce proceedings. In criminal proceedings a judge must make a preliminary decision about the facts in order to authorize a search warrant or to detain an accused. Cases are often remanded to a trial judge for a new trial after appellate review, without reassignment to a different judge. In none of those situations does the judge's prior ruling suggest that the judge has "prejudged" the case and is disqualified from sitting on it any further. *See, e.g., Liteky v United States*, 510 U.S. 540, 544 (1994):

> Also not subject to deprecatory characterization as "bias" or "prejudice" are opinions held by judges as a result of what they learned in earlier proceedings. It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to diet in successive trials involving the same defendant.

United States v Carlton, 534 F.3d 97, 100 (2d Cir. 2008) ("Opinions held by judges as a result of what they learned in earlier proceedings in a particular case are not ordinarily a basis for recusal").

Respondents in judicial discipline proceedings have repeatedly argued to the Supreme Court that the Commission cannot fairly judge the merits of their case after it has investigated and approved the complaint. The Court has consistently rejected those arguments. *See, e.g., Chrzanowski,* 465 Mich at 483-487; *In re Mikesell,* 396 Mich 517, 528-529 (1976). Just as the Commission can properly investigate, charge,

and adjudicate, it can properly assess whether the evidence supports interim suspension and still adjudicate the evidence on the merits.

The fallacy of respondent's argument is further demonstrated by the fact that it applies equally to the Supreme Court. The Court is the only body with the power to make any decisions concerning judicial discipline. The Commission may only recommend. As the only deciding body, the Court has to rule on the Commission's petitions for interim suspension. By respondent's logic, if the Court grants a petition, it has "prejudged" the case and is disqualified from further action concerning the case, by the very same MCR 2.003 on which respondent relies here.

The sole authority respondent cites for her proposition that making a preliminary ruling disqualifies the factfinder is *People v Gibson,* 90 Mich App 792 (1979). *Gibson* was concerned with a very different question. Its facts are that a judge presided over two separate trials of codefendants. During the first trial the judge stated that he believed the evidence from that trial established the guilt of the second defendant.

Gibson is a departure from the normal rules concerning bias, so should be confined to its facts. Normally a judge need not recuse himself simply because he acquired knowledge of facts during a prior proceeding. "In order to disqualify a judge under MCR 2.003(B)(2), actual bias or prejudice must be shown." *People v. Upshaw*, 172 Mich.App. 386, 388-89 (1988). Probably the most extreme

circumstance in which this arises is when a judge renders a verdict after a bench trial, the case is reversed, and the judge needs to render another verdict. Yet the fact that a judge was involved in a prior trial or other proceeding against the same defendant does not amount to proof of bias for purposes of disqualification. *People v. White*, 411 Mich. 366, 386, 308 N.W.2d 128 (1981); *Emerson v. Arnold (After Remand)*, 92 Mich.App. 345, 353, 285 N.W.2d 45 (1979) (where the same judge conducted the summary disposition hearing and the bench trial).

For these reasons, *Upshaw* refused to apply *Gibson* to disqualify a judge who rendered a verdict in a trial that was remanded, requiring him to retry the case in which he had rendered a verdict. *Upshaw* noted that in *Gibson* it was "the trial judge's prejudgment, rather than an exercise of his judgment, which requires disqualification. . . ." 172 Mich.App. at 388-89. "[W]hat a judge learns in his judicial capacity—whether by way of guilty pleas of codefendants or alleged coconspirators, or by way of pretrial proceedings, or both—is a proper basis for judicial observations, and the use of such information is not the kind of matter that results in disqualification." *United States v. Bernstein*, 533 F.2d 775, 785 (2d Cir. 1976). Since "evidence presented in the trial of a prior cause * * * do [es] not stem from an extrajudicial source," it creates no personal bias requiring recusal. *State v. Smith* (Iowa 1976), 242 N.W.2d 320, 324.

In *United States v. Thirion*, 813 F.2d 146, 155 (8th Cir. 1987), a trial court sentenced Thirion after having sentenced codefendants and having stated in the sentencing of the codefendants that they were less culpable than Thirion. Thirion was later tried before the same judge and moved for recusal, citing this statement as proof of bias. On appeal, the 8th Circuit Court of Appeals rejected this claim, stating that the trial judge's "observation came entirely from his participation at the previous trial. To accept Thirion's argument would mean that no judge could preside at a second trial upon remand from an appellate court." *See also United States v Burnette*, 518 F.3d 942, 945 (8th Cir. 2008), in which the Eighth Circuit rejected a claim that the trial judge was biased, when the judge sentenced a criminal defendant after finding, while sentencing a coconspirator, that the defendant was not credible.

Gibson, the one case on which respondent relies, *might* be relevant if, 1) having reviewed evidence in a misconduct proceeding involving one judge, the Commission stated that the evidence in that proceeding persuaded it that another judge, who was not involved in the proceeding, was also guilty of misconduct, and 2) the Commission later reviewed evidence that the other judge committed misconduct.[4] But that is not this case. Here the Commission merely took the same sort of preliminary action judges often take.

[4] Even then it is not at all clear that *Gibson* would be relevant. Since the Commission sometimes acts as investigator, it could well be justified to conclude that evidence that comes before it in one formal hearing provides the basis to bring misconduct charges against a second judge, and still to review the evidence concerning that second judge.

Respondent points to language in the petition in which the Commission refers to the strength of the evidence. In point of fact, it is necessary for the Commission to comment on the evidence *whenever* it seeks interim suspension from the Supreme Court. That is not unique to this case. Even more to the point, whenever the Supreme Court grants a petition for interim suspension it is necessary for the Supreme Court to accept that evidence. However, as the petition notes, it seeks only interim relief, and the statements in it are only in support of interim relief. They do not prejudge the ultimate outcome.

Respondent points out that in filing its petition the Commission adopted, essentially in toto, the petition that had previously been filed by the Deputy Director. In candor, it is likely that the Commission did not give the petition detailed scrutiny before filing, as demonstrated, for example, by the inclusion of paragraph # 14, which uses the future tense to describe respondent's upcoming arraignment, an event that had actually already happened. This is an additional reason the Commission's action when filing its petition does not demonstrate any bias infecting its resolution of the merits.

Whatever the language of the petition, ultimately each member of the Commission is in the best position to determine whether he or she has "prejudged" respondent's conduct to any greater degree than happens in every case in which a factfinder learns of facts during the course of a proceeding, yet is charged with

ultimately making a decision on the merits. Each Commissioner can state, for himself or herself, whether he or she intended the petition for interim suspension to be a conclusive finding with respect to the evidence, or merely a statement that the evidence was such that interim suspension is warranted until the Commission and Supreme Court have had a chance to give that evidence the detailed review that is yet to come.

B. Motion to Administratively Close Matter

There is no reason for any Commissioner to disqualify him or herself. Even if each Commissioner were required to disqualify, though, that would not be a reason to "administratively close" the case. There is a valid complaint against respondent, and a hearing has been held on that complaint. There is no reason to close the case while the administrative consequences of mass disqualification are resolved. In fact, there is no allowance for such a procedure in the court rules.

Relief Requested

For the reasons stated above, the Examiners urge the Commission to deny respondent's motion for disqualification or to close the case.

Respectfully submitted,

/s/ Lynn Helland
Lynn A. Helland (P P32192)
Examiner
3034 W. Grand Boulevard
Suite 8-450
Detroit, Michigan 48202
(313) 875-5110

/s/ Casimir J. Swastek
Casimir J. Swastek (P42767)
Associate Examiner

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