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on Judicial Disabilities

STATE OF MARYLAND

BEFORE THE COMMISSION ON JUDICIAL DISABILITIES

IN THE MATTER OF: *
*
JUDGE DEVY PATTERSON RUSSELL * CJD 2018-009
*

RESPONSE OF JUDGE RUSSELL

The Honorable Devy Patterson Russell (“Judge Russell”) through undersigned counsel and pursuant to Md. Rule 18-407(c) files this response to the charges in the above referenced case.

General Response

Judge Russell denies that she committed sanctionable conduct as defined in Md. Rule 18-401(k).

Judge Russell denies that she violated the Maryland Code of Judicial Conduct as promulgated in Md. Rule 18-100.1 *et seq.*

Judge Russell respectfully requests that the Commission dismiss the charges filed by Investigative Counsel and terminate the proceeding.

Motion to Dismiss

Factual predicate

The factual events set forth in the instant charges (CJD 2018-009 at ¶ 6) occurred in March 2015. They were known by the District Court of Maryland for Baltimore City Administrative Judge Barbara B. Waxman (“Judge Waxman”) in March 2015. Thereafter in April 2015 Judge Waxman – without notifying Judge Russell - imposed a

secret “remedial sanction” on Judge Russell for the alleged conduct. These events were then brought to the attention of the District Court of Maryland Chief Judge John P. Morrissey (“Judge Morrissey”) in April of 2015.

As the result of escalating tensions arising from the secret “remedial sanction” imposed by Judge Waxman and other interactions by members of the District Court bench in Baltimore City, Judge Morrissey arranged for a mediation to occur between Judge Waxman and Judge Russell in April 2016. The mediation was unsuccessful.

Thereafter, in June 2017 Judge Russell brought certain matters to the attention of Investigative Counsel at the Commission on Judicial Disabilities (“the Commission”). Judge Russell’s concerns were ignored. Although cursorily contacted she was never even interviewed by Investigative Counsel. [REDACTED]

[REDACTED]

Judge Russell was then charged by the Commission on January 16, 2018 in CJD 2016-189 with charges that were tried before the Commission beginning on October 15, 2018 and argued before the Court of Appeals on March 4, 2019 (Misc. Docket JD No. 001 September Term, 2018). The events of the instant case (CJD 2018-009) occurring in March 2015 were known by the Commission in January 2018 when charges were brought in CJD 2016-189. The Commission “carved out” the events of March 2015 from the charges brought in January 2018.

This “carve out” was deliberate and was done to obtain a procedural advantage. Discovery in CJD 2016-189 revealed that Investigative Counsel had interviewed the

participants in the events of January through March of 2015.¹ Upon information and belief Investigative Counsel had a statement that they had taken describing the incident; Investigative Counsel had the documents from the incident; and certain of the witnesses – when deposed in CJD 2016-189 – described what they knew about the events of March 2015.² Despite this, Investigative Counsel affirmatively prevented Judge Russell from discussing the events of January through March of 2015 by filing a motion in limine - which was granted by Judge Hazlett.

This granting of the motion in limine – thereby preventing Judge Russell from discussing the events of January and March 2015 - severely and negatively impaired her defense in CJD 2016-189. However, now the Commission wants to litigate in CJD 2018-009 the very matter it prohibited Judge Russell from discussing in CJD 2016-189. Obviously the Commission believed that discussing the events of March 2015 in CJD 2016-189 would have been to Judge Russell’s advantage.

[REDACTED]

[REDACTED] Prior to the hearing before the Commission Judge Russell moved pursuant to Md. Rules 18-102.11, 18-402(b), 18-407(i)(4) to recuse Judge Hazlett. Judge Hazlett denied that motion.

[REDACTED]

¹ A number of Bailiffs and Judges.

² Judges Waxman and Morrissey.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Legal argument

The charges should be dismissed for a variety of legal reasons – limitations, laches, staleness, collateral estoppel, *res judicata*, and fundamental fairness. The basic fact of the matter is that these events were brought to the attention of Administrative Judge Waxman, Chief Judge Morrissey and Investigative Counsel of the Commission many years ago – beginning in 2015. Written reports were made, a secret remedial sanction was imposed, mediation was unsuccessfully attempted, statements were obtained and depositions were taken. The Commission - despite knowing about the events of March 2015 – deliberately elected not to charge Judge Russell in January 2018.

1. Limitations

Maryland has a general three year statute of limitations for civil cases. Md. Code Ann. Cts. & Jud. Proc. § 5-101. The accrual of the cause of action for this matter began in March 2015. Under Maryland law a plea of limitations would be a complete bar for a law suit filed four years later in January 2019.

2. Laches and Staleness

The equitable doctrine of laches bars litigation of a claim when there is unreasonable delay in its assertion and the delay results in prejudice to the opposing party. The Court of Appeals has held that laches “is a defense in equity against stale claims, and is based

upon grounds of sound public policy by discouraging fusty demands for the peace of society.” *Ross v. State Board of Elections*, 387 Md. 649, 671, 876 A.2d 692, 705 (2005).

Generally “[t]here is no inflexible rule as to what constitutes, or what does not constitute, laches; hence its existence must be determined by the facts and circumstances of each case.” *Id.*

It is, however, well settled that laches “applies when there is an unreasonable delay in the assertion of one's rights and that delay results in prejudice to the opposing party.” *Frederick Road Ltd. Partnership v. Brown & Sturm*, 360 Md. 76, 117, 756 A.2d 963, 985 (2000), citing *Inlet Assoc. v. Assateague House Condominium Ass'n*, 313 Md. 413, 438–39, 545 A.2d 1296, 1309 (1988); See *Ross*, 387 Md. at 669, 876 A.2d at 704 (“[L]aches must include an unjustifiable delay and some amount of prejudice to the defendant”); *Schaeffer v. Anne Arundel County*, 338 Md. 75, 83, 656 A.2d 751, 755 (1995) (“[L]aches is an inexcusable delay, without necessary reference to duration in asserting an equitable claim”) (emphasis in original); *Simpers v. Clark*, 239 Md. 395, 403, 211 A.2d 753, 757 (1965) (“[F]or the doctrine [of laches] to be applicable, there must be a showing that the delay [in the assertion of a right] worked a disadvantage to another”); *Hungerford v. Hungerford*, 223 Md. 316, 320–21, 164 A.2d 518, 521 (1960) (“Only two requisites are necessary in order to invoke the doctrine of laches. There must have been some lapse of time during which plaintiff failed to assert his rights, and the lapse must have caused some prejudice to the defendant”). Prejudice is “generally held to be any thing that places [the defendant] in a less favorable position.” *Ross*, 387 Md. at 670, 876 A.2d at 704, quoting *Buxton*, 363 Md. at 646, 770 A.2d at 159; *Parker*, 230 Md. at 130, 186 A.2d at 197; *Roberto v. Catino*, 140 Md. 38, 43, 116 A. 873, 875 (1922).

Liddy v. Lamone, 398 Md. 233, 243–44, 919 A.2d 1276, 1283 (2007).

Laches applies in the instant case as does the related notion of staleness. There has been a lengthy (four years) and unreasonable (procedural posturing) delay in the bringing of these charges against Judge Russell. The Commission cannot advance any valid reason for not bringing these charges in 2018 or earlier. Judge Russell is clearly in a less

favorable position now in 2019 than she would have been had the charges been brought in 2015.

3. *Collateral Estoppel and Res Judicata*

These current charges could have - and should have - been addressed in the omnibus charges that were brought in January 2018 (2016-189). In addition, some of the issues in the 2016 case have been decided in a different manner in the 2018 case. The recusal rulings are the complete opposite in the 2016 case and the 2108 case.

While not a perfect theoretical fit, the doctrines of collateral estoppel and *res judicata* apply to the facts of this case. The doctrines of collateral estoppel, and *res judicata*, “are different; they apply in different circumstances and they prevent different things.”

Colandrea v. Wilde Lake Cmty. Assoc., Inc., 361 Md. 371, 390, 761 A.2d 899, 909 (2000). Collateral estoppel involves issue preclusion; while *res judicata*, involves claim preclusion.

The function of the doctrine of collateral estoppel (“issue preclusion”) is to “avoid the expense and vexation of multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibilities of *inconsistent decisions*.”

Colandrea, 361 Md. at 387, 761 A.2d at 907. (Emphasis added.)

Under principles of *res judicata* (“claim preclusion”), where a “second suit is between the same parties, and is upon the same cause of action, a judgment in the earlier case . . . is an absolute bar, not only as to all matters which were litigated in the earlier case, but as to *all matters which could have been litigated*.” *MPC, Inc. v. Kenny*, 279 Md. 29, 32, 367 A.2d 486, 489 (1977). (Emphasis added.)

The collateral estoppel analysis clearly demonstrates the notion of inconsistent decisions – one recusal ruling for 2016 and a completely different recusal ruling in 2018.

The *res judicata* analysis clearly demonstrates that Judge Russell is now being forced to defend in 2019 an incident that occurred in 2015 which could have been litigated in the 2016 case. As discussed *supra* Judge Russell wanted to discuss the events of March 2015 in CJD 2016-189.

In sum, the Commission is attempting to have it both ways - ruling one way in the 2016 case and another way in the 2018 case (collateral estoppel). The Commission clearly could have brought the 2018 charges in the 2016 case but for procedural advantage chose not to do so (*res judicata*).

4. *Fundamental Fairness*

Fundamental fairness applies to proceedings before the Commission. “[T]he Commission, functioning as a fact-finding body, was not bound by strict rules of evidence, but only by the fundamental rules of fairness.” *In re Diener*, 268 Md. 659, 682, 304 A.2d 587, 599–600 (1973). In accord, *In re Bennett*, 301 Md. 517, 527, 483 A.2d 1242, 1247 (1984).

Rules of fundamental fairness require that charges that could have brought four years ago – but were not for procedural advantage – should not be allowed to go forward with opposing rulings involving the same parties. Simply put, not fair.

5. *Conclusion*

The charges should be dismissed for all of the above stated reasons.

Motion To Recuse and Request for Hearing

Judge Russell pursuant to Md. Rules 18-102.11, 18-402(b), 18-407(i)(4) moves to disqualify Judges Reed and Kershaw from sitting on the instant case. Judge Russell specifically requests a hearing on this motion to recuse and an opportunity to brief the issue – fundamental fairness requires no less.

In the earlier proceeding (CJD 2016-189) Judges Reed and Kershaw *sua sponte* recused themselves, leaving Judge Susan H. Hazlett (“Judge Hazlett”) as the only remaining judicial member presiding for the Commission in that matter. Apparently Judges Reed and Kershaw believed that they had a conflict. The matter was never briefed or argued in 2016-189.

However, Judge Russell is now aware of a Memorandum and Order – again apparently done *sua sponte* - signed by Judge Reed dated January 18, 2019 “unrecusing” both Judges Reed and Kershaw from any matters involving Judge Russell. (Attached as Exhibits A & B redacted). Judge Russell was never given the opportunity to participate in this decision making process. She was not advised that the matter would be reconsidered by the Commission; she was not given the opportunity to brief the issue; and, she was not given the opportunity to present evidence at a hearing.

Judge Russell rejects the notion of the so-called doctrine of necessity and requests the opportunity to brief and argue the issue at a hearing. The Commission should examine the Md. Constitution Art IV, §§ 4A & 4B. Those sections set - as a matter of Maryland Constitutional Law - the composition of the Commission and the procedures to follow in the event of a vacancy or a conflict.

Specific Response to Facts

Judge Russell was not present on January 16, 2015 when “Hearing Judge” used profanity in the courtroom.³ Later while planning a retirement party with the current Lead Bailiff for the former Lead Bailiff, Judge Russell heard about the incident.⁴ Judge Russell - following the request of Judge Waxman that any potentially newsworthy matters be brought to the attention of Judge Waxman - asked the current Lead Bailiff for permission to inform Judge Waxman of what had occurred in “Hearing Judge’s” Courtroom on January 16, 2015. The current Lead Bailiff granted her permission. Judge Russell informed Judge Waxman of what she had heard and was informed by Judge Waxman that she would investigate the incident. Judge Russell thought that the matter was over.

Thereafter on March 10, 2015 when Judge Russell returned to finalize the plans for the retirement party she was told by the current Lead Bailiff that she had not spoken with Judge Waxman. At that time - for the first time – Judge Russell requested to review the incident report to confirm that what she had told Judge Waxman was, in fact, correct. The incident report did not contain the use of profanity by the “Hearing Judge.” The

³ The Commission in an apparent effort to avoid transparency has not named the “Hearing Judge” or the other parties involved in the matter in the Charges. Why? Unless the Commission desires to hold a “Star Chamber” hearing the name of the “Hearing Judge” and others will obviously be brought out should this matter proceed to a public hearing. For the present Judge Russell will acknowledge in this response what will ultimately be the Commission’s futile attempt at confidentiality. However, to be clear, Judge Russell will not consent to a secret or closed hearing in this case and will expect that any hearing be open to the public. In fact, the Commission’s effort to shield the name of the “Hearing Judge” goes to the very heart of Judge Russell’s basic concerns in this entire matter – certain Judges taking sides in an effort to denigrate Judge Russell to the advantage of the “Hearing Judge.”

⁴ It should be noted that the “Hearing Judge’s” use of profanity was widely known and discussed by many courthouse personnel – in the words of the courtroom bailiff the incident had gone ‘viral.’ *Infra*.

Lead Bailiff then summonsed the courtroom bailiff who had written the report. At that time he recounted what had occurred and he voluntarily wrote an addendum to the report.

Upon information and belief the lead bailiff informed Judge Waxman - in writing – back on March 13, 2015 - that the courtroom bailiff stated that, the story [the Hearing Judge’s use of profanity towards a citizen] had gone ‘viral’ as there were public defenders and states attorneys in the courtroom at the time. The courtroom bailiff then told the lead bailiff that he thought that [The Hearing Judge] said something like ‘what is your f****ing problem? The courtroom bailiff then added those comments to his incident report.

Upon information and belief, the courtroom bailiff may have indicated that he was summonsed by the lead bailiff on March 10, 2015 to her office. The courtroom bailiff may have stated that Judge Devy Russell was also present but did not say anything to him. The courtroom bailiff also may have stated that [The lead bailiff] asked him to add [Hearing Judge’s] comments to the report so he wrote an addendum on the report.

Judge Russell never asked the courtroom bailiff to file an amended report – Judge Russell was not present when the incident occurred. She had to rely on what the courtroom bailiff had heard and what he had orally reported. Thereafter the Lead Bailiff met with Judge Waxman and the report was again amended.

Judge Russell specifically denies waiving the amended report around and bragging about it to anyone and denies that she committed any other sanctionable conduct as alleged in that paragraph of the complaint.

Judge Waxman investigated the matter – and upon information and belief she obtained a written report on March 13, 2015 - Judge Morrissey learned of the matter and upon information and belief may have informed Investigative Counsel in 2017. Judge Waxman imposed a secret remedial sanction in 2015 and Judge Morrissey arranged for mediation in 2016. The Commission did not bring charges until January 2019.

The general public was never involved in this matter. No citizens, no parties, no witnesses, no lawyers. It was never reported in the press. Now the Commission desires to pursue this matter in a public forum. It was not sanctionable conduct.

Procedural Irregularities

The Commission did not properly follow the Maryland Rules that apply to judicial disabilities matters. The report (“Board Report”) of the Judicial Inquiry Board (“the Board”) was voted on and approved on August 8, 2018, and was transmitted from the Board to the Commission on August 14, 2018. Judge Russell was notified that the Board Report was transmitted to the Commission on September 6, 2018. And pursuant to Md. Rule 18-404(k) Judge Russell filed objections to the Board Report and requested an informal meeting with the Board on September 21, 2018. Judge Russell’s request to meet in person with the Board was denied.

Two months later on November 29, 2018 the Commission invited Judge Russell to appear before the Commission – and required her waive many of her substantive and procedural rights - on December 17, 2018. Judge Russell declined to waive her rights and submitted a supplement response to the Board Report. (Attached as Exhibit C)

The Commission did not follow the requirements of the Maryland Rules. The matter should be referred back to the Board and/or dismissed for procedural irregularities.

Conclusion

For all of the aforementioned reasons the charges should be dismissed.

Dated: April 3, 2019

Counsel for Respondent

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of April 2019, a copy of the foregoing Response was emailed to:

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