

The Supreme Court of Ohio

CASE ANNOUNCEMENTS AND ADMINISTRATIVE ACTIONS

November 28, 2006

[Cite as *11/28/2006 Case Announcements, 2006-Ohio-6212.*]

MISCELLANEOUS ORDERS

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

In re Judicial Campaign Complaint
Against James O'Reilly

Case No. 2006-2045

OPINION

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(5)(E)(1) and R.C. 2701.11. The commission members are: Judges Peggy Bryant, chair; Nancy D. Hammond; Nancy McDonnell; Lynn H. Schaefer; and Jeffrey E. Froelich.

The complainant in this matter is Steven P. Goodin. The respondent, James O'Reilly, Attorney Registration No. 0030674, was, at the time the complaint was filed, a judicial candidate seeking election to the First District Court of Appeals in the November 2006 election.

The complainant filed a judicial campaign grievance with the Secretary of the Board of Commissioners on Grievances and Discipline ("Board") on October 16, 2006. The complainant alleged that respondent violated Canon 7(E)(1) of the Code of Judicial Conduct by broadcasting a television advertisement that contained false, deceptive, and misleading allegations regarding the respondent's election opponent, Patrick T. Dinkelacker. The grievance included numerous exhibits, including a digital copy of the campaign advertisement in question.

A probable cause panel of the Board was appointed to review the grievance, and, upon finding probable cause, the panel ordered the Secretary of the Board to prepare and file a formal complaint based on the complainant's grievance. On October 25, 2006, the Secretary filed a formal complaint alleging that respondent's campaign advertisement was deceiving and misleading to a reasonable person and that, in broadcasting the advertisement, the respondent violated Canon 7(E)(1) of the Code of Judicial Conduct.

The Board convened a three-member hearing panel, which conducted a hearing on the formal complaint on October 31, 2006. On November 3, 2006, the hearing panel issued its Report of Findings and Recommendations, which is appended to this opinion. The hearing panel found, by clear and convincing evidence, that:

* * * even if individual words and phrases in Respondent's ad are not false, the entirety of the message that packages three cases involving pornography, rape, and murder into the conclusion that Judge Dinkelacker made "errors" or "mistakes" in those cases has both the effect and intent of deceiving or misleading a reasonable person. * * * [In addition], the tone, production, and "visual aids" used in the television advertisement are clearly designed to mislead a reasonable person about the situations referenced in the text. See Hearing Panel Report at p. 11.

The hearing panel recommended that respondent be ordered to cease and desist from broadcasting the offending advertisement, be fined \$5,000, and be assessed the costs of the proceeding.

On November 13, 2006, the Supreme Court of Ohio appointed this five-judge commission to review the report of the hearing panel pursuant to Gov. Jud. R. II(5)(E)(1). The commission was provided with the record certified by the Board, including the transcript of the October 31, 2006 proceeding before the hearing panel and the exhibits admitted into evidence. The commission also received a letter from respondent's counsel, dated November 14, 2006, in which he stated that the respondent waived any objections to the hearing panel's findings and recommendations. Attached to the letter from respondent's counsel was an affidavit from an individual who provided advertising services to the respondent's campaign committee. The affiant noted that he received instructions from the campaign committee, in the afternoon of November 3, 2006, to cease the broadcast of the advertisement in question and that he immediately communicated those instructions to television stations. On November 15, 2006, the commission conducted a telephone conference during which it deliberated on this matter.

Pursuant to Gov. Jud. R. II(5)(E)(1), the commission is required to independently determine whether clear and convincing evidence exists to support a finding that respondent violated Canon 7 of the Code of Judicial Conduct. Having

reviewed the record made before the Board hearing panel and the report of the hearing panel, the commission affirms and adopts the findings of fact and conclusions of law made by the hearing panel with regard to the violation of Canon 7(E)(1). This provision prevents a judicial candidate from broadcasting information regarding an election opponent that would be deceiving or misleading to a reasonable person. The campaign advertisement in question misrepresented the record of respondent's opponent based on his participation as an assistant prosecutor or trial judge in three high-profile cases. The advertisement, in its entirety, was intended to highlight alleged errors or mistakes for the obvious purpose of suggesting that respondent's opponent was unfit for service on the court of appeals. The advertisement had the further effect of misleading and deceiving the public regarding the opponent's record as a prosecutor and a jurist.

Sanction

The hearing panel recommended the entry of a cease and desist order, imposition of a \$5,000 fine, and assessment of costs against the respondent. Because the election is concluded, issuance of a cease and desist order would have no purpose. With regard to the fine recommended by the hearing panel, the commission notes that although the respondent, through counsel, notified the commission that he waived any objections to the findings and recommendation of the hearing panel, he nonetheless asks that this commission consider several factors that he believes justify a reduction or elimination of the recommended fine.

The standards that guide this commission in determining the appropriate sanction for judicial campaign misconduct are as follows:

A judicial candidate who violates Canon 7 should receive a sanction commensurate to the seriousness of the violation. The sanction should be sufficient to punish the violator and serve as a deterrent to similar violations by judicial candidates in future elections. *In re Judicial Campaign Complaint Against Brigner* (2000), 89 Ohio St.3d 1460, 1461, citing *In re Judicial Campaign Complaint Against Morris* (1997), 81 Ohio Misc.2d 64, 65.

In addition to these general standards, prior commissions appointed to review judicial campaign complaints have imposed monetary sanctions where a judicial candidate has made use of statements that have damaged the reputation of an opponent as a jurist [*In re Judicial Campaign Complaint Against Burick* (1999), 95 Ohio Misc.2d 1] or distorted an opponent's record and service as a public official [*In re Judicial Campaign Complaint Against Hildebrandt* (1997), 82 Ohio Misc.2d 1, 4].

We first examine three factors cited by respondent in support of his request that the commission reduce or eliminate the \$5,000 fine recommended by the

hearing panel. First, respondent asks that we consider the fact that the advertisement did not alter the outcome of the election. We consider the outcome of the election, particularly one unfavorable to respondent, to be of little consequence where a violation of Canon 7 has been established. Instead, the focus should be on the circumstances that existed at the time the respondent engaged in the misconduct—in this case, the fact that respondent created and disseminated the advertisement for the purpose of misleading and deceiving persons who would be voting in the upcoming election.

Second, respondent references language in the hearing panel's report that commended respondent for his attempts to consult the applicable law before broadcasting the advertisement. The commission likewise appreciates respondent's attempts to consult the law governing judicial campaign conduct. However, all judicial candidates have such an obligation [*In re Judicial Campaign Complaint Against Hein* (1999), 95 Ohio Misc. 31, 36], and respondent's efforts in this regard do not rise to the level of mitigation.

Third, respondent notes that he took immediate action to stop the broadcast of the offending advertisement upon receiving notice of the hearing panel's report and recommendation. We view such action not as a mitigating factor but as an appropriate response to a unanimous finding by a hearing panel of the Board of Commissioners on Grievances and Discipline that respondent violated a judicial campaign conduct standard.

Taken together, these factors do not lessen the seriousness of the misconduct before us, although they do, together with respondent's record of no prior disciplinary violations, lead us to conclude that the imposition of additional sanctions is not warranted in this matter.

We conclude that the \$5,000 fine recommended by the hearing panel is commensurate to the seriousness of the violation and in accord with the standards established in prior cases. Accordingly, it is the order of this commission that respondent shall be fined \$5,000 and shall pay the costs of the proceedings before the hearing panel and this commission. Payment of the fine and costs shall be made within thirty days of this date.

The Secretary shall issue a statement of costs before this commission and instructions regarding the payment of the fine and costs. This opinion shall be published by the Supreme Court Reporter in the manner prescribed by Rule V, Section 8(D)(2) of the Rules for the Government of the Bar of Ohio.

So Ordered.

Judge Peggy Bryant, Chair

Judge Nancy D. Hammond

Judge Nancy McDonnell

Judge Lynn H. Schaefer

Judge Jeffrey E. Froelich

Dated: November 27, 2006

MEDIATION REFERRALS

The following case has been returned to the regular docket pursuant to S.Ct.Prac.R. XIV(6)(E):

2006-1415. State ex rel. Starr v. Indus. Comm.
Franklin App. No. 05AP-670.