BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA

INQUIRY CONCERNING A JUDGE: CYNTHIA A. HOLLOWAY NO.: 00-143

Florida Supreme Court
Case No.: SC00-2226

_____/

MOTION TO DISMISS PROCEEDINGS DUE TO BAD FAITH OF THE JUDICIAL QUALIFICATIONS COMMISSION

COMES NOW Respondent, Cynthia A. Holloway, by and through her undersigned counsel and hereby moves to dismiss the Amended Notice of Formal Charges in its entirety due to the inappropriate actions of the Judicial Qualifications Commission and the selective investigation and prosecution performed by its agents. The grounds for relief on this basis, in isolation or in conjunction with each other, justify the termination of these proceedings.

A. Improper involvement of the JQC Special Counsels, Thomas MacDonald and Martha Cook.

Mr. Thomas C. MacDonald was an inappropriate choice for Special Counsel in a judicial qualifications investigation concerning Judge Holloway. In fact, Mr. MacDonald is and has been an inappropriate choice for Special Counsel and/or General Counsel on any investigation of a judge in the Thirteenth Judicial Circuit. It is clear that Mr. MacDonald has a direct conflict of interest in the investigation of any judge in the

Thirteenth Judicial Circuit in that Mr. MacDonald's partner, Martha Cook, of Cook and MacDonald, has applied for at least seven judgeships in Hillsborough County including at least two of which can be traced directly to investigations handled by Mr. MacDonald. If not a direct conflict of interest, this demonstrates, at a minimum, an appearance of impropriety that should have kept Mr. MacDonald from ever being involved in this investigation. This glaring impropriety was even the subject of a recent editorial in the *Tampa Tribune* of March 29, 2001. Copy attached as Exhibit 1.

In addition to this direct conflict of interest, Mr. MacDonald, who was given authority to negotiate a settlement of this case prior to the filing of formal charges, has a personal bias against Respondent and her husband, Todd Alley. Mr. MacDonald's bitterness toward Respondent and her husband relates back to a time when all three were employed by the same law firm. While Respondent and her husband continue to have positive relationships with the people previously associated with that firm, Mr. MacDonald left that employment under negative circumstances. Surely Mr. MacDonald harbors some resentment towards former colleagues whom he feels were responsible for his ouster from that firm. Apparently, Mr. MacDonald continues to be resentful of past events and has told others, including Respondent's counsel, that he dislikes Respondent's husband.

Mr. MacDonald had an obligation to disclose his inability to act neutrally toward Respondent and her family and should have either disqualified himself or declined appointment in this investigation. Instead, Mr. MacDonald accepted a primary role in Respondent's prosecution and refused to fairly negotiate a settlement in this matter prior to the filing of formal charges. Specifically, Mr. MacDonald would not agree to any settlement unless Respondent admitted that she had lied during her deposition taken by Mr. Johnson in July 2000 even though the facts clearly show that Respondent did not make any misrepresentations. (See Motion for Summary Judgment pp. 10-13). Had the Judicial Qualifications Commission appointed General Counsel who was not biased against Respondent, this investigation would have been resolved in October of 2000. Mr. MacDonald has also expressed his personal opinion that Mr. Alley and Mr. Holloway treated Mr. Johnson unprofessionally and with hostility during the taking of the Respondent's deposition. Not only does the transcript of the deposition not bear this out, but in fact Mr. Johnson sent correspondence to Mr. Alley thanking him for being so cooperative. Copy of Mr. Johnson's letter dated July 20, 2000 attached as Exhibit 2. These facts alone created at least the appearance of a lack of neutrality which should have prevented Mr. MacDonald from ever being involved in the proceedings against Respondent.

Moreover, the Judicial Qualifications Commission has allowed Mr. MacDonald's law partner, Ms. Martha Cook, to actively participate in Respondent's investigation and to make decisions concerning settlement negotiations. Ms. Cook has a conflict of interest in participating in JQC investigations due to her repeated submissions of applications for judicial appointments in the Thirteenth Judicial Circuit, no less than seven times since February 1999. In fact, Ms. Cook has applied for two positions that were recently vacated due to Judicial Qualifications Commission investigations in which her law partner, Mr. MacDonald, was acting as General Counsel. In addition, Ms. Cook's billing records from January 2001 clearly indicate that she has billed the Judicial Qualifications Commission on file 00-73, the file number assigned to Gaspar Ficarrotta, a judge who recently resigned in the Thirteenth Judicial Circuit. She also applied for that vacancy. Copy of Cook billing records attached as Exhibit 3.

Notwithstanding her direct conflict, Ms. Cook has actively participated in this matter. On February 16, 2001, Ms. Cook contacted one of Respondent's attorneys, Mr. Scott Tozian, and informed him that Special Counsel, Ms. Beatrice Butchko, would be reporting to her while Mr. MacDonald was ill. She also stated that "we" at the JQC did not like these matters settled by Special Counsel. At the very least, Ms. Cook's involvement

creates an appearance of impropriety in that her reluctance to resolve the proceedings was influenced by her desire for an additional judicial vacancy for which she could be considered.

In addition, Mr. MacDonald's continued participation into the JQC investigation following the filing of formal charges was in contravention of Article 5, Section 12 of the Florida Constitution. In 1996, the Florida Constitution was amended to establish a bifurcated proceeding in which the investigative panel is separated from the hearing panel. Art. 5; §12, Fla. Const. (amended 1996). The investigative panel is a division of the Commission that is "vested with the jurisdiction to receive or initiate complaints [and] conduct investigations" while the hearing panel is a division of the Commission that is "vested with the authority to receive and hear formal charges from the investigative panel." Art 5, §12(b); Fla. Jud. Qual. Comm'n R. 2(2) & (3).

The Article V Task Force recommended the bifurcation of the commission proceedings based on public testimony asserting, "that once [a unified] JQC had been exposed to all the investigative information and it had determined probable cause to file formal charges, it would be difficult for the same commission to act as a neutral adjudicative body." Art. 5; § 12, Fla. Const. (*commentary by* William A. Buzzett & Deborah K. Kearney, 1996 Comm. Substitute for Senate Joint Resolution 978). To avoid the

inherent "unfairness in a system that combined the functions of investigation, prosecution, hearing, and decision-making into one single process," the unified Judicial Qualifications Commission proceeding was abolished. Accordingly, the Florida Constitution was amended to state, "[m]embership on the panels may rotate in a manner determined by the rules of the commission provided that no member shall vote as a member of the investigative and hearing panel on the same proceeding." Id.; Art. 5; § 12 (f)(d).

The procedure by which a bifurcated Judicial Qualifications Commission proceeding is created and maintained is not limited to the prohibition against commission members serving on both panels. Rather, the goal of a fair and just bifurcated process must also extend beyond the membership of the panels to the counsel assigned to each of the panels because of the panel's dependence upon its counsel to investigate and prepare documents on its behalf. For example, the Investigative Panel, as a body, has the responsibility for determining the existence of probable cause and of issuing and filing the Notice of Formal Charges. The Investigative Panel's responsibility of preparing the formal charging document is delegated to counsel that has been assigned to the Investigative Panel.

Because of the significant and substantive involvement of counsel to the separate panels, different counsel must be designated for each panel. In pertinent part, Article V,

schedule (f)(2)(e) of the Florida Constitution required that "[t]he commission shall hire separate staff for each panel." This provision recognized that the goals of a bifurcated proceeding would be subverted if the staff and counsel for the Investigative Panel were also allowed to participate in the hearing panel proceedings.

Moreover, Florida Judicial Qualifications Commission Rule 2, subsections (6), (7) and (8) acknowledges a distinction between the panels to which the "General Counsel," "Counsel to the Hearing Panel" and "Special Counsel" are assigned. Under these subsections, "General Counsel" serves as legal counsel to the Commission and the Investigative Panel while the duties of "Counsel to the Hearing Panel" are owed solely to the Hearing Panel. Fla. Jud. Qual. Comm'n R. 2(6)&(7). Special Counsel, on the other hand, refers to an attorney who is "designated by the Investigative Panel to gather and present evidence before the Investigative Panel <u>or</u> the Hearing Panel with respect to the charges against a judge and to represent the Commission in all proceedings including investigations." Fla. Jud. Qual. Comm'n R. 2(8)(*emphasis added*).

Mr. MacDonald apparently created a role for himself that is not authorized or recognized by the Commission's own rules. Prior to the hearing before the Investigative Panel, Mr. MacDonald actively conducted investigations in this matter and

participated in the elicitation of testimony from Respondent during the Investigative Panel hearing. Based upon those activities, Mr. MacDonald appeared to have been acting as "Special Counsel." However, Mr. MacDonald also acted as "General Counsel" by preparing and filing the Notice of Investigation and the Notice of Formal Charges in this matter. While Mr. MacDonald assumed two roles, at least his activities at that point were connected with the Investigative Panel's duties.

However, Mr. MacDonald continued his involvement into the second phase of this bifurcated process which is entirely within the purview of the Hearing Panel. It was improper for Mr. MacDonald, who was extensively involved in the creation of the charging document, to have continued to engross himself in the proceedings before the Hearing Panel by requiring his approval of any negotiated settlement and by directing the actions of Special Counsel. Mr. MacDonald's continued involvement thwarted the Florida Constitution's mandate to conduct a bifurcated Judicial Qualifications proceeding. The bifurcated process was designed to avoid the very type of bias Respondent has experienced in this prosecution.

Because Mr. MacDonald was inhibiting the resolution of this matter and because Mr. MacDonald's continued involvement was violative of the Florida Constitution and the Judicial Qualifications Commission Rules, Respondent submitted a Motion to

Disqualify Mr. MacDonald to the Judicial Qualifications Commission. A draft of the motion was sent to John Beranek, General Counsel to the Hearing Panel, in December 2000. Copy of Tozian letter dated December 20, 2000 along with draft motion attached as Exhibit 4. However, since Respondent did not want to needlessly embarrass Mr. MacDonald, Respondent did not initially file this Motion with the Court. It was expected that the Judicial Qualifications Commission would take appropriate action without any involvement of the Court. This request was ignored by the JQC and no action was taken at that time to remove Mr. MacDonald.

Unfortunately, Mr. MacDonald continued to actively participate in the investigation following the filing of formal charges as shown by Mr. MacDonald's time slips that he submitted to the Judicial Qualifications Commission for payment of legal fees. Since it was obvious that Mr. MacDonald was still influencing the proceedings and perhaps divulging information to the media (see Section B, below), Respondent ultimately requested the JQC to consider the disqualification of Mr. MacDonald.

Although Mr. MacDonald and the Judicial Qualifications Commission have indicated that he is no longer participating in this matter, the JQC continues to direct that Mr. MacDonald still receive a copy of all correspondence and pleadings. (See Pre-Trial Order dated July 16, 2001). This requirement contradicts

any expressed intention that Mr. MacDonald has removed himself from the proceedings. Mr. MacDonald's billing records contradict his statement in April of this year that he had not been involved in this case since October 2000. Copy of *St. Petersburg Times* and *Tampa Tribune* articles dated 4/5/01 attached as Exhibit 5. He has actively participated in the handling of this matter including revising pleadings in December 2000, reviewing materials in January 2001, reviewing investigative reports in March 2001, and having telephone conferences with Special Counsel in March 2001 and with Judge Wolf in April 2001. Copy of MacDonald billing records attached at Exhibit 6.

Mr. MacDonald's initial investigation of this matter despite his bias against Respondent and her husband; his law partner's continued application for vacant judgeships which he creates; his and his law partner's rejection of attempts at resolution and Mr. MacDonald's continued directives to Special Counsel have irretrievably tainted these proceedings.

B. Violations of Judicial Qualifications Commission Rule 23 was repeatedly violated, indicating Respondent's investigation was conducted in bad faith.

Florida Judicial Qualifications Rule 23 (a) states, "[u]ntil formal charges against a judge are filed. . ., all proceedings by or before the Commission shall be confidential." However, there have been repeated violations of Rule 23. The Judicial

Qualifications Commission has continuously waged a media campaign against the Respondent, rather than in fairly conducted proceedings, and has flagrantly disregarded the confidential nature of these proceedings. Prior to the first Rule 6(b) hearing, the press had somehow been notified of the date, time and location of the hearing as a member of the press from the *Tampa Tribune* contacted Respondent's attorney the day before the hearing. From the questions that this reporter asked Respondent's attorneys, it was clear that the substance of the investigation had also been disclosed. In addition, this same reporter was sitting outside the hearing room door waiting for Respondent at the exact day, time and place of the hearing. Mr. MacDonald's billing records indicate he had a telephone conference with the *Tampa Tribune* on October 12, 2000, the day before the hearing, and again on October 13, 2000, the day of the hearing. See Exhibit 6.

Prior to the filing of formal charges, Respondent and her attorney, Mr. Tozian, attempted to resolve this case with General Counsel to the JQC, Mr. MacDonald. On October 25, 2000, the day prior to the filing of the formal charges in a telephone conversation between Mr. Tozian and Mr. MacDonald, Mr. Tozian was advised that if the case was not resolved by 2:00 o'clock the next day, the formal charges would be filed with the Florida Supreme Court. The following day, at approximately 9:30 a.m.,

Mr. Tozian received a call from the local FOX affiliate who advised him that they were aware of the 2:00 o'clock deadline. Mr. MacDonald's billing records reflect a telephone conference with the media on October 25, 2000, after he spoke with Mr. Tozian.

The reporter refused to identify the source of his information. However, since the deadline to which he referred was communicated to Mr. Tozian in a conversation with Mr. MacDonald and Mr. Tozian did not disclose this deadline to anyone other than his client, the only plausible explanation is that this confidentiality leak originated with the JQC.

In yet another instance of a substantial breach in confidentiality, members of the press contacted Mr. Tozian about a JQC investigation before either Respondent or her attorneys knew that such an investigation was even being conducted. Specifically, on March 27, 2001, Mr. Tozian was contacted by a reporter from the *Tampa Tribune* concerning the JQC's investigation of Respondent's relationship with the owners of Outback Steakhouse. Mr. Tozian told the reporter that as far as he knew there was no such investigation as neither Respondent nor the Outback principal had been contacted by the JQC. Thereafter, on March 28, 2001, the same reporter contacted Mr. Tozian again insisting that she continued to receive information that such an investigation was ongoing. Mr. Tozian again assured the reporter

that he knew nothing about this investigation. On March 29, 2001, the reporter again contacted Mr. Tozian to determine whether he was able to confirm such an investigation and again, Mr. Tozian told her that he had no basis to confirm the investigation.

Later, in the afternoon of March 29, 2001, Mr. Tozian received a phone call advising him that Bob Butler, investigator for the JQC, had just contacted the CEO of Outback Steakhouse, Chris Sullivan. Mr. Sullivan is close personal friends with Respondent's husband, Todd Alley, and Respondent. At that time, Mr. Sullivan was questioned with regard to trips he had taken with Respondent and her husband in an airplane owned by Outback Steakhouse. That interview was the JQC's first attempt to contact Mr. Sullivan.

Although it was later determined that there was nothing inappropriate about Respondent's financial disclosures, Respondent was the focus of intense, negative media coverage concerning this "confidential" investigation. Copy of news articles from the *Tampa Tribune* dated April 3 and 4, 2001 attached as Exhibit 7. It is outrageous that the media was advised of the JQC's intent to investigate prior to the JQC even speaking to any witness concerning this matter. Moreover, since the Respondent and her attorneys were not aware of any such investigation, it is clear that the information was provided to

the media by the JQC. The leaks to the media evince an intent to sway public opinion using unsubstantiated allegations of improper conduct and resulted in the deprivation of a fair and neutral environment in which to defend against the formal charges. It is also clear that the leaks are an attempt to pressure Respondent into resigning by divulging allegations concerning close personal friends in an attempt to embarrass Respondent, her family and friends.

As if the foregoing leaks were not egregious enough, Respondent's attorney Michael Rywant was contacted by a reporter for the *Tampa Tribune* on May 23, 2001, regarding the amended investigation by the JQC. This reporter had knowledge of the issues which were contained in the Amended Notice of Investigation, a notice that Ms. Butchko had only verbally discussed with counsel on May 19, 2001, wherein she stated that she was preparing the hearing notice at the time. It is amazing that the *Tampa Tribune* always knows who and what is being investigated and when a notice of investigation is going to be filed, despite the fact that the investigative aspect of the proceedings is to be confidential in order to protect the reputation of the parties and the integrity of the process.

The Supreme Court has on several occasions expressed concern regarding breaches of confidentially by the JQC, its staff and its counsel. In In re Graziano, 696 So. 2d 744, 752 (Fla. 1997),

the Supreme Court noted that the confidentiality requirements promote the effectiveness of the judicial disciplinary process and protect judicial officers from unsubstantiated charges, such as those relating to the Respondent and Chris Sullivan. Just a year ago, the Supreme Court felt the need to again remind the JQC of its obligations to maintain confidentiality in In re Frank, 753 So. 2d 1228, 1241 (Fla. 2000), another Hillsborough County proceeding replete with leaks to the media. At least with respect to investigations in Hillsborough County, there is no confidentially and information seems to flow freely to the media.

C. Special Counsel has selectively investigated the charges and has refused to consider evidence favorable to Respondent.

It is Respondent's belief that the initial charges could and should have been amicably resolved. Even Mr. MacDonald expressed that this matter would have been a "woodshed" talk if it had not been for the issue regarding the Respondent's deposition.

The circumstances surrounding this deposition and the JQC's role in that deposition are circumspect. Mr. Johnson has testified that he initiated his relationship with the JQC in April of 2000, and first spoke to the JQC investigator in May of 2000. His first contact with Respondent regarding the taking of the deposition in his child custody matter was not until June 8, 2000. Copy of Mr. Johnson's letter dated June 17, 2000 to C.

Todd Alley attached as Exhibit 8. It is clear that the JQC knew the deposition was going to be taken and one must wonder just how much involvement JQC Counsel or its investigator had in the taking of this deposition.

An even more troubling aspect of this case is that the JQC never spoke with anyone present at the deposition with the exception of Mr. Johnson, a person who has on numerous occasions threatened the Respondent. There were three attorneys, all in good standing with The Florida Bar, present, including one whom the Respondent did not know previously. Even after formal charges were filed, no one spoke to these witnesses until depositions were taken in May 2001, ten months after the deposition of Respondent that is in issue. These witnesses, available to the investigators from the beginning, confirm that no false or misleading testimony was given by the Respondent and that they each interpreted Mr. Johnson's questions as did the Respondent. Special Counsel, Beatrice Butchko, has the obligation of ensuring that the charges are legally sufficient through consideration of all relevant evidence pertaining to the charging document. However, neither Ms. Butchko nor the JQC investigator has accepted or considered any evidence or testimony that is offered in favor of Respondent. At least one witness interviewed by Special Counsel has indicated that her interview

was terminated as she attempted to provide positive information about the Respondent.

When Special Counsel came to Tampa for three days to "investigate" these charges, an offer was extended for her meet individually with Mr. Alley, Mr. Holloway and Mr. Brooks, yet she refused to speak with these important witnesses. The obvious intent of the visit was not to further the charges pending but to "dig up new dirt." Special counsel launched inquiries into irrelevant details of Respondent's personal life. For example, many witnesses were asked where and when Respondent gets her nails done, whether Respondent was "spoiled" or whether she flaunts her wealth. One can only assume that the same motivation to seek out only negative information explains why only Mr. Johnson and not the attorneys present at Respondent's deposition were interviewed by the JQC.

During this time, the JQC refused to turn over witness interviews to which Respondent was entitled under the JQC's rules. This ultimately necessitated the filing of a Motion to Compel with the Supreme Court, which was unanimously granted. However, this obstructionist tactic needlessly caused thousands of dollars in additional attorney's fees to be incurred and impeded Respondent's ability to defend herself against the charges and personal attacks of the JQC.

In preparation for the 6(b) hearing concerning the amended charges in this matter, Special Counsel has failed to provide any statements regarding Charge 6. Rather, it was Respondent who offered Jeanne Tate's affidavit which averred to the circumstances of the tree-cutting incident. In addition, the records of the City of Tampa clearly indicate that no permit or permission to cut the trees had been granted on the date in question. Copy of letter from Tampa city employee, Steve Graham, attached as Exhibit 9. Despite the lack of any documentary or sworn proof to substantiate Charge 6, the panel found probable cause. The JQC's selective review and consideration of the facts prior to finding probable cause reveals a disturbingly biased investigation. Moreover, it demonstrates an unwillingness to adhere to its own rule prohibiting unnecessary investigations into "obviously unfounded or frivolous" allegations. See Fla. Jud. Qual. Comm'n R. 6(a).

D. The JQC has attempted to selectively enforce the Canons of Ethics by charging Respondent with conduct it has previously found to be acceptable.

In her Motion for Summary Judgment the Respondent cites to this panel the fact that in a recent decision the JQC specifically found that Judge Brown's contact with a law enforcement officer concerning an investigation of his son was not improper conduct despite testimony from the officer that

Judge Brown was demeaning and expected favorable treatment. Yet here the JQC is charging the Respondent with a violation of the judicial canons for significantly less egregious conduct. Here, the officer testified that the Respondent started her conversation with him with the statement that she was not trying to influence the investigation but if a statement of the child had to be taken to take it soon. In addition, Detective Yaratch testified that the Respondent did not say anything to "intimidate, coerce or try to influence" him. How can the Respondent's conduct be actionable when demonstrably more egregious conduct has previously been found to be acceptable?

This idea of selective enforcement was further demonstrated with the filing of charges involving Judge Holloway's contact with Judge Essrig. It is clear that the accommodation requested was not only reasonable given the circumstances but was one Judge Essrig says she grants on a regular basis for attorneys and non-attorneys alike. In addition, if the Respondent violated judicial canons with such a reasonable request then it is submitted that every judge should be charged for asking another judge for similar accommodations, including getting people off of jury duty.

The Judicial Qualifications Commission is charged with the duty of preserving faith in our justice system. Our forefathers were correct in reining in the natural instinct to believe a

person guilty by providing us the protections of due process and declaring the accused are innocent until proven guilty. The Judicial Qualifications Commission has the ability to play a very important role in that process, but it cannot continue to engage in actions that further erode confidence in our system.

The Supreme Court has previously imposed the sanction of dismissal upon The Florida Bar for the irresponsible prosecution of disciplinary matters. The Florida Bar v. Rubin, 362 So. 2d 12, 16 (Fla. 1978). The court rejected the Bar's recommendation of disbarment finding that the Bar's conduct was "inexcusable." Id. at 16.

The court justified this severe sanction with the following analysis:

> The bar has consistently demanded that attorneys turn "square corners" in the conduct of their affairs. An accused attorney has a right to demand no less of the Bar when it musters its resources to prosecute for attorney misconduct. We have previously indicated that we too will demand responsible prosecution of errant attorneys, and that we will hold the Bar accountable for any failure to do so.
>
> > "We have pointedly held that the responsibility for exercising diligence in the prosecution rests with the Bar. When it fails in this regard the penalizing incidents which the accused lawyer suffers from unjust delays, might well supplant more formal judgments as a form of discipline. This is so even though the record shows that the conduct of the lawyer merits discipline." (citing The Florida Bar v. Randolph, 238 So. 2d 635, 639 (Fla. 1970)).

The JQC, like The Florida Bar, acts as an arm of the Supreme Court in judicial investigations and prosecutions. As the court observed in the Rubin case when less than diligent prosecution is conducted, the subject of the prosecution suffers unjustly. In the instant case, Respondent has suffered a biased, selective prosecution fraught with media leaks which have served to supplant a more formal judgment as a form of discipline.

WHEREFORE and by reason of the foregoing, Respondent respectfully requests this Honorable Court dismiss the instant proceeding based upon the irresponsible and improper conduct of the JQC as outlined above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of September 2001, the original of the foregoing Motion to Dismiss Proceedings Due to Bad Faith of the Judicial Qualifications Commission has been furnished by overnight delivery to: Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927 with copies by U.S. Mail to:

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