COMMONWEALTH OF PENNSYLVANIA
COURT OF JUDICIAL DISCIPLINE

IN RE:

Andrew T. LeFever, Esq.	:	
Magisterial District Judge	:	7 JD 2020
Magisterial District 02-2-04	:	
2nd Judicial District	:	
Lancaster County	:	

MEMORANDUM OF LAW IN OPPOSITION TO THE JUDICIAL CONDUCT BOARD'S MOTION FOR THE COURT TO RECONSIDER ITS DECISION TO DENY ITS MOTION IN LIMINE

A. There Is No Basis for Reconsideration of the Court's Order Denying the Judicial Conduct Board's Motion in Limine.

The Judicial Conduct Board (Board) asks this Court to reconsider its Order filed September 9, 2021 denying the Board's Motion in Limine that sought to preclude Judge LeFever's testimony in his defense that he intended to comply with the Rules Governing Standards of Conduct of Magisterial District Judges (Rules). "A trial court always has the authority to reconsider its own judgment. The question of whether or not to exercise that authority is left to the sound discretion of the trial court." *Moore v. Moore*, 634 A.2d 163, 167 (Pa. 1993). "[R]econsideration should be granted sparingly or there will no finality of judgments or orders. The only proper grounds for granting reconsideration are new and material evidence or facts, a change in the controlling law or a clear error in

applying the facts or law to the case at hand so that it is necessary to correct a clear error and prevent a manifest injustice from occurring." *Scartelli General Contractors Inc., v. Selective Way Ins. Co.*, 6 Pa. D. & C. 5th 61, 64 (Lackawanna Co. Sept. 9, 2008). "Mere disagreement with the court's conclusion is not a basis for reconsideration." *Id.* (citations omitted). With these standards in mind, the Board's request for reconsideration of this Court's order denying the Board's Motion in Limine should be denied.

The Board claims that it was aware of this Court's decision in *In re Whittaker*, 948 A.2d 279 (Pa.Ct.Jud.Disc. 2008), when it filed its Memorandum in Support of its Motion in Limine to preclude Judge LeFever's proffered testimony that he intended to comply with the Rules. The Board says that it "did not cite *In re Whittaker* because it does not apply to Canon 4, Rule 4.1(A)(1), Canon 4, Rule 4.1(A)(3), and Canon 4.2(A)(1), which Respondent is alleged to have violated." Memorandum in Support of the Judicial Conduct Board's Request for the Court to Reconsider Its Decision to Deny Its Motion in Limine (Memo in Support), p. 1. To be sure, none of the cited rules is referred to in *Whittaker*. However, it is presumptuous to state that the rule of *Whittaker* "does not apply" to these provisions. That the rule announced in *Whittaker* does apply to these rules – two of which use language similar to the rule at issue in *Whittaker* that said that a judge "shall not" engage in specified activity – was the basis of the argument advanced

by counsel on behalf of Judge LeFever in his Memorandum of Law in Opposition to the Motions in Limine Filed by the Judicial Conduct Board (Memo in Opposition).[1] That the Board now *argues* that the rule does not apply to the charges leveled against Judge LeFever does not make it so.

Moreover, as indicated by the Board's Memo in Support, *Whittaker* is clearly relevant to the resolution of the Motion in Limine filed by the Board as reflected in the Memo in Opposition. Otherwise, it would not be going to such lengths to overcome the results of the Court's Order and suggesting that it be "overruled on the basis that it was wrongly decided." Memo in Support, p. 5.

Perhaps more importantly, given that the precedent established by *Whittaker* was clearly adverse to the position that the Board was espousing, it was incumbent upon the Board to attempt to distinguish it when it filed its motion and supporting memorandum. It was one of only a few cases that dealt with the issue of the requisite mental state for this Court to find a violation of the Rules and it was decided by this Court unanimously. Fortunately, counsel for Judge LeFever found the case and provided it to assist the Court in resolving the Board's motion.[2] The

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[1] Judge LeFever incorporates his Memo in Opposition into this Memorandum and will file a copy of it along with this Memorandum for the ease of the Court in reviewing the Board's request for reconsideration.

[2] That is not to say that the Court would not have found its own precedent that is clearly relevant to the issue raised by the Board's motion in limine through its own devices.

Board should not use the guise of a motion for reconsideration to address *Whittaker* for the first time. *Whittaker* and its import were clearly available to the Board when it filed the motion in limine and its supporting memorandum. There has been no intervening change in the law since the Board filed its Memorandum in Support of its Motion in Limine. Reconsideration should properly be denied for that reason alone.

Similarly, the material facts have not changed since the Board filed its Motion in Limine. The facts of this case have been largely stipulated and most of the stipulated facts have been accepted by the Court.[3] Judge LeFever's proffered testimony has been on record since the filing of his Pretrial Memorandum on June 3, 2021. Thus, a change in the material facts does not warrant reconsideration.

Finally, there is no clear error in applying the facts or law to the case at hand so that it is necessary to correct a clear error and prevent a manifest injustice from occurring. Rather, the Board merely disagrees with the Court's conclusion on its Motion in Limine. That is not a basis for reconsideration.

B. The Change in Verbiage Between the New and the Old Rules Does Not Result in the Rule of *Whittaker* Being Inapplicable to the Violations Alleged Against Respondent.

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[3] By Order dated June 11, 2021, the Court accepted stipulated facts that had been agreed to by the Board and Judge LeFever and filed with the Court on March 23, 2021. On September 3, 2021, the parties filed additional stipulations with the Court which have not yet been accepted.

In brief response to the points that the Board attempts to make, a few observations are offered. First, though the version of the Rules discussed in *Whittaker* do not have the Comments found in the new version, language of similar import is found in the former version. For example, former Rule 1, entitled "Integrity and Independence of Judiciary," stated: "*An independent and honorable judiciary is indispensable to justice. Magisterial district judges* should participate in establishing, maintaining and enforcing, and *shall themselves observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions for these rules governing standards of conduct of magisterial district judges shall be construed and applied to further that objective*." Former Rule 1 (emphasis added). The language of this Rule made it clear that it applied to all the rules that followed this first one, including former Rule 15A that was at issue in *Whittaker*. In similarly hortatory[4] language, former Rule 2 stated, in pertinent part: "*Magisterial district judges* shall respect and comply with the law and *shall conduct themselves at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary*." Former Rule 2A (emphasis added). The Note to former Rule 2 explains: "Public

[4] *See In re Larsen*, 626 A.2d 529, 578, 579, 581 (Pa. 1992) (opinion adopting report of members of the Judicial Inquiry and Review Board) (describing the "hortatory" or hortative" language of former Canons 1 and 2 of the Code of Judicial Conduct which are virtually identical to the language of former Rules 1 and 2).

confidence in the judiciary is eroded by irresponsible or improper conduct by members of the judiciary." Former Rule 2, Note. Can it be said that the language quoted by the Board regarding "the public confidence in the independence and impartiality of the judiciary" from the Comments to the Rules adds anything more than that which was set forth in the former Rules themselves as well as the accompanying Note?

Certainly, when this Court decided *Whittaker*, as when it decided *In re Crahalla*, 747 A.2d 960 (Pa.Ct.Jud.Disc. 2000), on which *Whittaker* relied, it had particular rules before it. A "no solicitation" rule in *Crahalla*, former Rule 11, and a "no public employment" rule in *Whittaker*, former Rule 15A. Both used "shall not" language identical to the "shall not" language in Rules 4.1(A)(1) and (A)(3). Is there any doubt that this Court would have applied the same reasoning if the judge in *Whittaker* had been charged with former Rule 15B(2)(a)? That subsection which is part of the same rule which was at issue in *Whittaker* said: "Magisterial district judges or a candidate for such office *shall not* …hold office in a political party or political organization or publicly endorse candidates for political office." Former Rule 15B(2)(a). That rule was the predecessor for two of the rules with which Judge LeFever is accused of violating, to wit: Rule 4.1(A)(1) ("a magisterial district judge or a judicial candidate shall not … act as a leader in, or hold an office in, a political organization") and 4.1(A)(3) ("a magisterial district judge or a

judicial candidate shall not … publicly endorse or publicly oppose a candidate for any public office.") The rationale of *Whittaker* and its holding is clearly applicable to Judge LeFever's case.

C. There Is No Basis or Reason to Overrule *Whittaker.*

As noted above, mere disagreement with a court's conclusion is not a basis for reconsideration. *Scartelli General Contractors Inc., v. Selective Way Ins. Co.*, 6 Pa. D. & C. 5th at 64. It is likewise not a basis for overruling a prior decision.

Cited above are former Rules which embody the same aspirations as Section [3] of the Preamble to the Rules. *See, e.g.*, Former Rules 1 and 2, *supra*. Former Rule 15B, like Rules 4.1 and 4.2, clearly applied to magisterial district judges and candidates for that office. So nothing about the changed verbiage in the current Rules requires even a reexamination of *Whittaker*, let alone its overruling.

As it did in arguing for its Motion in Limine, the Board again equates violations of the Rules with absolute liability offenses for which there is no *mens rea* or scienter requirement. *See* Memo in Support, p. 6 (the prohibition in Rule 3.10(C), the successor to former Rule 15A with which the judge in Whittaker was charged, is "absolute") and 12 (equating the Rules with "similar public welfare offenses"). That simply is not true and the Board's continuing to say it does not make it so. It is now repackaging its argument in an effort to obtain reconsideration

and the overruling of *Whittaker*. An already rejected argument is not a basis for reconsideration.

In its last-ditch effort to have this Court reexamine and overrule *Whittaker*, the Board challenges the *Whittaker* Court's analysis of the important considerations identified in *Whittaker* as supporting its conclusion. *Whittaker*, *supra*, at 298-302. As set forth in Judge LeFever's previously filed Memo in Opposition, Memo in Opposition, pp. 5-7, and as addressed by the Board, Memo in Support, pp. 12-14, those considerations include, *inter alia*:

1. The legislative purpose of discouraging the conduct prescribed by the rules at issue "is not thwarted by requiring the element of scienter to constitute a violation of the rule … ." *Whittaker*, at 298.

2. The penalties for any violation of the Rules "are not 'relatively small' ranging, as they do, from reprimand to removal from office." *Id.*

3. Different from a public welfare offense "where the effect of a conviction on the reputation of the offender is negligible, the injury to the reputation of a judicial officer 'disciplined' by this Court cannot be overassessed." *Id.*

The Board seriously downplays the importance or validity of these considerations. It disagrees with the conclusion of *Whittaker* that the legislative purpose of the Rules is not thwarted by a scienter requirement saying that such a

requirement frustrates the purpose of the rules by referring to "the Supreme Court's well delineated intent to promulgate rules to regulate judicial conduct so that the independence, integrity, and impartiality of the judiciary can be maintained" because "permitting a judge will go free from discipline for plainly violating known prescriptions [*sic*] and prohibitions would certainly frustrate that purpose." Memo in Support, pp. 12-13. In jumping to this conclusion, the Board fails to recognize the Supreme Court's admonition that a judge's intent is important to the disciplinary process. In seeking reconsideration, the Board makes no mention[5] of Section [6] of the Preamble which states, in pertinent part:

> "[I]t is not intended that disciplinary action would be appropriate for every violation of the Conduct Rules' provisions. *Whether disciplinary action is appropriate, and the degree of discipline to be imposed*, should be determined through a reasonable application of the text and *should depend on such factors as* the seriousness of the violation, *the intent of the magisterial district judge*, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system."

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[5] In its previously filed Memorandum of Judicial Conduct Board Regarding Motion in Limine to Exclude Testimony From Respondent Related to His Intent to Comply With the Rules Governing Standard of Conduct of Magisterial District Judges, the Board takes the crabbed view that a judge's intent is only relevant for purposes of determining sanction. *Id.*, at 8. As explained above in text, the intent of the judge is relevant throughout the disciplinary process starting with the Board's receipt of a complaint. That is the import of the conjunctive "and" separating the phrases "[w]hether disciplinary action is appropriate, *and* the degree of discipline to be imposed" in the above quoted Comment.

Rules, *Preamble* [6] (emphasis added). To this add that the Supreme Court has explained, in an appeal from a case before this Court, that "[t]he discipline of a judicial officer is a process which begins the moment a complaint is received by the [Judicial Conduct B]oard." *In re Hasay*, 686 A.2d 809, 817 (Pa. 1996). This means that the Board is obligated to consider a magisterial judge's intent during the investigative stage of the disciplinary process even before proceedings are commenced in this Court. The purpose of the Rules cannot be thwarted or frustrated by following them as the Supreme Court intended as expressed in the words chosen by the Court. They should not be conveniently ignored by the agency charged with investigating allegations of judicial misconduct and pursuing alleged violations in this Court.

Regarding the second consideration, the Board takes the view that a sanction in a particular case may be slight or even non-existent, particularly if the infraction is *de minimis*. Memo in Support, p. 13.[6] That view simply misses the mark. If only a slight sanction could be imposed for any violation, the Board's argument might have some appeal. However, once any violation is determined to have been established by the Board by clear and convincing evidence, the Court has its full panoply of sanctions available to it, including the severest of sanctions, removal.

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[6] Though the Board argues that Judge LeFever's conduct is not de minimis, *see* Memo in Support, p. 13 n. 5, Judge LeFever has asserted a contrary view. *See* Answer to Judicial Conduct Board Complaint, ¶¶ 30, 39 and 44, pp. 12, 15 and 17.

See In re Roca, 2016 Pa. Jud. Disc. LEXIS 55, 28 (Pa.Ct.Jud.Disc. 2016), quoting *In re Eagen*, 814 A.2d 304, 306-07 (Pa.Ct.Jud.Disc. 2002) That is different from strict liability offenses like traffic violations which always have relatively low penalties.

Lastly, the Board downplays the seriousness of the effect of a conviction on a judge's reputation, arguing it depends on the severity of the sanction imposed. Memo in Support, p. 14. That simply is not true. Any discipline tarnishes a judge's reputation to some extent. Reputation is protected under the Pennsylvania Constitution. Pa. Const., Art. I, ¶ 1.

It has recently been reported that a judge of the United States Court of Appeals for the District of Columbia noted during argument of a case involving a misconduct order that had been issued regarding a federal judge. According to the article, it was argued that the judge was not "harmed by the misconduct order even though the underlying reason for it had been withdrawn." To that argument, one of the appellate panel members called "the misconduct order 'inherently stigmatizing.'" *See* "DC Circ. Mulls 'Calculating' Behavior in Ohio Judge Censure," Nadia Dreid, *Law360* (September 9, 2021, 9:13 PM EDT). As this Court said in *Whittaker*, "the injury to the reputation of a judicial officer 'disciplined' by this Court cannot be overassessed." *Id.* at 298.

The Board's reasons for reexamining and overruling *Whittaker* are unavailing. Its request should be denied.

C. Conclusion

For the reasons set forth above and any additional reasons set forth in the previously filed Memorandum of Law in Opposition to the Motions in Limine Filed by the Judicial Conduct Board filed on behalf of Judge LeFever, it is respectfully requested that this Honorable Court deny the Judicial Conduct Board's Motion for the Court to Reconsider Its Decision to Deny Its Motion in Limine.

Respectfully submitted,

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Date: September 13, 2021

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records and Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing of confidential information and documents differently than non-confidential information and documents.

Submitted by: Counsel for Andrew T. LeFever

Signature: 

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PROOF OF SERVICE

In compliance with Rule 122 of the Court of Judicial Discipline Rules of Procedure, on the date below a copy of the Memorandum of Law in Opposition to the Judicial Conduct Board's Motion for the Court to Reconsider Its Decision to Deny Its Motion in Limine was mailed and emailed to Colby J. Miller, Judicial Conduct Board Deputy Counsel, at the following addresses:

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