

BEFORE THE JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA

INQUIRY CONCERNING A JUDGE, :
NO. 06-52, CHERYL ALEMAN : CASE NO. SC07-198
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**JUDICIAL QUALIFICATIONS COMMISSION’S RESPONSE TO JUDGE
ALEMAN’S MOTION TO DISMISS OR MOTION FOR A MORE
DEFINITE STATEMENT AND MEMORANDUM OF LAW**

The Judicial Qualifications Commission (“JQC”), by and through its undersigned Special Counsel, hereby files its Response to Judge Cheryl Aleman’s Motion to Dismiss or Motion for a More Definite Statement and Memorandum of Law (“Motion”). As grounds therefor, the JQC states as follows:

INTRODUCTION

A.

This case arises out of a Notice of Formal Charges (“Formal Charges”) filed by the JQC on February 6, 2007. Briefly summarized, the five counts of the Formal Charges allege as follows:

Count I - Count I alleges that in a case styled, *State of Florida v. Braynen*, Judge Aleman violated Canons 1, 2A, and 3B(4)¹ of the

¹ Canon 1 provides, in part, that:

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe

Code of Judicial Conduct by improperly denying a motion to disqualify and further abusing her authority by issuing a rule to show cause against two public defenders when they were delayed in returning to the courtroom following a brief recess during a trial.

Count II - Count II alleges that in a case styled, *State of Florida v. Hollis*, Judge Aleman violated Canons 1, 2A, and 3B(4) by abusing her criminal contempt powers when she sentenced a lawyer to 60 days in jail (where he was then incarcerated for several days before being released). Among other things, Judge Aleman is alleged to have deliberately issued an Order To Show Cause for the lawyer to appear on a date when she *knew* he was out of town and would not be able to appear.

Count III - Count III of the Formal Charges alleges that in a case styled, *State of Florida v. Felix*, Judge Aleman violated Canons 1, 2A, and 3B(8)² by improperly denying the defendant, Jean Felix's, request for medical furlough, despite i) no objection from the State Attorney's Office; and ii) a stipulation from the Public Defender's

those standards so that the integrity and independence of the judiciary may be preserved.

Canon 2(A) similarly provides that:

A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Canon 3B(4) provides, in part, that:

A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity

² Canon 3B(8) provides:

A judge shall dispose of all matters promptly, efficiently, and fairly.

Office and State Attorney's office that Mr. Felix was suffering from an "incurable fatal disease" and had a life expectancy of two months.

Count IV - Count IV of the Formal Charges alleges that Judge Aleman violated Canons 1, 2A, and 3B(2),³ by entering a superfluous order in the *Felix* case in which she attempted to deflect criticism of her decision to deny medical furlough after an unfavorable article appeared in the local newspaper.

Count V - Count V of the Formal Charges alleges that Judge Aleman violated Canons 1, 2A, and 3E(1)⁴ by refusing to disqualify herself in two cases in which Michael Gottlieb was defense counsel of record, despite the fact she had previously disqualified herself in another case in which details emerged concerning her acrimonious relationship with Mr. Gottlieb during the time she served as an assistant statewide prosecutor.

Count VI - Count VI of the Formal Charges alleges that if the actions described in Counts I - V occurred as alleged, Judge Aleman's behavior would constitute conduct unbecoming a member of the judiciary and would impair the confidence of the citizens of this state in the integrity of the judicial system and in her as a judge.

³ Canon 3B(2) provides that:

A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

⁴ Canon 3E(1) provides, in part, that:

A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned

B.

The purpose of a motion to dismiss is to test the legal sufficiency of a complaint. Florida law is settled that “[u]nlike a motion for summary judgment, when ruling on a motion to dismiss, ‘[a] court may not go beyond the four corners of the complaint in considering the legal sufficiency of the allegations.’” *Pacific Insurance Co., Ltd. v. Botelho*, 891 So. 2d 587, 590 (Fla. 3d DCA 2004) (quoting *Barbado v. Green & Murphy, P.A.*, 758 So. 2d 1173, 1174 (Fla. 4th DCA 2000)). As indicated in Judge Aleman’s Motion, however, a narrow exception to this rule permits a court to look beyond the four corners of the complaint where dismissal is sought on the basis of lack of subject matter jurisdiction and only questions of law are implicated. See Motion to Dismiss at 6.

Relying upon that exception, Judge Aleman argues in her voluminous Motion that “[t]he Notice of Formal Charges must be dismissed for lack of subject matter jurisdiction and for failure to state a claim, ***because it turns on mere disagreements with rulings of the circuit court and violates due process.***”

Specifically, she contends:

Counts I and V disagree with the circuit court’s rulings on motions to disqualify. Counts II disagrees with the circuit’s court’s rulings on contempt. Counts III and IV disagree with the circuit court’s rulings on a Motion for Furlough. ***None of these disagreements is properly the subject of a judicial misconduct investigation any more than is a disagreement with other controversial rulings of trial judges around the state.***

See Motion to Dismiss at 18 (emphasis added).

As elaborated upon, *infra*, the Florida Supreme Court has expressly held that a judge's legal rulings can be the subject of judicial disciplinary proceedings. Thus, the sole premise upon which Judge Aleman's 43-page motion is based; namely, that judicial rulings are beyond the purview of the JQC, is simply wrong. Not only is Judge Aleman's jurisdictional argument unavailing, more important, it is a poorly disguised ruse by which she attempts to deceive the Hearing Panel into considering evidence which is beyond the four corners of the Formal Charges. There is no question that the JQC has jurisdiction over the conduct alleged in the Formal Charges (even if denominated as "legal rulings"). Accordingly, the Hearing Panel should reject Judge Aleman's attempt to introduce extraneous evidence and instead determine the sufficiency of the Formal Charges by restricting its review to the four corners of the Formal Charges, as required by Florida law.

ARGUMENT

I. JUDGE ALEMAN'S MOTION TO DISMISS SHOULD BE DENIED

A. IMPROPER LEGAL RULINGS ARE PROPERLY THE SUBJECT OF JUDICIAL DISCIPLINARY PROCEEDINGS

At page 2 of her Motion, Judge Aleman recites a litany of cases, which she contends are illustrative of the types of "behavior historically penalized under the Code of Judicial Conduct." See Motion to Dismiss at 2. These so-called

prototypical cases include instances, for example, where judges were alleged to have been publicly intoxicated; sexually harassed lawyers; or made deliberate efforts to hinder law enforcement investigations. *Id.* Noticeably absent from Judge Aleman's recitation of the types of behavior she agrees is worthy of judicial discipline, however, is any mention of the vast body of cases in which judges' "legal rulings" were also the subject of judicial discipline. Such cases have included the following:

- *In re Perry*, 641 So. 2d 366 (Fla. 1994) (imposing discipline against judge for exercising his criminal contempt powers in an arbitrary and improper manner);
- *In re Graham*, 620 So. 2d 1273 (Fla. 1993) (imposing discipline against judge for arbitrarily increasing the length of suspension of a defendant's driver's license in one case and, in another case, imposing an unnecessarily lengthy sentence in a DUI case and thereafter refusing to mitigate the sentence);
- *In re McAllister*, 646 So. 2d 173 (Fla. 1994) (imposing discipline against judge for holding an assistant public defender in criminal contempt of court);
- *In re Turner*, 421 So. 2d 1077 (Fla. 1982) (imposing discipline against judge for holding an attorney in contempt of court and sentencing him to a fine and 24 hours in jail, despite judge's defense that he had repeatedly informed the attorney that the attorney was not following the court's instructions);
- *In re Crowell*, 379 So. 2d 107 (Fla. 1979) (imposing discipline against judge for abusing his contempt powers in three separate instances, including one instance where he declared an attorney in contempt and assessed a penalty of \$750.00 or thirty days in jail);

- *In re McMillan*, 797 So. 2d 560 (Fla. 2001) (imposing discipline against judge where he presided over a matter in which disqualification was required or where his impartiality might reasonably be questioned);
- *In re Wood*, 720 So. 2d 506 (Fla. 1998) (imposing discipline against judge where he refused to recuse himself in four different cases until the party seeking recusal either filed a petition for a writ of prohibition or the Fifth District Court of Appeal actually granted the party's petition);

As indicated by the foregoing line of cases, Judge Aleman's contention that the cloak of a "legal ruling" talismanically insulates her behavior from review by the JQC is nonsensical and plainly belied by Florida Supreme Court precedent.

For instance, in *In re Perry*, 641 So. 2d 366 (Fla. 1994), in rejecting the precise jurisdictional argument made by Judge Aleman here in a case in which the court was considering whether the respondent judge had abused his contempt powers, the supreme court reasoned as follows:

Judge Perry contends his alleged transgressions were nothing more than errors of law. Consequently, he asserts that this actions are outside the jurisdiction of the Commission and should not be subject to disciplinary proceedings. Further, he asserts that the bails he set for both the traffic and contempt offenses were lawful and reasonable. To the contrary, we find that the bails he set in th[o]se two instances were arbitrary, unreasonable, and designed to punish the defendants rather than to assure their presence for trial.

In this proceeding, we are addressing Judge Perry's conduct in applying and enforcing the law, and we find, given the record in this case, that this

disciplinary proceeding is appropriately before the Commission.

Perry, 641 So. 2d at 368 (emphasis added).

Similarly, in *In re Inquiry Concerning A Judge (Vitale)*, 630 So. 2d 1065 (Fla. 1994), the Florida Supreme Court held that a public reprimand was warranted where a judge failed to vacate an order which both parties agreed was mistakenly entered, thereby necessitating one of the parties to take an appeal. *Id.* at 1066. Likewise, in *Inquiry Concerning A Judge (Colby)*, 629 So. 2d 120 (Fla. 1993), the Supreme Court approved a recommendation that a judge be publicly reprimanded where he had convicted criminal defendants without a plea or trial after the defendants failed to appear. *Colby*, 629 So. 2d at 120.

Irrespective of whether such errors are deemed ethical misconduct or “mere disagreements with court rulings,” as Judge Aleman prefers to describe them, the Supreme Court has noted that such behavior diminishes public confidence in the judicial system and warrants discipline. *Colby*, 629 So. 2d at 120; *Vitale*, 630 So. 2d at 1065; see also *Garcia v. Manning*, 717 So. 2d 59 (Fla. 3d DCA 1998) (noting that ***a judge’s continued failure to correctly apply the law will result in a referral of the offending judge to the Judicial Qualifications Commission for consideration of appropriate disciplinary measures***). Accordingly, Judge Aleman’s Motion to Dismiss the Formal Charges for lack of subject matter jurisdiction should be denied.

II. JUDGE'S ALEMAN'S MOTION FOR A MORE DEFINITE STATEMENT SHOULD BE DENIED

Judge Aleman's alternative Motion for a More Definite Statement should also be denied. The exactitude with which Judge Aleman is demanding that the Formal Charges be pled must be tempered by Rule 6 of the Judicial Qualifications Commission's Rules (hereinafter J.Q.C.R.), which provides that:

the notice [of formal charges] shall be issued in the name of the Commission and specify in ordinary and concise language the charges against the judge and the essential facts upon which such charges are based

See J.Q.C.R. 6(g). The Notice of Formal Charges is not a criminal indictment⁵ and, by virtue of J.Q.C.R. 12 (which incorporates the Florida Rules of Civil Procedure to the extent they are not deemed inapplicable by the JQC's Rules), the Formal Charges are only required to contain "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief . . ." See Fla. R. Civ. P. 1.110(b). "The function of a motion for more definite statement is to require that a vague, indefinite, or ambiguous pleading be so amended as to enable the party required to respond thereto to intelligently discern the issues to be litigated and to properly frame his answer or reply." *Conklin v. Boyd*, 189 So. 2d 401, 403-04 (Fla. 1st DCA 1966). As evidenced by the voluminous exhibits she has submitted in support of her Motion to Dismiss, Judge Aleman can hardly

demonstrate she is unable to frame a response to the Formal Charges. The Formal Charges are in the manner traditionally accepted and contain precise references to the specific provisions of the Code of Judicial Conduct Judge Aleman is alleged to have violated for each individual count.

III. JUDGE ALEMAN'S DUE PROCESS RIGHTS HAVE NOT BEEN VIOLATED

Claiming that her due process rights have been violated, Judge Aleman also complains:

[T]he Notice of Formal Charges states that this honorable body found probable cause for the institution of formal charges against Judge Aleman before she was notified of the charges and fully a month before it invited her to appear at a hearing to defend against such a finding.

See Motion to Dismiss at 39. Although understandable, this misapprehension is based upon a scrivener's error in the Notice of Formal Charges, which states:

You are hereby notified that the Investigative Panel of the Florida Judicial Qualifications Commission, by a vote of those members present at its meeting held in Tampa, Florida on **July 25, 2006**, has determined . . . that probable cause exists for formal proceedings . . . to be instituted against you . . .

The Investigative Panel did not meet on July 25, 2006. The meeting mistakenly referenced in the Formal Charges as having occurred on July 25, 2006, actually occurred on August 25, 2006, and the Notice of Formal Charges should have

⁵ See *In re Inquiry Concerning A Judge*, 357 So. 2d 172, 181 (Fla. 1978) (noting that proceedings before the Judicial Qualifications Commission are not criminal proceedings).

reflected the August 25th meeting date. Accordingly, there have been no due process violations.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **JUDICIAL QUALIFICATIONS COMMISSION'S RESPONSE TO JUDGE ALEMAN'S MOTION TO DISMISS OR MOTION FOR MORE DEFINITE STATEMENT AND MEMORANDUM OF LAW** has been furnished by U.S. Mail to **JEROME HOFFMAN, ESQ.**, and **NATHAN A. ADAMS, IV, ESQ.**, Holland & Knight, LLP, Post Office Drawer 810 (32302), Tallahassee, FL 32301; **J. DAVID BOGENSCHUTZ, ESQ.**, Bogenschutz, Dutko, & Kroll, P.A. 600 S. Andrews Ave., Suite 500, Fort Lauderdale, FL 33301; **BROOKE S. KENNERLY**, Executive Director, Judicial Qualifications Comm'n, Mount Vernon Square 1110 Thomasville Road Tallahassee, FL 32309; **THE HONORABLE THOMAS B. FREEMAN**, Chair, Hearing Panel, Criminal Justice Center, 14250 49th Street North, Clearwater, FL 33762; and **JOHN BERANEK, ESQ.**, Counsel, Hearing Panel, P.O. Box 391, Tallahassee, FL 32301, on this _____ day of **April, 2007**.

Attorney