STATE OF MICHIGAN

BEFORE THE JUDICIAL TENURE COMMISSION

Complaint against
Hon. Byron J. Konschuh
40th Circuit Court
255 Clay Street
Lapeer, Michigan 48446

Docket No. 159088
Formal Complaint No. 100

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Hon. Byron J. Konschuh's Reply to Disciplinary Counsel's Findings of Fact and Conclusions of Law

Introduction

Disciplinary Counsel's Proposed Findings of Fact and Conclusions of Law ("Disciplinary Counsel's FFCL") tries to build a case against Judge Byron Konschuh with three main ingredients. First, Disciplinary Counsel ignores most of the evidence presented at the months-long hearing, avoiding any ambiguities, any conflicts, and anything that might undermine their narrative. Second, they propose and apply rules without attempting to prove that rules actually exist, much less that they appear in governing written authority. Third, Disciplinary Counsel relies on hyperbole and overstatement. Contrary to bedrock principles of civility, they label Konschuh's positions "absurd" (p. 19) and "preposterous" (p. 40). See *Bennett v State Farm Mut Auto Ins Co,* 731 F3d 584, 584 (CA 6, 2013) (explaining that hyperbole like "ridiculous" is uncivil).

Before asking whether Disciplinary Counsel carried their burden of proving misconduct by a preponderance of the evidence, the Master should consider *all* of the evidence (not just the evidence cited in Disciplinary Counsel's motion), strike every claim that Disciplinary Counsel fails to support with law or evidence, and disregard all of Disciplinary Counsel's uncivil hyperbole. A fair, dispassionate review of the evidence and governing law will establish that Disciplinary Counsel has not carried their burden. The Master should dismiss all claims.

Count I: 2016 Plea

Count I is Disciplinary Counsel's claim that Konschuh lied about the nature of his 2016 plea. They object to Konschuh's argument that his plea was limited to the language of his agreement with prosecutor Deana Finnegan. (Exhibit 1i). Disciplinary Counsel cites evidence that Konschuh pleaded to MCL 750.485, a misdemeanor, and asserts that Konschuh's representations were therefore false. (*Disciplinary Counsel's FFCL* at 1-11). Yet Disciplinary Counsel does not address the legal standards that govern this claim.

"…[A] misrepresentation and a misleading statement generally include an actual intent to deceive." *In re Gorcyca,* 500 Mich 588, 639; 902 NW2d 828 (2017). The respondent in *Gorcyca* made a self-serving guess about her past conduct, which the Court rejected. It held that Judge Gorcyca's statement, though wrong, was not a misrepresentation: "Even though there may be some instances in which a misrepresentation and a misleading statement are not based on an actual intent to deceive, we believe that, at a minimum, there must be some showing of wrongful intent." *Id.*

Konschuh's *nunc pro tunc* motion included two documents entitled "Motion/Order of Nolle Prosequi," both of which reference MCL 750.485. (Exhibit 1t). If Konschuh was trying to mislead the court, he would not have included those documents. And Disciplinary Counsel cannot establish that Konschuh tried to mislead the Commission or the Master when, as they admit, his answer to the Amended Formal Complaint acknowledged that he stipulated to Count 6 of the amended information. (*Disciplinary Counsel's FFCL* at 5). Nor can they claim that Konschuh tried to mislead anyone in his November 2017 deposition, since his plea was a matter of public record.

When Konschuh asserted that his plea was limited to MCL 21.44, he was asserting a good-faith *legal* position.[1] He had a legitimate reason to dispute the misdemeanor charge. Finnegan added the misdemeanor count after the mediation and without notice to Konschuh or his lawyers.

[1] Disciplinary Counsel's *Proposed Findings of Fact and Conclusions of Law* provide an analogy. The Master limited the parties to 50 pages. Disciplinary Counsel filed a 54-page brief. There is no court rule that would allow Disciplinary Counsel to exceed page limits in this fashion. Under MCR 7.202(B), the only pages that a party can exclude from a page limit are "tables, indexes, and appendixes." Applying Disciplinary Counsel's approach about the *nunc pro tunc* motion would lead to the conclusion that Disciplinary Counsel made a material misrepresentation to the Master by representing a 54-page brief to be a 50-page brief. But Disciplinary Counsel's approach is overly harsh and overlooks the way that lawyers give different legal interpretations to a single set of facts. Disciplinary Counsel just took a *legal* position that prompted it to assert the false *factual* claim that a 54-page brief is really a 50-page brief. Yet anyone can see that their brief plainly exceeds the page limit. In the same way, Konschuh's motion argued a position that, from one perspective, was contrary to the record. But it was a legal argument and was no more dishonest than Disciplinary Counsel's claim that 54 equals 50.

(8-27-19 tr. at 2368). Konschuh agreed to the misdemeanor count during the hearing but never had a chance to consult with his lawyers about what the new count meant. Then Judge Neithercut kept the complaint open rather than accept Konschuh's plea.[2] (Exhibit 1cc at 17). These facts amount to a good-faith basis for Konschuh's *nunc pro tunc* motion.

With this record, Konschuh had a legitimate reason to question the misdemeanor count. He fairly presented the record when he challenged that count through his *nunc pro tunc* motion, and made a good-faith legal argument for setting aside his plea. Disciplinary Counsel may believe Konschuh was wrong but that does not mean his legal argument was a misrepresentation. Under *Gorcyca,* these facts are not a valid basis for a finding of misconduct. *Gorcyca,* 500 Mich at 639.

Counts II, III, IV, and V

From the very first line of Disciplinary Counsel's discussion of Counts II, III, and IV, Disciplinary Counsel paints a distorted picture. They argue that Konschuh "engaged in a long term embezzlement by depositing county funds into his personal bank accounts." (*Disciplinary Counsel's FFCL* at 11). But that assertion ignores the repeated, detailed testimony about Konschuh paying expenses on behalf of his office and staff and, as a result, believing that he was entitled to reimbursement. (7-2-19 tr. at 277; 7-8-19 tr. at 522-24, 529-30; 7-9-19 tr. at 699-70; 96-19 tr. at 3087). Others, like Cathy Strong, confirmed Konschuh's testimony. (8-27-19 tr. at 2321-2322).

[2] Disciplinary Counsel misstated this quotation in its Amended Formal Complaint. According to Paragraph 26, Judge Neithercut "stated that he: … accepts the plea and finds Mr. Konschuh guilty of count six, failure to account for county money." (*Amended Formal Complaint,* ¶26). In fact, Judge Neithercut stated: "Given these facts that People—or the Court accepts the plea and finds Mr. Konschuh guilty of count six, failure to account for county money, and dismisses without prejudice counts—*well no, wait a minute.* When am I supposed to do the dismissal, now or later? This says a delayed sentence with a dismissal with prejudice upon successful completion, so I guess that means *I'm supposed to keep those open for the time being.*" (Exhibit 1cc, page 17) (emphasis added). The full text—including the portions that Disciplinary Counsel omitted—indicate that Judge Neithercut kept the entire complaint open.

Disciplinary Counsel may dispute the *amount* owed to Konschuh but they cannot dispute that Konschuh paid money for his office and believed he was entitled to reimbursement.[3]

Count II: Transmodus

Disciplinary Counsel relies heavily on the proposition that the Transmodus and BounceBack contracts violated county policy. But they have not proven by a preponderance of the evidence that the policy their argument relies on was actually in effect in 2008, when Konschuh entered into the Transmodus and BounceBack agreements. In fact, it was *not* in effect. John Biscoe, the country controller (and one of Disciplinary Counsel's witnesses), testified that he did not believe the contracts policy existed in written form in 2008:

> Q. …[F]irst of all, in 2008 there was no specific policy that would forbid my client from entering into a contract with a company like BounceBack, correct? Is that true?
>
> A. *There was no specific policy*, but there certainly was a statutory obligation to the county board and I believe the authority is given to the county board to enter into contracts with the county. *So we did not have a written policy that I recall.* In '09 it got put on the server in terms of contracts going in front of the board. And it certainly was practice across the whole system. All contracts went through the board. [7-11-19 tr. at 983 (emphasis added)]

Biscoe offered this testimony *after* he identified the Grants, Contracts and Agreements policy that Disciplinary Counsel relies on. (Exhibit 5j, 7-10-19 tr. at 858-59). So the Grants, Contracts and Agreements policy was not part of the county's written policies in 2008.

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[3] Disciplinary Counsel asserts that Konschuh's subjective intent is irrelevant. (*Disciplinary Counsel's FFCL* at *iii*). But the case that Disciplinary Counsel cites for this point, *In re Ferrara,* 458 Mich 350; 582 NW2d 817 (1998), actually says that a respondent's subjective intent *is* a relevant factor: "Although the *Respondent's subjective intent* as to the meaning of his comments, his newly exhibited remorsefulness and belated contrition *all properly receive consideration*, any such individual interests are here necessarily outweighed by the need to protect the public's perception of the integrity of the judiciary." *Id.* at 362 (quoting *In re Tsichart,* 422 Mich 1207, 1209-10; 371 NW2d 850 (1985) (emphasis added)).

Nevertheless, Disciplinary Counsel asserts that there was a policy in effect in 2008. They rely on the testimony of Doreen Sue Clark, John Biscoe's assistant. (8-19-19 tr. at 1912). Clark testified that she thought the Grants, Contracts, and Agreements Policy had been in effect since 1996. (8-19-19 tr. at 1914; Exhibit 5j). But Clark could not confirm that the Grants, Contracts, and Agreements Policy was on the J drive from 2007 to 2009: "I cannot, I guess, confirm or deny that, because we did try to have a majority of our policies all on that J drive. But they were also, because of ransomware, wiped completely off. But that was not till I think later." (8-19-19 tr. at 1916, 1928). So, like Biscoe, Clark's testimony offers no proof that the contracts policy was in effect and available to Konschuh at the relevant time.

The question for the Master, then, is whether Disciplinary Counsel has proven by a preponderance of the evidence that the contract policy was in effect in 2008 when Konschuh entered into the agreements with Transmodus and BounceBack. The answer should be "no." Although Clark thought the policies existed since 1996, John Biscoe—Clark's boss—testified that there was *no* written policy that would have prohibited the Transmodus and BounceBack contracts in 2008. (7-11-19 tr. at 983). As the controller, Biscoe's testimony carries greater weight than that of his subordinate, Clark. That greater weight is especially appropriate when much of Clark's testimony was equivocal. (8-19-19 tr. at 1916, 1928) ("I cannot, I guess, confirm or deny that ….). It follows that Disciplinary Counsel has not carried their burden on this point. *In re Haley,* 476 Mich 180, 189; 720 NW2d 246 (2006) (holding that Disciplinary Counsel must prove misconduct by a preponderance of the evidence).

Count III: BounceBack

Disciplinary Counsel's errors continue in their discussion of the BounceBack contract. At the outset, they portray the BounceBack program as secret. In fact, it was public knowledge. Any merchant who benefitted from the program had to sign up. (9-5-19 tr. at 2989-90). Local press

even covered the new program. (7-2-19 tr. at 240-41). Konschuh had every reason to believe that the county Board of Commissioners knew about this highly publicized program.

Disciplinary Counsel also tries, again, to assert that Konschuh knew about the Grants, Contracts, and Agreements policy when he entered into the BounceBack contract. But none of the citations in Disciplinary Counsel's brief supports that conclusion. They cite Doreen Sue Clark's testimony that it was in effect since 1996. But Disciplinary Counsel skips the testimony from Clark's boss, John Biscoe, who testified that the policy did not exist in written form in 2008. (7-11-19 tr. at 983). Disciplinary Counsel relies on Tim Turkelson's testimony that Konschuh "referred" him to the Grants, Contracts, and Agreements policy. (8-14-19 tr. at 1212). But Turkelson did not give a timeframe—and he did not address John Biscoe's statement that the policy was not in effect in written form in 2008.[4]

In arguing that the BounceBack contract was "clearly" a county contract, Disciplinary Counsel refers to testimony from their expert, Cary Vaughn. (*Disciplinary Counsel's FFCL* at 11). But Vaughn was testifying to hypotheticals about what would happen if Disciplinary Counsel was elected prosecutor and entered into a contract. (8-20-19 tr. at 1964). When the inquiry focused on specifics rather than hypotheticals—when Vaughn addressed what the policies *actually* required—Vaughn had no idea: "Q. Are you familiar with Lapeer County government's policies? A. Not that county in particular, no." (8-20-19 tr. at 1945). Vaughn was in no position to offer an opinion on whether Lapeer County policy prohibited Konschuh's conduct. In this context, the Grievance

[4] Turkelson also has insurmountable credibility problems. He did not tell the truth about whether Detective Pendergraff interviewed him. Compare Pendergraff's testimony (8-16-19 tr. at 1629 ("We sat down and talked and I asked him questions.")) with Turkelson's (8-14-19 tr. at 1312 ("I was never interviewed by Detective Pendergraff.")). He has a vendetta because he believes Konschuh somehow made him lose the 2016 campaign for prosecutor. (8-14-19 tr. at 1350-51). And he has a practice of sending juvenile, unprofessional emails that call Konschuh obscene and insulting names (8-14-19 tr. at 1341, 1349). His credibility is nil.

Administrator has not proven by a preponderance of the evidence that any policy prohibited Konschuh from entering into the Transmodus or BounceBack agreements in 2008. And if there was nothing wrong with entering into those agreements, then Konschuh's subsequent conduct was neither dishonest nor improper.

Count IV: LEORTC and City of Lapeer

Regarding payments from LEORTC and the City of Lapeer, Disciplinary Counsel's argument relies on its unsupported assertion that Konschuh could not use these funds to benefit the prosecutor's office. They assert that "[i]t is both shameless and illogical for respondent to pocket money for work he claims his APAs did on their own time." (*Disciplinary Counsel's FFCL* at 25). There is no rule that justifies discipline based on what Disciplinary Counsel believes is "shameless and illogical." Disciplinary Counsel has the burden of connecting alleged misconduct to rules, and it provided nothing more than one of the laundry lists that Justice Viviano objected to in *Gorcyca. In re Gorcyca,* 500 Mich at 645 n 1 (Viviano, J., concurring). With nothing more than their own sense of what is "shameless and illogical," Disciplinary Counsel asks the Master to use subjective, unwritten standards.[5] The Master should decline this invitation to lawlessness.

Count V: Reimbursements

Disciplinary Counsel's arguments veer directly off the rails when it comes to Konschuh's reimbursements. They assume, without support, that holiday and Administrative Professional's Day lunches must have a singular purpose. Konschuh's testimony—which Disciplinary Counsel does not mention—contracted that view. (7-3-19 tr. at 390-91). They also ignore the fact that both

[5] Disciplinary Counsel also disregards testimony that Konschuh used fees from LEORTC and the City of Lapeer for the benefit of his office. He did not simply "pocket money," as Disciplinary Counsel claims. Indeed, Cailin Wilson testified that she gave the funds to Konschuh to be applied to office expenditures, such as coffee, water, and meals. (8-15-19 tr. at 1515-18).

Cathy Strong and Steve Beatty corroborated Konschuh's testimony about these luncheons having a dual purpose. (8-27-19 tr. at 2323; 8-29-19 tr. at 2589). Again, Disciplinary Counsel ignores unfavorable evidence (like evidence corroborating the lunches' dual purpose) and makes up standards with no basis in law (like their claim that the luncheons could not have a dual purpose). Disciplinary Counsel has not proven misconduct by a preponderance of the evidence. *Haley,* 476 Mich at 189.

Count VI: Oysters

Count VI concerns Konschuh's interactions with the Oysters. Disciplinary Counsel wants the Master to conclude that Konschuh behaved inappropriately during that conversation by being "belligerent" and by swearing at Bonnie Oyster. To reach that conclusion, the Master would have to disregard all of Konschuh's testimony and credit all of Bonnie and Samuel Oysters' testimony in full. That is something the Master should not do. Samuel and Bonnie Oyster could not get their story straight at trial. (See Konschuh's Proposed Findings of Fact and Conclusions of Law, ¶¶71-72). Their conflicting testimony lacks credibility.[6]

According to the Oysters' contemporaraneous, signed report, Konschuh's worst sins were having "a belligerent attitude," using the word "ass," and appearing "angry and bitter" to Bonnie Oyster. (Exhibit 119). Disciplinary Counsel cannot seriously contend that judges commit misconduct whenever they display anger and bitterness off the bench. That would create an impossible standard; even after donning a robe, judges remain human. And using the word "ass" in a private conversation off the bench hardly rises to the level of judicial misconduct. If it did, then a judge would commit misconduct just by reading aloud from *Oliver Twist* ("'If the law

[6] Konschuh's Proposed Findings of Fact and Conclusions of Law includes an error. Paragraph 163 states, "Likewise, Bonnie Oyster's claim that Konschuh used the word 'ass' is not credible because that assertion does not appear in her contemporaneous report. (7-12-19 tr. at 1184)." In fact, the report *does* include the word "ass." (Exhibit 119).

supposes that,' said Mr. Bumble, squeezing his hat emphatically in both hands, 'the law is a ass — a idiot.'"). Canon 2 requires judges to treat others with "courtesy and respect." It does not enshrine a code of prudishness. Disciplinary Counsel has failed to prove misconduct.

Count VII: Recusals/Disclosures

When it comes to recusals, Disciplinary Counsel does not say a word about Konschuh's testimony that Chief Judge Nick Holowka instructed him to handle non-substantive criminal matters, and to recuse himself if matters required his substantive input. (9-6-19 tr. at 3183). Konschuh testified that he followed that instruction. (*Id.*) Instead, Disciplinary Counsel takes the position that Konschuh had to recuse himself in *any* case involving Sharkey, Turkelson, or Richardson. But Disciplinary Counsel cites no case holding that a judge must *always* recuse himself in nonsubstantive matters in which a former opponent, his former attorney, or a current friend represents one of the parties. All that the Master has to go on is Disciplinary Counsel's subjective opinion—and that is not enough to carry their burden of proof. *Haley,* 476 Mich at 189.

As for disclosures, Disciplinary Counsel's argument depends on fudging an important fact. Konschuh's December 7, 2016 and January 3, 2017 disclosures were inadequate, they say, because they "omitted the crucial fact that [Konschuh] owed Mr. Sharkey nearly a half million dollars." (*Disciplinary Counsel's FFCL* at 41). But Konschuh did not receive his itemized bill until October 2017. (7-8-19 tr. at 553; 8-27-19 tr. at 2448). Konschuh knew that he owed something but had no idea how much. So Disciplinary Counsel's attempt to use the size of Sharkey's bill to question Konschuh's disclosure practices is based on a falsehood.

Count VIII: Alleged Misrepresentations

Count VIII accuses Konschuh of making misrepresentations to the Michigan State Police and the Judicial Tenure Commission. A misrepresentation is a false or misleading representation, usually made with an intent to deceive or be unfair. *Gorcyca,* 500 Mich at 639. Two critical

ingredients, therefore, are a false statement and proof that the statement is indeed false. *Id.* Disciplinary Counsel does not even attempt to establish those elements for Count VIII. Instead, its discussion of Count VIII is a list of subjects about which Konschuh supposedly made misrepresentations. That list has no citations to the record. Disciplinary Counsel cites neither proof that Konschuh actually made the statement at issue nor evidence that the statement was false. Michigan courts routinely reject this kind of summary, evidence-free argument. *Moses, Inc v SEMCOG,* 270 Mich App 401, 417; 716 NW2d 278 (2006) ("If a party fails to adequately brief a position, or support a claim with authority, it is abandoned."). The Master should do the same.

It is appalling that Disciplinary Counsel would accuse a judge of making misrepresentations and then make no effort to actually substantiate those claims after a multi-month trial. (These claims also fail for the reasons stated in Konschuh's Proposed Findings of Fact and Conclusions of Law.)

Conclusion

For the foregoing reasons, the Master should conclude that Disciplinary Counsel failed to prove misconduct by a preponderance of the evidence.

Respectfully submitted,

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