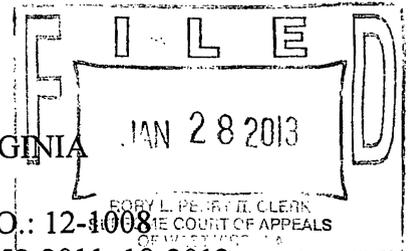


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



IN THE MATTER
JUDGE WILLIAM M. WATKINS, III
Putnam County Family Court Judge

SUPREME COURT NO.: 12-1008
COMPLAINT NOS.: 152-2011, 18-2012
74-2012, 77-2012
113-2012, 126-2012

BRIEF OF JUDGE WILLIAM WATKINS, III

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I. STATEMENT OF CASE

A. HISTORY OF THE PROCEEDINGS

For his statement of the case and history of proceedings, Judge William M. Watkins, III (hereinafter “Judge Watkins”) adopts the statement of the case set forth in the Brief of Special Judicial Disciplinary Counsel; however, Judge Watkins adds the following:

At the hearing held in this matter on November 27, 2012 before the Judicial Hearing Board, the Judicial Hearing Board admitted 63 joint exhibits into evidence and that Respondent testified on his own behalf and no other sworn witness testimony was presented at the hearing. It is relevant and critical that this Court understand that prior to the November 27, 2012 hearing, Special Counsel and Judge Watkins’ counsel, both of whom had been “living with” this case for months prior thereto, had not only reached agreement with regard to the numerous stipulations and proposed discipline presented to the Judicial Hearing Board; as well as the voluminous set of exhibits; but also, as to the manner the parties would proceed at the November 27, 2012 hearing. This is critical to this Court’s understanding that not only were the written stipulations agreed but, the exhibits submitted were joint exhibits and that counsel had agreed in advance of the hearing that the only testimony to be presented at the hearing would be that of Judge Watkins himself. Candidly this decision had been made by Judge Watkins and his counsel in order to avoid a Courtroom’s “circus” and/or a media frenzy of the direct testimony of the complaining witnesses and the result any cross-examination thereof. The avowed rationale of Special Disciplinary Counsel’s agreement to proceeding in the absence of the testimony of witnesses other than Judge Watkins lay in the nature of the complaining witnesses and their susceptibility to challenge and likelihood of being discredited upon cross-examination. It was not until moments before the November 27, 2012 hearing that the Judicial Hearing Board’s clerk announced to counsel that the presiding Judicial Officer was going to permit

each the claimant to make a public five (5) minute statement.

Judge Watkins objected to this procedure and so advised the Clerk. The Clerk advised that the presiding Judicial Officer was aware of Judge Watkins objection but would proceed with such statements nonetheless. This aspect of the hearing is critical in two (2) respects. First, the same deviated from the agreement reached between counsel and secondly, the same deviated from the standard procedures of the Judicial Hearing Board. The most notable problem with such a decision and such procedure, it allowed the Judicial Hearing Board to receive unsworn testimony not subject to cross-examination. The seriousness of this miss-step by the Judicial Hearing Board is demonstrated in its "Order" when it discusses Judge Watkins demeanor when he was "called out" by one of the complainants. Consequently, the Judicial Hearing Board, which determined to allow unsworn testimony, not subject to cross-examination, contrary to the agreement of counsel and the standard rules of procedure of the Judicial Hearing Board directly caused an incident which the Judicial Hearing Board found sufficient to include in its Findings of Fact, much to the extreme prejudice of Judge Watkins.

Additionally, although the stipulations and exhibits had been presented to the Judicial Hearing Board far in advance of the November 27, 2012 hearing, as a result of the assembled multitude of persons including significant representatives of the media, the Clerk of the Judicial Hearing Board, after the conclusion of the hearing, consulted counsel for the parties as to yet another deviation of the Judicial Hearing Board. The Clerk inquired of counsel whether or not either counsel objected to the Clerk disseminating copies of the Stipulations to the spectators. Judge Watkins strongly objected to this and advised the Clerk that it was improper and was simply "feeding the frenzy." In spite of such objection, the Clerk disseminated copies of the Stipulations after the hearing to the assembled crowd.

Finally, during the statement of one of the complainants, Mark Halburn, the complainant not only attempted to introduce charges and matters not then before the Judicial Hearing Board, but focused upon the psychological reports which were part of the exhibits, stipulated and introduced before the Judicial Hearing Board. The gravamen of such was to place on notice the Presiding Judicial Officer as well as the Clerk and all of the members of the Judicial Hearing Board that the psychological evaluations of Judge Watkins were of particular and specific importance and interest to Mr. Halburn and others. The full effect of this and the ramifications thereof fell like stones from the sky when the Judicial Hearing Board released its "Order" of December 3, 2012 wherein the Judicial Hearing Board excerpted from only one of two Psychological Reports contained in the joint exhibits, both of which had been ordered sealed by the Presiding Judicial Officer and were thereafter printed in the Charleston Newspapers and were the subject of commentary on Charleston Radio and Television news programs. The failure of the Presiding Judicial Officer, the Clerk of the Judicial Hearing Board as well as the Hearing Board itself to protect the dissemination of Judge Watkins psychological reports, which had been ordered sealed, and were excerpted by the Judicial Hearing Board in its December 3, 2012 "Order" was a tragedy which should have and could have been prevented. Most disquietingly, after the public dissemination of the quotations from Judge Watkins psychological report which after were not sealed in the Judicial Hearing Board's December 3, 2012 "Order" was the disclosure by the Judicial Hearing Board's Clerk to Judge Watkins counsel that not only were the members of the Judicial Hearing Board aware that certain paragraphs of the proposed "Order" contained quotations from a sealed document, according to the Clerk, upon inquiry by Judge Watkins' counsel, "the same may have been done intentionally." It is Judge Watkins' belief that these facts in addition to those as set forth in Special Disciplinary Counsel's Brief are needful and

necessary to a fair and just adjudication of the issues involved in this case.¹

II. SUMMARY OF ARGUMENT

Judge Watkins contends that the Judicial Hearing Board's "Order" of December 3, 2012 is unconstitutional and violates Article VIII, Section 8 of the West Virginia Constitution. Judge Watkins contends that the Judicial Hearing Board's proceedings and its "Order" of December 3, 2012 violated Judge Watkins' rights guaranteed under the United States Constitution under the Sixth Amendment thereof to due process and (effective) Assistance of Counsel. Judge Watkins contends that the Judicial Hearing Board's proceedings and its "Order" of December 3, 2012 violates the Fourteenth Amendment to the United States Constitution guaranteeing due process and assuring against the abridgment of the privileges and immunities of the citizens of the United States.

Judge Watkins also contends that from the totality of the circumstances and due to the multiple errors committed by the Judicial Hearing Board and multiple violations of fundamental rights by the Judicial Hearing Board's proceedings and its "Order" of December 3, 2012, the Judicial Hearing Board's "Order" is unworthy of and should not be accepted and/or adopted by this Court.

III. STATEMENT REGARDING ORAL ARGUMENT

Oral Argument is presently scheduled in this matter for February 5, 2013.

IV. ARGUMENT

Judge Watkins whole heartedly agrees with Special Judicial Disciplinary Counsel's preamble to her Argument section wherein counsel's states:

"In cases in which this Court is asked to discipline judicial officers, we independently review the record to determine if the findings of fact and recommendations of the Hearing Board are appropriate. As we stated in Syllabus Point 1 of *In Re Browning*, 192 W.Va. 231, 452

¹ Judge Watkins is aware that certain facts represented aforesaid are not contained in the record of this case; however, Judge Watkins was merely following suit with certain statements and matters contained in Special Disciplinary Counsel's Brief which were likewise not part of the record.

S.E.2d 34 (1994), “ ‘[t]he Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial [Hearing] Board in disciplinary proceedings.’ Syllabus Point 1, *West Virginia Judicial Inquiry Commission v. Dostert*, 165 W.Va. 233, 271 S.E.2d 4207 (1980).” Included “within this independent evaluation is the right to accept or reject the disciplinary sanction recommended by the Board.” *Matter v. Crislip*, 182 W.Va. 637, 638, 391 S.E.2d 84, 85 (1990).

However, in discharging its duty and rendering a decision in this case, this Court cannot merely examine the written Stipulations and the “Order” of the Judicial Hearing Board dated December 3, 2012. Judge Watkins urges that the Court question the procedures employed and the protections denied to Judge Watkins at the public hearing held on November 27, 2012, as well as the manner in which the Judicial Hearing Board reached the conclusions and recommendations set forth in its December 3, 2012 “Order”, specifically in light of the agreement reached between counsel in the case and urged upon the Judicial Hearing Board by Judge Watkins and the Judicial Hearing Board’s own counsel and the Judicial Hearing Board’s failure to give an explanation for its choosing of certain matters and its ignoring of others.

Given the foregoing prior rulings of this Court, this Court clearly understands that this Court does not stand as a “rubberstamp” of the Judicial Hearing Board but has placed upon itself the duty and obligation to look beyond the written record.

BURDEN OF PROOF

Judge Watkins recognizes that the Special Judicial Disciplinary Counsel has performed admirably in this case. Clearly, in this regard, the Judicial Hearing Board was presented with factual stipulations and exhibits which provided the Judicial Hearing Board ample evidence to reach a proper conclusion in this case. Judge Watkins does not complain that Special Judicial Disciplinary Counsel did not meet her burden; however, Judge Watkins urges that by its disregard of its own

counsel's recommendations; disregard of jointly stipulated exhibits; deviation from its established procedures; disregarding and abrogating the agreement reached by its counsel and counsel for Judge Watkins as to the conduct of the November 27, 2012 hearing; as well as all other matters addressed herein, the Judicial Hearing Board violated the substantive rights of Judge Watkins and rendered its recommendations indefensible.

SANCTION

The ultimate sanction recommended by the Hearing Board violates Article VIII, Section 8 of the West Virginia Constitution. It is indeed the "ultimate sanction". While unsaid by the Judicial Hearing Board in its "Order" of December 3, 2012, the Judicial Hearing Board proposes to impeach, that is, remove from office, Judge Watkins. While Special Judicial Disciplinary Counsel argues that Article VIII, Section 8 of the West Virginia Constitution provides "for no limitation upon the length of the suspension of a Judge," she impliedly agrees that Article VIII Section 8 of the West Virginia Constitution does not vest this Court nor any other body with the right to remove a Judge from office. As a matter of fact, the drafters of the West Virginia Constitution carefully crafted this section and specifically inserted the word "temporarily" preceding the word "suspend." It is axiomatic that the West Virginia Constitution does not even contemplate the removal of a Judge by the Supreme Court or any other body but preserves that right in the electorate to exercise such a sanction by impeachment or at the ballot box.

This same thinking carries forth in Rule 4.12 of the Rules of Judicial Disciplinary Procedure wherein the specific terminology employed the limits the power of suspension to one (1) year, wherein Paragraph 4 of Rule 4.12 states: "suspension without pay for up to one (1) year...". It is clear that both the drafters of the West Virginia Constitution, as well as the authors of the Rules of Judicial Disciplinary Procedure, contemplated that the "ultimate sanction" was a one (1) year

suspension. Although counsel clearly recognizes problems with a greater than one (1) year suspension complying with a temporary suspension order and Article VIII, Section 8, Special Judicial Disciplinary Counsel “throws herself on her sword” for the Judicial Hearing Board wherein she attempts to very creatively provide justification for the Judicial Hearing Board’s “Order” by attempting to carve out an exception by claiming that Article VIII, Section 8 of the West Virginia Constitution and Rule 4.12 of the Rules of Judicial Disciplinary Procedure apply singly to each charge and urges justification of a “compound” sanction. Although quite creative, such a reading flies in the face of Article VIII, Section 8 of the West Virginia Constitution which clearly provides for a temporary suspension and Rule 4.12 which provides for a suspension without pay for up to one (1) year. The Judicial Hearing Board made the determination, initially, to consolidate numerous complaints and thereafter rendered a sanction amounting to a permanent suspension or judicial impeachment of Judge Watkins and did not provide even its own counsel any guidance as to how it viewed or might have viewed each violation or whether or not it considered each violation separately in determining its recommended discipline.

Counsel correctly directs the Court to the case of *In re: Toler*, 218 W.Va. 653, 625 S.E.2d, 731 (2005), wherein this Court addressed sanctions relative to multiple violations; however, in reading *Toler* and urging it upon this Court, the same must be read in conjunction with the language of Article VIII, Section 8 of the West Virginia Constitution and Rule 4.12, Paragraph 4, of the Rules of Judicial Disciplinary Procedure. Furthermore, in her Brief counsel describes the suspension as being a suspension of four (4) years and that Judge Watkins is aggrieved that this is too harsh. Counsel contends that the Judicial Hearing Board “is not recommending that Respondent be removed from the Office of the Family Court Judge, *only suspended* from that position for a finite period of time.” Unfortunately, regardless of how the recommended suspension is viewed, whether

in years, days or weeks, the suspension recommended by the Judicial Hearing Board is in fact **not** temporary, it is clearly in excess of one (1) year; and, it does, in fact, remove Judge Watkins from his elected office. As the suspension is to the end of his elected term, the concomitant result is a judicial impeachment and disenfranchisement of all of the majority voters of Putnam County that elected Judge Watkins to that position. Additionally, it appears that Special Judicial Disciplinary Counsel contemplates that, after imposition of such a suspension, Judge Watkins would thereafter be impeached. In other words, the Judicial Hearing Board would pull the sword and impeachment would thrust it home. Again, Special Judicial Disciplinary Counsel is highly creative in making such an argument, but this Court must not be dazzled by fancy footwork in Special Judicial Disciplinary Counsel's valiant attempt to justify the Judicial Hearing Board's unconstitutional recommendation when in fact Judge Watkins would be removed from his elected office and never again permitted to serve out the term within the office to which he was elected by the majority vote of Putnam County.²

Additionally, Special Judicial Disciplinary Counsel discusses in great length the power of this Court to suspend a Judicial Officer. The power of this Court to suspend a Judge is, as stated above, set out in the Constitution at Article VIII, Section 8. In fact, such suspension was to be stayed; however, it was, in fact, an agreed to suspension. Thus, Judge Watkins formally acknowledged the right of this Court to suspend a Judge. It is, however, unquestionably urged upon this Court that the suspension recommended by the Judicial Hearing Board is, in fact, judicial impeachment or removal from office and it is violative of Article VIII, Section 8 of the West Virginia Constitution as it is certainly not temporary.

It is telling to note that Special Judicial Disciplinary Counsel clearly understands the value

² Additionally, Special Judicial Disciplinary Counsel strays outside the record of this case and attempts to further justify the Judicial Hearing Board's unconstitutional recommendation by arguing that a temporary judge has already been appointed and therefore "no harm, no foul".

and necessity of providing a factual basis and legal authority behind decisions of the Judicial Hearing Board. It is telling because, as urged by Judge Watkins, the Judicial Hearing Board failed miserably in providing a factual basis and legal support for its deviation from its practice and procedures and for its determination to ignore certain joint stipulated exhibits and adopt others. It is in this latter area that Judge Watkins contends that the Judicial Hearing Board deprived him of his due process rights and effective assistance of counsel as guaranteed him under the Sixth Amended to the United States Constitution. The Judicial Hearing Board took the Stipulations and Recommendation of counsel, as well as the Stipulated Exhibits, and determined to pick and choose from such Stipulations and Exhibits. Specifically, the Judicial Hearing Board opted to adopt in whole and even excerpt from one psychological evaluation report while ignoring the other without any justification or legal authority therefore. The Judicial Hearing Board initially opted to accept the Factual Stipulations and Exhibits agreed to and recorded urged upon them by their counsel, but determined to ignore their counsel's recommended discipline. The Judicial Hearing Board opted to accept the testimony and evidence of Judge Watkins but determined to ignore their counsel's agreement with Judge Watkins with regard other witnesses and allowed unsworn testimony to be presented without benefit of cross-examination. Obviously, a number of the complainant's were prime subjects for cross-examination particularly Mr. Halburn. Begging the Court's leave, since November 27, 2012, Mr. Halburn has run amuck through the West Virginia Judiciary leveling threats against sitting Judges and Justices and creating havoc in the Courts. Based upon the agreement of counsel, Judge Watkins declined the numerous offers by lawyers, particularly domestic relations practitioners and other community leaders and common citizens to testify in his behalf; thus, depriving him of his due process rights and effectively emasculating his counsel and effectively rendering his counsel ineffective, thus, violating those rights guaranteed him under the Sixth Amendment to the United States Constitution.

Furthermore, Special Judicial Disciplinary Counsel spends additional time in her brief addressing the Stipulated Facts which were presented to the Judicial Hearing Board and how the Judicial Hearing Board “took notice of difficulty of *some* of the Complainants in these cases”; thus acknowledging the problems of Mr. Halborn and others. In like fashion, to the Judicial Hearing Board’s “Order” of December 3, 2012, Special Judicial Disciplinary Counsel provides the Court with numerous citations from across the United States regarding the treatment of errant Judges. In the first instance, it is noted that almost none of these cases are from West Virginia and neither Special Judicial Disciplinary Counsel nor the Judicial Hearing Board identify whether or not such jurisdictions have a similar prohibition regarding suspension as our West Virginia Constitution Article VIII, Section 8 as it is noteworthy that the vast majority of these cases include the language “and for other reasons”. Such other reasons being bigotry, sexual harassment and outright criminal conduct; none of which is involved in any of the charges against Judge Watkins.

In sum, Special Judicial Disciplinary Counsel argues that Judge Watkins is “displeased with the decision.” Beyond that, Special Judicial Disciplinary Counsel speculates as to what the members of the Judicial Hearing Board found and what they did not find at the hearing of November 27, 2012. The word “speculates” is employed as that identifies the only manner in which one can attempt to understand the rationale and basis for the Judicial Hearing Board’s decision. In almost an analogous situation to a “poison tree doctrine” argument, given the fact that the Judicial Hearing Board’s “Order” of December 3, 2012 fails to explain or give authority for a number of its recommended findings and conclusions and in light of the extremely serious procedural violations which occurred at the November 27, 2012 hearing, how can counsel or this Court determine how the Judicial Hearing Board reached its recommendations in this case. Counsel posits that it was a credibility issue raised by the Judge’s testimony. Again, two (2) members of the Board were not in attendance

in person but by telephone. Counsel posits that the members were “much closer to the pulse of the hearing to resolve such issues as credibility and conflict of facts” when in fact their own counsel knew this case inside and out and as stated above “lived with” this case for months and made a sound recommendation as to the proposed discipline herein about which two (2) members prior to said hearing concurred and even congratulated counsel for the exemplarily job of a proper recommendation. This situation begs the question: “was the credibility and conflict of facts that Special Judicial Disciplinary Counsel refers a result of the surprise appearance and unsworn testimony presented at the hearing or was it from the lawfully constructed and submitted stipulations?”

Finally, counsel states “the Hearing Board went to great lengths in its December 3, 2012, to demonstrate from the evidence that the basis for these critical Findings of Fact.” A detailed and extensive reading, review, evaluation and analysis of the Judicial Hearing Board “Order” of December 3, 2012 yields no insight whatsoever into the “great lengths” the Hearing Board went to determine to accept one (1) psychological evaluation and ignore another; depart from its Standard practices and procedures in order to mollify the crowd; disregard the agreement between counsel with regard to the testimonial evidence to be presented at the November 27, 2012 hearing and allow unsworn testimony not subject to cross-examination of an abusive and pointed nature directed at Judge Watkins while he was placed in a position of vulnerability and unable to respond; sealed, at its own counsel’s request, the private protected psychological records of Judge Watkins and thereafter excerpt same, out of context, in its “Order” without according Judge Watkins’ records the protection they demanded which resulted in the disclosure of selected portions thereof to the public and the media; ignore its own counsel’s recommendation while at the same time accepting the Stipulations; and, recommend to this Court a constitutionally prohibited sanction. More troubling is Special

Judicial Disciplinary Counsel's statement to this Court that: "Moreover, Respondent's statements in the October 2012 evaluation and his conduct in the November 2012 hearing made clear to the Judicial Hearing Board that he is either unwilling or incapable of meaningful change." This is quite a disappointing statement as Special Judicial Disciplinary Counsel had access to the "October 2012 evaluation" for a significant period of time prior to entering into the proposed Stipulations and Recommended Discipline, as well as the other stipulated psychological evaluation, when she entered into the stipulations and recommended decision. Additionally, the "conduct in the November 27, 2012 hearing" referred to by Special Judicial Disciplinary Counsel was presumably the reaction of Judge Watkins to the "public flogging" of Mark Halburn. Not only were Mr. Halburn's remarks a total and complete surprise given the agreement of counsel with regard to the testimony to be introduced at the November 27, 2012 hearing, as previously shown, the same were unsworn and Mr. Halburn had no fear of cross-examination and recrimination. Not only was Mr. Halburn unsworn and not subject to cross-examination and allowed to testify in contravention of the agreement between counsel, none of Mr. Halburn's remarks were directed to the Judicial Hearing Board but were pointedly directed at Judge Watkins and involved questions of his manhood and the introduction of clearly improper matters.

V. CONCLUSION

Judge Watkins made some mistakes. Judge Watkins took ownership of those mistakes both orally at the November 27, 2012 hearing and also by written Stipulation. Judge Watkins, in an effort to avoid protracted litigation and a media "circus" determined to decline the offers of numerous lawyers and community leaders as well, as common citizens, to appear and testify on his behalf; to present evidence of the hundreds of children and innocent spouses that he has protected over the years; present evidence of the quality of the thousands of other cases over which he has presided and

over which he returned measured and responsible, as well as insightful orders resolving same, in order that he continue serving the citizenry of Putnam County. Judge Watkins was duly elected to his office by the majority voters of Putnam County. Judge Watkins trusting that he would receive fair and impartial treatment from the Judicial Hearing Board entered into agreements and stipulations with counsel for the Judicial Hearing Board which counsel for the Judicial Hearing Board represented to the Judicial Hearing Board would resolve the complaints filed against him and ensure his continued good service without further incident. Unfortunately, what he received was a lack of procedural due process; a lack of substantive due process; disclosure of his private and protected psychological records to the public and the media; and an unconstitutional sanction. Judge Watkins and the Judiciary must be protected by this Court from the possible reoccurrence of such an incident.

Judges, while charged with duties and responsibilities regarding their actions, must also be free to conduct their courtrooms, deal with litigants, and, render decisions that they believe the circumstances demand. The fear of an unconstitutional sanction against any Judge at any level will have a chilling effect on the independence of West Virginia's Judiciary.

As a result thereof, Judge Watkins prays that this Court reject the "Order" of the Judicial Hearing Board; that this Court adopt and affirm the recommendations of Judge Watkins' counsel and Special Judicial Disciplinary Counsel presented to the Judicial Hearing Board in this case and impose the discipline that was meticulously tailored to achieve the goals of reprimanding Judge Watkins, ensuring that events such as those that gave rise to the Judicial Ethics Complaints involved in this case never reoccur; and, humanly, compassionately and judicially resolve these matters. Alternatively, this Court, based upon all the foregoing and the intendant harm and damage to Judge Watkins, as well as the entire Judiciary, dismiss these actions.

JUDGE WILLIAM M. WATKINS, III
By counsel,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of foregoing "BRIEF OF JUDGE WILLIAM M. WATKINS" was served upon the following party by U.S. Mail on this day, January 28, 2013, and hard copy:

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