

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN THE MATTER OF:
THE HONORABLE STEPHEN O. CALLAGHAN
JUDGE-ELECT OF THE 28TH JUDICIAL CIRCUIT

SUPREME COURT No. 16-0670
JIC COMPLAINT No. 84-2016

FORMAL STATEMENT OF CHARGES

The West Virginia Judicial Investigation Commission, pursuant to Rules 2.7 (a) and (d) and 2.8 of the Rules of Judicial Disciplinary Procedure, has determined that probable cause does exist to formally charge Stephen O. Callaghan, Judge-Elect of the 28th Judicial Circuit (“Respondent”) with violations of the Code of Judicial Conduct and that formal discipline is appropriate based upon the following probable cause findings:

1. Respondent received his Juris Doctorate from Western Michigan University Cooley Law School in 1994. He passed the July 1994 West Virginia Bar examination. Respondent became licensed to practice law in the State of West Virginia on or about October 3, 1994. At all times relevant to the proceedings set forth below, Respondent was actively practicing law in and around Nicholas County, West Virginia. As such, Respondent is subject to the West Virginia Rules of Professional Conduct.
2. Application I(B) of the Code of Judicial Conduct states in pertinent part that “[a]ll judicial candidates for judicial office shall comply with the applicable provisions of this Code.”
3. The Code of Judicial Conduct defines “judicial candidate” as:

[A]ny person, including a sitting judge, who is seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, authorizes or, where permitted engages

in solicitation or acceptance of contributions or support or is nominated for election or appointment to office.

4. Respondent filed pre-candidacy papers to run for Judge of the 28th Judicial Circuit in the May 2016 election with the West Virginia Secretary of State on or about May 14, 2015. Respondent became a judicial candidate upon filing his pre-candidacy papers. Respondent filed his certificate of candidacy with the Secretary of State's Office on or about January 14, 2016.
5. As a judicial candidate, Respondent was subject to Canon 4 of the Code of Judicial Conduct. *See generally* Rule 4.1, 4.2 and Rule 4.4. *See also* Comment 2, Rule 4.1 ("When a person becomes a judicial candidate, this Canon becomes applicable to his or her conduct.").
6. On November 24 and December 30, 2015, Counsel for the Judicial Investigation Commission sent letters to all non-incumbent pre-candidates for Circuit and Family Court Judge, including Respondent. The letters notified the non-incumbent pre-candidates that they were bound by Canon 4 of the new Code of Judicial Conduct and advised them where they could find a copy online. The letter was mailed to Respondent at 820 Broad Street, Summersville, WV 26651.
7. On May 10, 2016, Respondent won election to the seat. Based upon information and belief, he will take office on or about January 1, 2017.
8. Respondent's sole opponent in the election was the Honorable Gary L. Johnson, incumbent Judge of the 28th Judicial Circuit. Judge Johnson first took office on January 1, 1993, and has served continually since that time. On May 10, 2016, Judge Johnson lost his re-election bid to Respondent. Based upon information and belief, Judge Johnson will vacate office on or about December 31, 2016.

9. Respondent received a total of 3,472 votes while Judge Johnson received 3,245 votes. Respondent garnered 51.69% of the vote while Judge Johnson received 48.31% of the vote.
10. At all times relevant to the allegations set forth below, Respondent had an active personal Facebook page. At all times relevant to the allegations set forth below, Respondent's campaign committee also had an active campaign Facebook page styled "Steve Callaghan for Judge 2016."
11. By virtue of being a candidate for election to judicial office, Respondent subjected himself to Canon 4 of the Code of Judicial Conduct. Because he is a lawyer who was a candidate for judicial office he was also required to comply with Rule 8.2 of the Rules of Professional Conduct.
12. On May 26, 2016, Nicholas Johnson filed a judicial ethics complaint against Respondent. The complaint was given No. 84-2016.

After investigating and evaluating the Complaint, the Judicial Investigation Commission finds that there is probable cause to make the following **CHARGES** and **FINDINGS**:

CHARGE I

JUDGE-ELECT CALLAGHAN violated Rules 4.1(A)(9) and 4.1(B) (Political and Campaign Activities of Judges and Judicial Candidates in General), and Rules 4.2(A)(1), (3), (4) and (5) (Political and Campaign Activities of Judicial Candidates in Public Elections) of the Code of Judicial Conduct and Rules 8.2(a) and (b) (Judicial and Legal Officials) of the Rules of Professional Conduct as set forth in the attached Appendix when he committed the following acts:

13. On or about May 5, 2016, Respondent, while campaigning for judicial office, mailed or caused to be mailed a two-page political flyer to voters in Nicholas County. The front side of the flyer contained a wrongfully created photograph that was intended to deceive voters into believing that Judge Johnson and U.S. President Barack Obama were drinking beer and partying at the White House while conniving with one another to kill coal mining jobs in Nicholas County. The front of the flyer depicts the Judge standing amidst party streamers with the President, who is holding a beer, and the caption: "Barack Obama and Gary Johnson Party at the White House. . ." The caption continues at the top of page two by stating ". . . While Nicholas County loses hundreds of jobs." Page two of the flyer also contains Respondent's picture superimposed over a picture of a hand holding mined coal. To the left is a pink slip which states "Layoff Notice" and below that:

While Nicholas County lost hundreds of jobs to Barack Obama's coal policies, Judge Gary Johnson accepted an invitation from Obama to come to the White House to support Obama's legislative agenda. That same month, news outlets, reported a 76% drop in coal mining employment. **Can we trust Judge Gary Johnson to defend Nicholas County against job-killer Barack Obama?**

At the bottom of the page, the caption reads: "On May 10, Put Nicholas County First. Vote Steve Callaghan."

14. On or about May 5, 2016, Respondent also posted or caused to be posted the complete flyer on his personal and campaign Facebook pages.
15. Respondent admits that the foundation for the contents of the flyer is based on Judge Johnson's June 2015 visit to Washington D.C. to attend a child trafficking seminar. Respondent utilized Rainmaker Inc. to conduct research on Judge Johnson. Rainmaker found a July 2015 news story and a Supreme Court press release detailing Judge

Johnson's attendance at the child trafficking seminar. Both the news article and the press release make clear that the child trafficking seminar was sponsored by the federal Administration for Children and Families and that the event "educated leaders on the increased dangers vulnerable children in state care face of being trafficked. . . ." The press release and the news article made absolutely no mention of a party, alcohol or President Obama attending the event.

16. Judge Johnson has never met President Obama. Judge Johnson has never been invited to the White House by President Obama. As part of his judicial duties, Judge Johnson serves as Chair of the State Court Improvement Program ("WVCIP"). As Chair, Judge Johnson, along with four other WVCIP members, attended the annual weeklong National CIP Conference in Washington D.C. The conference was held during the week of June 8, 2015. At least three members of WVCIP were required to attend the National Conference in order to maintain federal grant status. Concomitantly, the Federal Administration for Children and Families held a two-day seminar on child trafficking beginning on June 10, 2015. The first day of the child trafficking seminar was at the White House Complex -- in a building adjacent to the actual White House. Only three CIP members from each state could attend the White House portion of the child trafficking seminar. The determination of who could attend was left up to each State CIP. The WVCIP decided that Judge Johnson, Lieutenant D.B. Swiger of the West Virginia State Police and Sue Hage, Deputy Commissioner of the West Virginia Bureau of Children and Families would attend the seminar. At the conclusion of the seminar, an open house was held at the National Human Trafficking Resource Center, located a few blocks from the White House. The open house consisted of light hors d'oeuvres and refreshments and tours of

the facility. No alcohol was served at the open house. Judge Johnson did not attend the open house. President Obama never attended the child trafficking seminar or the open house. Based upon information and belief, President Obama was not in Washington, D.C. on June 10, 2015.

17. Judge Johnson did not have any involvement in any loss of coal mining jobs in Nicholas County. As a judicial officer, Judge Johnson did not have any involvement in policymaking decisions by President Obama concerning coal. As a judicial officer, Judge Johnson must remain neutral and detached and would not be able to comment or take a position on such issues.

Mitigation

18. After being notified by Disciplinary Counsel of potential violations of the Code of Judicial Conduct on or about May 5, 2016, and without admitting the same, Respondent removed or caused to be removed the flyers from his personal and campaign Facebook pages.¹ Respondent also placed the following post on the pages:

My campaign committee recently produced a mail advertisement depicting a visit to the White House by Judge Gary Johnson. The specific characterization contained in the mail piece may be inaccurate and misleading. The mailer should not have been sent containing inappropriate information. I apologize personally for any misunderstanding or inaccuracies.

19. Respondent also ran ads on the local radio station on eight separate occasions between May 7 and May 9, 2016 which stated the following:

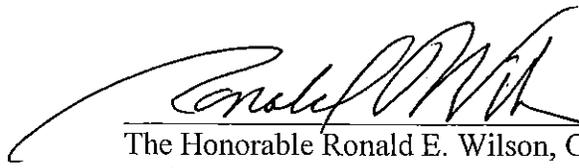
¹ During the evening hours of May 5, 2016, Disciplinary Counsel contacted Respondent by telephone and informed him of her belief that the flyer violated Rule 4.1(A)(9) and parts of Rule 4.2 of the Code of Judicial Conduct. Disciplinary Counsel told Respondent that if he took down the Facebook posts and ran radio ads to counter the negative effect of the flyer on voters, she personally would not file a complaint against him. However, Disciplinary Counsel also informed Respondent that if a member of the public subsequently filed a complaint it would be investigated and the Commission would be free to take whatever action it deemed appropriate but that evidence of his cooperation could be used as mitigation in any proceeding before the Judicial Hearing Board and the Court. Without admitting any wrongdoing, Respondent opted to remove the Facebook posts and run the radio ads.

If you received a mail advertisement recently from Steve Callaghan, Candidate for Nicholas County Circuit Judge, showing Judge Gary Johnson visiting the White House, please understand that the specific characterization of the White House visit may be inaccurate and misleading and should not have been sent containing this inappropriate information. Candidate Callaghan apologizes for any misunderstanding or inaccuracies. This message paid for by Callaghan for Judge 2016, Wayne Young, Treasurer.

The ads aired between 10:00 a.m. and 3:00 p.m. or between 6:00 a.m. and 7:00 p.m.

Judge-Elect Callaghan is advised that he has the right to file responsive pleadings to the charges made against him not more than 30 days after service of the formal charges upon him by the Clerk of the Supreme Court of Appeals of West Virginia. Any such pleadings shall be filed with the Clerk of the Supreme Court of Appeals and the Office of Disciplinary Counsel. For good cause shown, the Office of Disciplinary Counsel may extend the time for filing such pleadings. *See* Rule 2.10 of the Rules of Judicial Disciplinary Procedure.

STATEMENT OF CHARGES issued this 11 day of JULY, 2016.


The Honorable Ronald E. Wilson, Chairperson
Judicial Investigation Commission

APPENDIX

WEST VIRGINIA CODE OF JUDICIAL CONDUCT

Rule 4.1 Political and Campaign Activities of Judges and Judicial Candidates in General

- (A) Except as permitted by law, or by Rules 4.2, 4.3, and 4.4, a judge or a judicial candidate shall not: . . .
- (9) knowingly, or with reckless disregard for the truth, make any false or misleading statement; . . .
- (B) A judge or judicial candidate shall take reasonable measures to ensure that other persons do not undertake, on behalf of the judge or judicial candidate, any activities prohibited under paragraph (A).

Rule 4.2 Political and Campaign Activities of Judicial Candidates in Public Elections

- (A) A judge or candidate subject to public election shall:
- (1) act at all times in a manner consistent with the independence, integrity and impartiality of the judiciary; . .
- (3) review and approve the content of all campaign statements and materials produced by the candidate or his or her campaign committee, as authorized by Rule 4.4, before their dissemination;
- (4) take reasonable measures to ensure that other persons do not undertake on behalf of the candidate activities, other than those described in Rule 4.4, that the candidate is prohibited from doing by Rule 4.1; and
- (5) take corrective action if he or she learns of any misrepresentations made in his or her campaign statements or materials.

WEST VIRGINIA RULES OF PROFESSIONAL CONDUCT

Rule 8.2 Judicial and Legal Officials

- (a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.
- (b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

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THE HONORABLE STEPHEN O. CALLAGHAN
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SUPREME COURT NO. _____
JIC COMPLAINT NO. 84-2016

NOTICE OF FILING OF FORMAL STATEMENT OF CHARGES

Comes now Judicial Disciplinary Counsel pursuant to Rule 2.8 of the Rules of Judicial Disciplinary Procedure and on behalf of the Judicial Investigation Commission provides notice to the Honorable Stephen O. Callaghan, Judge-Elect of the 28th Judicial Circuit, by and through his Counsel, Lonnie C. Simmons, Esquire, by email, facsimile transmission and United States Mail that on the 18th day of July 2016, he duly filed the attached Formal Statement of Charges in the above-captioned matter with the Clerk of the Supreme Court of Appeals of West Virginia by hand delivering the original and ten copies to the Clerk's Office located at the Capitol Complex, Building One, Room E-317, 1900 Kanawha Boulevard East, Charleston, West Virginia 25305. Please be advised that Ms. Tarr also spoke with Mr. Simmons on Wednesday, July 13, 2016, via telephone at (304) 342-0133 and verbally advised him of the contents of the Statement of Charges and that the document would be filed with the Court no later than, Monday, July 18, 2016.

Respectfully submitted,



Teresa A. Tarr, Esquire
Brian J. Lanham, Esquire
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CERTIFICATE OF SERVICE

I, Brian J. Lanham, Judicial Disciplinary Counsel, do hereby certify that I served the Notice of Filing and a true and accurate copy of the Formal Statement of Charges on Respondent by placing the same in the United States mail first-class postage pre-paid and addressed as follows: Lonnie C. Simmons, Esquire, Counsel for Respondent, 604 Virginia Street East, Charleston, WV 25301; by facsimile transmission to Mr. Simmons at (304) 342-4605; and by email to Lonnie.Simmons@dbdlawfirm.com on this the 18th day of July 2016.


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