SUPREME COURT OF FLORIDA

INQUIRY CONCERNING A JUDGE
NO. 97-04

CASE NO. 91,325

RE: ELIZABETH LYNN HAPNER

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ELIZABETH L. HAPNER'S RESPONSE TO THE JUDICIAL QUALIFICATIONS COMMISSION'S REPLY

COMES NOW, Elizabeth L. Hapner, by and through her undersigned counsel, and responds to the Judicial Qualifications Commission's Reply as follows:

A. On April 27, 1998, Elizabeth L. Hapner resigned her position as a County Judge, in and for Hillsborough County, State of Florida.

B. On April 30, 1998, Elizabeth L. Hapner filed a response to this Court's Order to Show Cause advising of her resignation from the bench. Therein, she suggested to this Court that a dismissal, without action upon the Judicial Qualifications Commission's recommendation, is appropriate for several reasons. First, the recommended action no longer has practical significance nor does it serve a public purpose. Second, jurisdiction is lacking. Also, the punitive effect upon her of a continued proceeding is unjustified and inconsistent with the purpose of this action.

C. On May 6, 1998, Special Counsel to the Judicial Qualifications Commission filed a Reply to the above-referenced response. The Reply argues that this proceeding should continue despite the resignation from the bench of Elizabeth L. Hapner. In support of that argument, Special Counsel asserts that the Constitution of the State of Florida, as amended on November 5, 1996, vests continuing jurisdiction of the Judicial Qualifications Commission over judges until one year after resignation. Special Counsel also suggests that the continuation of this proceeding has practical significance and serves a public purpose because this Court may order the suspension of Ms. Hapner from The Florida Bar and may award costs to the prevailing party in addition to removal. Special Counsel also asserts that a continuation of this proceeding avoids an inappropriate precedent which "subvert[s] this Court's fundamental role of regulating the judiciary and the bar."

D. Accordingly, the primary issue now before this Court is the necessity and appropriateness of considering the recommendation of removal from the bench of Elizabeth L. Hapner, a former County Judge, who has voluntarily removed herself from public service by resignation.

E. In the event this Court determines that the continuation of this proceeding is necessary to a public purpose, is consistent

with its regulation of the judiciary, and is not punitive, then additional issues should be addressed. The additional issues include the necessity and propriety of sanctions other than as recommended by the Commission, including bar suspension and an award of costs.

Issue: Should this Court continue with this proceeding in view of the resignation?

1. The Judicial Qualifications Commission Hearing Panel filed its findings of fact, conclusions of law and recommendation of action on March 18, 1998. The Hearing Panel recommended "that the Supreme Court of Florida remove Judge Elizabeth L. Hapner from her position as County Judge for Hillsborough County, Florida." (emphasis added). (JQC Report, page 33).

2. However, Elizabeth L. Hapner is no longer a judge due to her voluntary resignation from office on April 27, 1998. Therefore, to continue with an action for removal is illogical and serves no purpose. Based upon this proceeding to date, the publication of such action to the public and Ms. Hapner's resignation, the public has been assured that the integrity and independence of the judiciary are preserved and public confidence in the integrity and impartiality of the judiciary has been promoted. These are the considerations established by Canon 1 and Canon 2,

Florida Code of Judicial Conduct.

3. The reply by Special Counsel to the Commission asserts that the public purpose to be served by the continuation of this proceeding includes the need for this court to consider imposition of lawyer discipline and the imposition of the cost and to avoid an "inappropriate precedent."

4. However, no public purpose is served by the continuation of this proceeding to impose a lawyer sanction against a former judge. Regardless of the status of this proceeding, the bar is authorized to initiate an investigation should that be deemed appropriate. The public purpose to be served by this proceeding concerns the judiciary. The positions of judge and lawyer and the purposes of discipline for each are as distinct as the separate entities established to investigate each (JQC/The Florida Bar), the Rules and Canons which regulate the two distinct memberships, and the differing remedies available to this Court for each position.

5. Furthermore, there has been no recommendation by the Commission of a suspension of Ms. Hapner as a lawyer. Accordingly, a suspension from the bar would be a deprivation of her right to earn a living without notice and without an opportunity to have defended against such action. Therefore, it is a violation of Ms. Hapner's right to due process of law as guaranteed her by the

Constitutions of the United States and the State of Florida. It would also be inconsistent with the limitation upon this Court's authority to act without recommendations of the Judicial Qualifications Commission. Article V, Section 12, Constitution of the State of Florida. This Court has recognized that it cannot discipline without a recommendation from the Commission. In re Fletcher, 664 So.2d 934, 936, (Fla. 1995). It was further acknowledged in a dissenting opinion to that case that this Court has "no authority under the Constitution either to increase this discipline or to direct further proceedings to obtain the desired result." Fletcher at 938. (Overton, J., dissenting).

6. Furthermore, the need for and fairness of a suspension is unsupported by the report of the Commission and the record. The issues considered by the Commission and addressed in its findings, conclusions and recommendations concern only the present fitness of Judge Elizabeth L. Hapner to serve as a judge. Neither the record nor the JQC Report support any suspension of Ms. Hapner as a lawyer.

7. Even less persuasive is the assertion that this Court should continue this proceeding based upon its authority to order costs to be paid by Ms. Hapner. The argument ignores several essential facts. First, no record evidence exists concerning the

costs associated with this proceeding. The alleged costs should not now, after the close of the evidence, be considered by this Court. Second, the Commission did not recommend the payments of costs. Third, neither the reasonableness of the costs nor the appropriateness of costs being imposed against Ms. Hapner have been addressed by the Commission.

Absent a recommendation for the imposition of such costs and absent any record evidence establishing the amount and reasonableness of costs, this Court should not now consider the issue. Therefore, the suggestion that costs concerns are a basis for continuing is meritless.

8. Concerning the responsibility to the public for costs, the consideration should be which party primarily caused such costs to occur. Ms. Hapner has twice made efforts to resolve this matter without the need for extensive litigation. As reflected in the Commission's report:

> "On the first morning of the trial, Judge Hapner, through her attorney, orally, and later in writing, amended her answer to admit the factual allegations of the charges, but deny the conclusions . . ." (JQC Report, page 3).

The intent of the admissions tendered to the Commission at the very beginning of the trial was to eliminate the expenditure of time associated with numerous witnesses and numerous documents being offered into evidence and to eliminate factual issues so that

the Hearing Panel could consider the legal issues and an appropriate remedy. In response to this tendered admission, Special Counsel asked for the right to a trial and the Commission granted that request. This proceeding then took four days for trial. The significant majority of that time was consumed by the twenty-four witnesses called by the Commission and by the time consumed concerning several evidentiary issues. This expenditure of time and expense should have been avoided.

Consistent with her efforts to bring closure to this matter and consistent with her interests and the interests of the public, Elizabeth L. Hapner resigned from her position on April 27, 1998. This resignation effectively resulted in that which the JQC sought, Ms. Hapner no longer serving as a judge.

Despite its counsel's demand for a trial and the Hearing Panel's allowance of a full trial, the Commission now argues that Ms. Hapner should be responsible to the citizens of this state for costs. This argument reflects the apparent position of the JQC that regardless of Ms. Hapner's attempts at resolution, this case was to be tried and continued through to this Court. This does not justify the continuation of this case.

9. The JQC cites Article V, Section 12 of the Constitution of the State of Florida as the basis for this Court's continuing

jurisdiction over Ms. Hapner after her resignation. It is suggested that the intent of the 1996 amendment was to avoid the scenario where a judge resigns prior to the initiation of an investigation into judicial conduct. Such a resignation avoids public notice of the alleged misconduct and may serve to avoid potential recommendations, other than removal.

However, the scenario presented by this proceeding was not necessarily intended to be controlled by the provision for continuing jurisdiction after resignation. Here, the charges, trial and the recommendation of the Commission have been publicized. The resignation of Ms. Hapner has also been publicized. Therefore, the public is fully aware of the allegations, the findings, the conclusions, the recommendation, the suspension and the resignation. Ms. Hapner is not vested and is not eligible to serve as a Senior Judge. Further publication therefore serves no identifiable or reasonable purpose.

10. As the JQC acknowledges, punishment is not a purpose recognized by this Court to be served by this proceeding. In re Shenberg, 632 So.2d 42 (Fla. 1992). This Court has stated that the object of Judicial Qualifications Commission disciplinary proceedings "is not to inflict punishment, but to determine whether one who exercises judicial power is unfit to hold a judgeship." In re

Kelly, 238 So.2d 565, 569 (Fla. 1970). This Court also stated that the purpose of JQC proceedings is to regulate the judiciary, not to punish. In re Leon, 440 So.2d 1267 (Fla. 1983). However, punishment is precisely what Special Counsel is urging this Court to impose.

The only effect of the continuation of this case will be to punish Elizabeth L. Hapner. The Commission's assertion that this proceeding will establish a useful public precedent fails to acknowledge any affect upon Ms. Hapner. This Court, however, should consider Ms. Hapner. After all, she served as a County Judge for in excess of a year. Her service was in a difficult division and she "performed extremely well on the bench." (JQC Report, paragraph 71).

11. Furthermore, the record evidence does not establish that the termination of this case will establish an inappropriate precedent or that its continuation will be beneficial. This is merely speculation. Conversely, the continuation of this proceeding, despite the resignation, will establish the precedent that regardless of the efforts of an accused judge to resolve an investigation into their present fitness, all cases brought pursuant to Article V, Section 12 will be concluded only after a full trial and after review by this Court. Such a precedent will

needlessly increase litigation, increase public expense and eliminate the effective resolution of future cases, regardless of the facts, the merits of the charges or the discipline recommended by the Commission.

It will also guarantee that an accused judge will suffer the public scrutiny, embarrassment, personal stress, and financial burdens which result from these public proceedings. Accordingly, it is suggested that an inappropriate precedent is the more certain result from the continuation of this matter.

12. The inappropriateness of this case proceeding is further evidenced by the trial proceedings. Rule 12(b) of the Florida Judicial Qualifications Commission Rules provides that Special Counsel shall, upon written demand of a party or counsel of record, promptly furnish the names and addresses of all witnesses whose testimony the Special Counsel expects to offer at the hearing. In this case, Elizabeth L. Hapner presented evidence concerning her reputation as a competent, honest and ethical attorney and judge and her contributions to the community. (JQC Report, paragraph 75). Special Counsel then presented three witnesses in rebuttal. These were the Honorable Stephen T. Northcutt, Gayle Kent and Carol Williams. The witnesses testified, over objection, concerning matters which occurred prior to all acts alleged by the Commission.

Their testimony concerned matters which were not alleged and which were not relevant to any matters alleged in the formal notice. More importantly, the witnesses' identities were first disclosed to Ms. Hapner's counsel at the conclusion of the trial proceedings on the day before they testified. Their names had not been disclosed prior to trial despite interrogatories propounded by Elizabeth L. Hapner requesting the identity of witnesses to be called and despite a demand pursuant to Rule 12(b) and the response thereto.

As a result of this non-disclosure and lack of notice, Ms. Hapner was surprised and was prejudiced by her inability to effectively rebut the testimony of the witnesses. She was effectively denied her right to reasonably defend as provided by Rule 15, Florida Judicial Qualifications Commission Rules. The Commission's indication in its report that this evidence was given "little consideration" does not obviate the prejudicial effect of the erroneous admission of the testimony.

13. Both the Commission's request for a continuation of this proceeding and its recommendation of removal are apparently primarily based upon the findings concerning the veracity of Ms. Hapner. Several of these findings, however, are based only upon conclusions that a witness testified in a manner more credible or accurate than Ms. Hapner. Although determinations of credibility

are appropriate for the fact finder, such do not necessarily support the determination of a lack of candor found here. In order for a lack of candor to have been proven, there must be clear and convincing evidence of a knowing and willfully false statement, not believed to be true by the witness. In re Davey, 645 So.2d 398, 407 (Fla. 1994).

It is insufficient to sustain the finding of a lack of candor that the JQC found Ms. Hapner's version of events to be unworthy of belief or another witness's testimony to be more credible or logical. Id. If such were the case, every judge who unsuccessfully defends against a charge of misconduct would be open to a charge of lack of candor. Here, the findings indicate the Commission's decision that Ms. Hapner's testimony was less logical or less convincing than other witnesses. However, the evidence of willful and intentional false statements is insufficient. The Commission simply determined credibility in several instances against Ms. Hapner and then erroneously equated that with a conclusion that a lack of candor existed.

As evidence of her belief in the truthfulness of her testimony, Ms. Hapner offered the testimony of an expert in the field of polygraph examinations and the results of his examination of her. (T 839). Neither form of evidence was accepted into evidence. A

proffer was then made a part of this record based upon a stipulation between counsel. (T 844). The proffered evidence included a polygraph test which included the following questions:

1) "Did you lie to the court about the tapes on August 12, 1996?"

2) "Can you recall having lied about the tapes during the contempt hearing on April 7, 1997?"

Ms. Hapner answered "no" to both questions. The expert stated that in his opinion "Ms. Hapner was truthful during this examination."

Despite the Commission's ruling which disallowed the polygraph examination and expert testimony, this Court should consider the examination and expert opinion. Because the JQC made specific findings as to Ms. Hapner's credibility that issue is critical to all matters now being considered. It is, again, what Ms. Hapner believed or recalled to be true that is the critical issue to many of the conclusions now being reviewed. Contrary to Special Counsel's position that the issue was not whether Ms. Hapner thought she was telling the truth, but only whether she was accurate and truthful, the most important question to have been resolved was her own belief of the true facts. This evidence of her truthfulness should not be disregarded.

14. The Hearing Panel concluded that its Special Counsel had proven violations of several Rules Regulating The Florida Bar. (JQC Report, paragraph 87). However, the cited rules do not reference specific findings of fact nor are there references to general matters supporting each rule. Ms. Hapner, as well as this Court, must therefore speculate as to the factual and record basis relied upon for these legal conclusions. This is unjustly prejudicial to Ms. Hapner and does not provide a sufficient record for review by this Court. (In re Fletcher, 664 So.2d 934, 936, (Fla. 1995).

15. More specifically, the alleged violations of Rule 3-4.3, Rules Regulating The Florida Bar, should not serve as a basis for this Court to continue this proceeding or to impose bar discipline. More specifically, a violation of Rule 3-4.3 was not proven and is not supported by the record. No evidence of any unlawful act or of an act contrary to honesty or justice was proven. Even in the light most favorable to the Commission, the evidence proved that Ms. Hapner's testimony was in error or that other testimony was simply more plausible.

16. Rule 4-1.1 of the Rules Regulating The Florida Bar deals with lawyer competence and has been cited by the Hearing Panel. The alleged violation of Rule 4-1.1 resulted from Elizabeth L.

Hapner's representation of four clients beginning in approximately July, 1996 and ending in December, 1996 when she closed her practice. No facts cited by the Commission support the conclusion of a violation of this rule. In fact, the testimony of witnesses presented by Ms. Hapner reflected her good reputation for competence. (See JQC Report, paragraph 75). Therefore, a violation of this rule should not be considered.

17. Rule 4-1.5(e) provides that a lawyer shall communicate the basis of a fee to a client, preferably in writing. There exists no requirement that a lawyer enter into a written agreement or otherwise document a fee, except as to contingent fees. The Commission concluded that Ms. Hapner failed to properly document her fee arrangements with Mr. Acebo and Mr. Torres. (See JQC Report, paragraphs 43 and 48). Therefore, the legal conclusion that Rule 4-1.5(e) was violated is erroneous.

18. Rule 4-1.6(d) is entitled "Exhaustion of Appellate Remedies." It requires a lawyer to exhaust all appellate remedies before revealing information relating to representation, except under enumerated circumstances. The Commission failed to make any finding or conclusion proving that Elizabeth L. Hapner failed to, or was ever required to, exhaust any appellate remedy before revealing any client information. In fact, there has been no

finding that she revealed client information. The inclusion of this violation in the report indicates the Hearing Panel's unquestioning acceptance of proof of the allegations presented by its Special Prosecutor without regard to the evidence.

19. The Commission also concluded that Rule 4-3.3 was violated. The Commission does not reference any evidence nor did it make any finding supportive of this conclusion. It is assumed that the relevant findings regard the matters of Mallen, Ms. Hapner's testimony about the threats by her former husband and the tapes. Rule 4-3.3 states that a lawyer shall not knowingly make a false statement of material fact or law to a tribunal. An essential element of the rule is the knowledge of falsity. Here, the record evidence is insufficient to prove, clearly and convincingly, that Ms. Hapner made statements to any tribunal knowing and believing them to be false. Therefore, a violation of Rule 4-3.3 should not be considered by this Court.

20. Rule 4-8.4 was also found to have been violated. The report, however, fails to specify a rule section. Clearly, not all provisions were violated. It is unfair for Ms. Hapner to surmise, speculate and guess the rules at issue. However, a reading of the Commission's Report seems to indicate an intent to find violations of Rule 4-8.4(c). Assuming that fact, this Court should consider

that each alternative element of the rule involves acts of intentional misconduct. The existence of clear and convincing evidence of an intentional act of dishonesty, fraud, deceit or misrepresentation is lacking in this record. The arguments previously stated concerning the conclusions of lack of candor also apply to this legal conclusion. This Court should not consider Rule 4-8.4 in determining the appropriateness to continue this proceeding or for any other purpose.

21. Article V, Section 12, Subsection (c), Constitution of the State of Florida authorizes this Court to act based upon a recommendation of the JQC. The ultimate decision to accept or reject the recommendation is for this Court. In re Graham, 620 So.2d 1273 (1993). However, the Court cannot rule without a recommendation from the Commission and must have an adequate record on which to base its decision. (See In re Fletcher, 664 So.2d 934 (Fla. 1995). In the absence of both a recommendation or any record evidence relevant to imposition of costs and bar discipline, this Court should not impose either remedy. Moreover, in view of the resignation of Elizabeth L. Hapner, this matter should be dismissed without further action by this Court.

Respectfully submitted,

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C E R T I F I C A T E O F S E R V I C E

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail this 15th day of May, 1998 to: Joseph H. Varner, Esquire, Post Office Box 189, Winter Haven, Florida 33882-0189; John Beranek, Esquire, General Counsel, Post Office Box 391, Tallahassee, Florida 32302; and Brooke S. Kennerly, Executive Director, Judicial Qualifications Commission, The Historic Capitol, Room 102, Tallahassee, Florida 32399-6000.

DONALD A. SMITH, JR., ESQUIRE