

COMMONWEALTH OF PENNSYLVANIA
COURT OF JUDICIAL DISCIPLINE

IN RE: :
 :
James M. DeLeon :
Supervising Judge, Criminal Division: No. 1 JD 06 :
Philadelphia Municipal Court :
Philadelphia County :

BEFORE: Honorable Richard A. Sprague, P.J.
Honorable Joseph A. Halesy
Honorable Robert L. Capoferri
Honorable Lawrence J. O'Toole
Honorable John L. Musmanno

OPINION AND ORDER

OPINION BY JUDGE SPRAGUE

FILED: July 27, 2006

We have before us Respondent's Motion to Dismiss based on the Judicial Conduct Board's alleged violation of its Rule 31 (J.C.B.R.P. No. 31). That rule provides:

RULE 31. DISPOSITION OF COMPLAINT.

(A) Except as provided in paragraph (C), within 180 days of the Board's receipt of the Judicial Officer's written response pursuant to Rule 30(B)(2)(c) or written response to any subsequent letter requesting information by the Board, the Board shall:

(1) dismiss the complaint upon a finding that there is no existing probable cause to file formal charges;

(2) dismiss the complaint with the issuance of a letter of counsel upon a determination that, even if the alleged conduct occurred, it was not conduct which requires that formal charges be filed, provided that the Judicial Officer:

- (a) consents in writing;
 - (b) stipulates that the letter of counsel may be used during proceedings involving new complaints against the Judicial Officer; and
 - (c) agrees to and satisfies any conditions required by the Board; or
- (3) authorize the filing of formal charges with the Court of Judicial Discipline.
- (B) If the Board dismisses a complaint following a full investigation, Chief Counsel shall promptly notify the Judicial Officer and the complainant.
- (C) Exceptions.
- (1) The Board may continue a full investigation of a matter beyond the 180-day period set forth in paragraph (A) upon a good faith belief that further investigation is necessary.
- (2) The Board may defer disposition of a complaint pursuant to paragraph (A) upon discovery or receipt of additional, corollary, or cognate allegations which may necessitate an investigation.
- (3) The receipt of the Judicial Officer's written response to any Rule 30(B) notice or supplemental or investigatory letter is a necessary prerequisite to the tolling and calculation of the 180-day period set forth in paragraph (A). Thus, the 180-day time period is wholly inapplicable if the Judicial Officer fails to file a written response and the investigation will continue to conclusion.

The Board's rule-making power derives directly from the Constitution:

The Board shall ... establish and promulgate its own rules of procedure.

Pa. Const., Art. V, §18(a)(6). It is pursuant to this constitutional authority that the Board established and promulgated its Rule 31.

In similar fashion this Court receives its rule-making power from the Constitution:

The court shall adopt rules to govern the conduct of proceedings before the court.

Pa. Const., Art. V, §18(b)(4). It is pursuant to this constitutional authority that this Court adopted Rule 411(D)(3). That rule provides:

(D) The Judicial Officer may challenge the validity of the charges on any legal ground including:

* * * *

(3) that the Board violated the proceedings governing it.

C.J.D.R.P. No. 411(D)(3).

In In re Hasay, 546 Pa. 481, 686 A.2d 809 (1996), the Judicial Conduct Board took the position that this Court did not have constitutional authority or jurisdiction to review the Board's compliance with its own rules of procedure. In that case we held that this Court did have such authority. In re Hasay, No. 2 JD 95, slip op. at 5 (Pa.Ct.Jud.Disc. May 10, 1995). On appeal our Supreme Court met the issue head-on stating:

The board claims that the court does not have the constitutional authority or jurisdiction to review the board's compliance with its own rules of procedure, but may only determine whether there is clear and convincing evidence of ethical misconduct. The board's position on this issue is radical: the board's decisions concerning probable cause to file formal charges with the Court of Judicial Discipline are non-reviewable by that or any other court. The board's brief states:

To the extent that C.J.D.R.P. No. 411(D) provides that "the Judicial Officer may challenge the validity of the charges on any legal ground including ... (3) that the Board violated the procedures governing it," it is clearly unconstitutional since the Court of Judicial Discipline's rule-making authority is limited to adopting rules which govern the conduct of the

hearings before it. Furthermore, there is no authority, either in the Constitution or in the Rules of Conduct for District Justices, for the proposition that a violation of the Board's Rules should constitute a defense to formal charges.

The opinion of the Court of Judicial Discipline stated: "Contrary to the Board's position that this Court's only function is to determine whether to impose a sanction, ... part of [that decision] may include, where relevant, an inquiry into the question of whether the Board has followed the rules it has adopted for its own governance." Slip op. at 5, May 10, 1995.¹

* * * *

We emphatically reject the assertion that the board's compliance with its rules of procedure is absolutely beyond judicial review. The rules exist in part to insure that due process is accorded judicial officers subject to investigation and prosecution by the board. The constitution states that all hearings before the Court of Judicial Discipline shall be "conducted pursuant to the rules adopted by the court and in accordance with due process." Pa. Const. Art. V, §18(b)(5).

* * * *

We therefore hold that the rules of the Court of Judicial Discipline properly include reference to the board's compliance with its rules as an issue subject to the review of the court.

The discipline of a judicial officer is a process which begins the moment a complaint is received by the board. The judicial officer is entitled to due process at all stages of the proceeding before the board, the court, and on appeal. A denial of due process by the board may be remedied by the court or on appeal. Every minor or technical violation of the board's rules may not be a denial of due process, and the appropriate remedy may be a minor matter; nonetheless, the guarantee of due process requires that the board's procedures be reviewable. The court's rule of procedure 411(D)(3), allowing an accused judicial officer to challenge the board's procedural integrity, is a valid exercise of the court's rule-

¹ We repeat here an additional observation made by this Court in the Hasay opinion of May 10, 1995:

If the Board were not subject to review by this Court to determine whether it has complied with its rules, the rules, and the constitutional provision directing the adoption of the rules would be meaningless. Id. at 4.

making authority, and is perfectly in keeping with the constitutional mandate that the court conduct its hearings “in accordance with the principles of due process.”²

Hasay, supra, at 493-95, 686 A.2d at 816-17.

The matter is, thus, solidly settled, and it is upon this authority that we here examine the Board’s compliance – or non-compliance – with its Rule 31.

At the outset we note that the Board, with commendable candor, has conceded that, in this case, it did not comply with the rule. (N.T. 14). Notwithstanding, given that the Board’s concession is based upon, and limited to, the facts of this case – as will be our decision – it is important that those facts be here set out.

Under Rule 31 the 180 day clock begins to run when the Board receives the judicial officer’s written response to the Board’s Notice of Investigation. In this case that response was received on June 6, 2003.³ Based upon Stipulations of Fact agreed to by the parties and upon Respondent’s exhibit R-3, items 14-72, we find that the Board’s investigation proceeded as follows:

- from June 6, 2003 to August 20, 2003 no investigation was conducted;
- from August 20, 2003 to March 2004 numerous witnesses were interviewed and depositions were conducted;
- no investigation was conducted from March 2004 until June 2004 when several witnesses were interviewed;

² The Judicial Conduct Board made this argument one more time in In re Cicchetti, 697 A.2d 297, 308-09 (Pa.Ct.Jud.Disc. 1997) respecting its alleged non-compliance with its Rule 15 (forbidding the Board’s consideration of complaints more than four years old unless the acts were part of a “pattern” of misconduct or the Board had “good cause” to consider them). In that case, following Hasay, we held that “reviewing the Board’s compliance with its Rule 15 is a matter within our purview – indeed it is our duty”

³ It is common, and it would be expected, that some investigation will have preceded the Board’s notification of the judicial officer; our record, however, does not contain information as to how long that investigation had been underway. In any event, the 180 day requirement of Rule 31 is not triggered until the judicial officer files his written response to the Notice, which, in this case, was June 6, 2003.

- except for one interview in August 2004, no investigation was conducted from June 2004 until October 14, 2005 when Respondent's deposition was taken;
- thereafter, no further investigation was conducted and the Board authorized filing of a Complaint in this Court on December 5, 2005.

Since the Board's investigation was not complete at the expiration of 180 days, and since by that time the Board had not done any of the things required of it under Rule 31(A)(1), (2) or (3), i.e., dismiss the complaint, issue a letter of counsel, or authorize the filing of formal charges with this Court, on December 8, 2003, proceeding under Rule 31(C)(1), the Board authorized an extension of the investigation beyond the 180 day limit. Board counsel has filed a Certification that at that time the Board had "a good faith belief that further investigation was necessary." We do not question the factuality of that certification nor do we question the propriety of the extension authorized on December 8, 2003.

However, the Board interprets the "Exceptions" clause of Rule 31(C)(1) to require formal extensions be made every 180 days and that each extension be supported by the aforementioned "good faith belief that further investigation is necessary." Acting accordingly, the Board authorized additional extensions of 180 days on May 3, 2004, December 6, 2004 and June 13, 2005. While we may not be constrained to question the existence of "good faith belief" that on those dates "further investigation was necessary," our examination of the Board's compliance with Rule 31 does not end there.

It is a given that the intention of Rule 31 is to require that the Board conduct its investigations with some expedition, that it not dawdle along all the while leaving the judicial officer under investigation to wonder whether he will be facing formal charges or not. It follows that this requirement cannot be met, nor this goal achieved, without the

concomitant requirement that the Board proceed with diligence in conducting its investigations. Our review of the Board's compliance with Rule 31 will not be complete, then, without an examination of that question.⁴

From the above timeline we note:

1. that the Board's investigation extended over a period of 2 ½ years (from June 6, 2003 to December 5, 2005)⁵;
2. that, except for one interview in August 2004, and the deposition of Respondent in October 2005 the Board did nothing from June 2004 until December 2005 – a period of 1 ½ years.

We believe that such lengthy, unexplained delay such as occurred in this case, coupled with an egregious lack of diligence on the part of the Board such as is present in this case,⁶ which results in prejudice to the Respondent, can only be remedied by dismissal of the charges.⁷

We note that, in this case, the Board lengthened the time it has prescribed for completion of investigations from 180 days to 900 days, and that for 540 days it did nothing (save for one interview).

We recognize that on each of the four occasions when it authorized extension of the investigation, the Board would have had “a good faith belief that further investigation

⁴ Similar inquiry, i.e. whether the Commonwealth acted with due diligence, is part of the process in determining whether the 180 day rule and the 365 day rule of Pennsylvania Criminal Rule of Procedure No. 600 has been complied with. See, Pa.Crim.R.P. No. 600(G), and Commonwealth v. Williams, ___ Pa. ___, 896 A.2d 523 (2006); Commonwealth v. Murray, 879 A.2d 309 (Pa. Super. 2005); Commonwealth v. Meadius, 582 Pa. 174, 870 A.2d 802 (2005); Commonwealth v. Hunt, 858 A.2d 1234 (Pa. Super. 2004).

⁵ In actuality the Board's investigation was longer than this because, as mentioned earlier, it is highly probable that some (not insubstantial) investigation preceded the Board's notice to Respondent.

⁶ Again, the Board has candidly acknowledged that it did not act with diligence in this case. (N.T. 72).

⁷ The Supreme Court of the United States, in considering an alleged violation of a criminal defendant's right to a speedy trial under the Sixth Amendment to the United States Constitution, though recognizing the serious consequences of dismissing the indictment, stated that “it is the only possible remedy.” Barker v. Wingo, 407 U.S. 514, 522, 92 S.Ct. 2182, 2188, 33 L.Ed. 2d 101, 112 (1972).

was necessary” as required by its Rule 31(C)(1). This would always be so because, by failing to do things that needed to be done, there always was something that needed to be done. Thus, if so interpreted, the exception of Rule 31(C)(1) could operate to extend an investigation indefinitely, and, so, would effectively cancel the 180 day rule and render nugatory the purpose, the intention, and the policy out of which it arose. We hold that where the Board’s “good faith belief that further investigation is necessary” is attributable to the Board’s lack of diligence the “good faith belief” is contrived and should not operate to nullify the rule.

We emphasize that in cases where violation of Rule 31 is alleged and dismissal of the charges is sought, the delay must have resulted in prejudice to the Respondent, and the burden is on the Respondent to establish prejudice. However, there can come a time in a given case where the delay is so lengthy that prejudice can be presumed.⁸ We do not here specify what that length of time is or may be in any case – save this case. We hold that in this case the delay was such that prejudice may be presumed.

In addition to the presumption, the record in this case contains evidence that the long delay did actually prejudice Respondent in his ability to prepare and present his side of the case. He testified that three individuals who were closely associated with his campaigns in 2001, 2002 and 2003 and who might have been able to testify in support of Respondent’s contentions that he personally made no efforts and had no knowledge of

⁸ Essentially, this is what Rule 600 of the Pennsylvania Rules of Criminal Procedure accomplishes by establishing the 180 and 365 day rules (Rule 600 (A)(2) and (3) for incarcerated and unincarcerated defendants respectively). In Barker v. Wingo, *supra*, the Supreme Court of the United States adopted a “balancing test” for determining violations of the speedy trial provision of the Sixth Amendment of the United States Constitution but stated: “Nothing we have said should be interpreted as disapproving a presumptive rule adopted by a court in the exercise of its supervisory powers which establishes a fixed time period within which cases must normally be brought.” *Supra*, at 530 n.29, 92 S.Ct. at 2192 n.29, 33 L.Ed.2d at 115 n.29 (emphasis added). The Pennsylvania Supreme Court did just that when it promulgated what is now Criminal Rule of Procedure 600. See, Commonwealth v. Hamilton, 449 Pa. 297, 297 A.2d 127 (1972).

any efforts to raise campaign funds in violation of Canon 7 of the Code of Judicial Conduct as charged by the Board, died in June 2005, October 2005 and January 2006. (N.T. 82-98). Respondent also testified that there were some “character witnesses” he would have liked to have called to vouch for his reputation but they died in 2006. (N.T. 97-102).

On the basis, then, of the inordinate length of time which elapsed after receipt of Respondent’s response to the Notice of Investigation until the Board’s authorization to file charges, which was due to the Board’s lack of diligence, in violation of Board’s Rule 31, and the actual prejudice to Respondent shown to have resulted from the passage of such a long time, we order that the Board’s Complaint be dismissed.

O’Toole, J., files a dissenting opinion.

Sandler and Lamb, JJ., did not participate in the consideration of this opinion.

Panepinto, J., did not participate in the consideration or disposition of this case.