

BEFORE THE FLORIDA
JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING A JUDGE,
THE HONORABLE MARNI A. BRYSON
JQC NO 2019-351

No. SC 21-546

MOTION FOR INQUIRY INTO BREACH OF RULE 23

Pursuant to Article V, Section 12(a)(4) of the Florida Constitution and Florida Judicial Qualifications Commission Rule (FJQCR) 23, Judge Marni Bryson respectfully submits this Motion for Inquiry into a Breach of Rule 23 and requests that the Commission in its entirety determine how the breach occurred.

Preliminary Statement

Both Florida Constitution Article V and FJQCR 23 require that all matters in a JQC proceeding remain confidential until the notice of formal proceedings is filed with the clerk of the Supreme Court of Florida. Rule 23(a) states: "Until formal charges against a judge are filed by the Investigative Panel . . . all proceedings by or before the Commission shall be confidential."

Rule 23(d) separately addresses the seriousness of a violation of Rule 23(a) by a member of the Commission: "Violation of this rule by a member of the Commission shall subject that member . . . to removal . . . and shall constitute

contempt of the Commission, which may be enforced by appropriate proceedings in the Supreme Court of Florida.”

A breach of Rule 23(a) by a member of the JQC not only reflects an egregious violation of the Commission’s own rules, requiring removal and contempt proceedings, it may also constitute evidence of the member’s personal animus towards a Respondent, thereby prejudicing the Respondent’s right to a fair and unbiased investigation or hearing. Based upon the facts set forth below, an immediate inquiry is required in this case under Rule 23(d) to ensure that there was no breach here by a member of the investigative or hearing panels. *In re Graziano*, 696 So. 2d 744 at 752 (Fla. 1997) (“We agree with the respondent that the JQC must provide reasonable safeguards against any breaches of the confidentiality requirements by itself, its staff, and its counsel.”) *In re Frank*, 753 So.2d 1228 (Fla. 2000) (“We again express our concern that the requirements of confidentiality be observed in proceedings before the commission...We request that the Commission be ever mindful of the implementation of those rules relating to confidentiality which give to all involved in the Commission’s proceedings confidence that the confidentiality will be observed”).

Relevant Facts and Procedure

Prior to formal charges being filed, the investigation of this matter was disclosed to the lawyer for a party who is adverse to Judge Bryson in an unrelated matter pending in circuit court in Martin County. The matter involves a civil lawsuit filed by Judge Bryson against attorney William Scherer and his law firm alleging interference in her child custody proceedings. During her deposition in that matter, on September 11, 2020, Judge Bryson was asked by counsel for the defendant: “Now, recently the chief judge has filed a judicial qualifications complaint against you, right?” (See deposition excerpt at Ex. A).

Counsel for the defendant, Javier Lopez, was aware of the confidential proceedings in this matter at least seven months before formal charges were filed by the JQC. Moreover, he appeared to have information that is never made public, even after a formal charge is filed: the identity of the complainant. In this case Lopez alleged in his question that the “Chief Judge” (Judge Krista Marx was the Chief Judge, and also the Chair of the JQC, at that time) was the complainant.¹ The lawyer’s question suggests that there was a particularly targeted disclosure of the confidential proceedings in this matter (possibly by someone who knew who the

¹ Judge Marx appears to have stepped down from her position as Chair of the JQC at or around the time this issue (and other significant information about Judge Marx) was raised with the investigative panel in October 2020 and January 2021.

complainant was) designed to harm Judge Bryson or, worse, that the charges against Judge Bryson are connected in some way to the lawsuit she filed a few months earlier. Lopez was also interviewed for an article published in the Palm Beach Post on July 1, 2021, when he was apparently questioned about whether the JQC investigation was connected in some way to the lawsuit filed five months earlier.² The article states: “Whether the lawsuit Bryson filed against Scherer spurred the JQC investigation is unknown. Lopez said there could be a connection”. (See Palm Beach Post, July 1, 2021, Jane Musgrave, reporter).

Counsel for the Investigative Panel was made aware of the breach and the obvious concerns by letter on October 8, 2020, months before formal charges were filed. Thereafter, on January 12, the full panel was advised in detail of the Rule 23 violation. There was no response or acknowledgment. The Investigative Panel was also provided information in the January 12 filing that Judge Marx, while Chair of the JQC, disclosed the details of confidential proceedings to Judge Bryson on five different occasions with respect to five different judges, all or most of whom have never been publicly charged. Judge Bryson offered to provide each of the Judges’ names to any investigator appointed by the JQC in a secure format to protect their

²Judge Bryson was made aware of the JQC investigation approximately five months after she filed the lawsuit against the defendant, William Scherer, and his law firm, Conrad Scherer.

privacy. There was no response and no request was ever made for the information, indicating an investigation was never undertaken.

An Immediate Investigation is Necessitated by the Facts

Unlike other cases where the media became aware of a JQC investigation through a source, the confidential information here was directed to a particular private party and was carefully calculated to prejudice Judge Bryson in the lawsuit against Scherer for interfering with her child custody proceeding. Accordingly, an immediate inquiry in this matter is necessary to determine if the breach was by someone on either the Investigative Panel or Hearing Panel. If the former, a biased member voted on the formal charges and they are invalid. If the latter, a biased member will sit on the Hearing Panel.

The inquiry would likely be quick and cause no delay because it may involve questioning only one person: the lawyer who asked the question at the deposition. Moreover, the first amendment issues that ordinarily arise when questioning the media about their sources are not a concern here. Nor are there attorney-client privilege concerns because, subsequent to the deposition of Judge Bryson, the defendant, Mr. Scherer, testified under oath that he did not have any knowledge of a JQC complaint against Judge Bryson. (See Scherer deposition excerpt at Ex.

B)³. Unless he perjured himself when he so testified, Mr. Lopez did not learn about the confidential JQC proceedings or the identity of the complainant through a conversation with his client. Finally, and perhaps most importantly, Scherer's attorney appears to have suggested to a reporter that there is some connection between the lawsuit Judge Bryson filed against his client and the subsequent initiation of the JQC investigation of Judge Bryson. The JQC should inquire of Mr. Lopez if he is aware of such a connection and, if so, determine if it is an improper connection that should result in the dismissal of the formal charges.

The JQC should make a clear record reflecting the evidence, its discussion and findings so that the Supreme Court has a record from which it can make its own findings as to whether a breach occurred and by whom. *In re Frank*, 753 So.2d (Fla. 2000) (noting the JQC's record was insufficient to permit the Court to determine itself if a breach had occurred). The record should contain information sufficient

³ Scherer was asked: "Are you aware of any pending complaint against, JQC complaint against Marni Bryson? He responded: "No, I am not aware of any. Those are all confidential as far as I can." See Exhibit B. If Mr. Scherer testified truthfully, Mr. Lopez did not learn about the JQC investigation from his client and there are no attorney-client privilege issues of concern. And, even if Scherer lied in his testimony and Lopez had learned it during a conversation with his client, Scherer still had to learn about it from someone else that had the confidential information and he can be questioned about it.

to allow the Florida Supreme Court to reach their own conclusion on these issues.

Id. A “skeletal record” does not suffice. *Id.*

Pursuant to Rule 23, the investigative proceedings in this case were to remain confidential throughout the investigative process. The violation is not cured by publication of a formal charge. To the contrary, the evidence set forth herein raises the following questions, among others, that go to the heart of whether Judge Bryson received an unbiased investigative panel and whether she will receive an unbiased hearing panel:

- 1) is there a member of the investigative or hearing panels that bore such personal animus toward Judge Bryson that he or she breached Rule 23 in an effort to prejudice her financially in an unrelated matter;
- 2) was the investigation in this case initiated for improper reasons related to a lawsuit filed by Judge Bryson months earlier against Scherer and his firm for interfering in her child custody proceeding;
- 3) did Judge Marx, a declared witness in this case whose credibility is at issue, resign as Chair at or around the time the Rule 23 violation was brought to the attention of the Investigative Panel? And, if so, was it because she had in fact violated Rule 23, which bears on her bias and therefore the credibility of her testimony;
- 4) was the refusal of the Investigative Panel to respond to or even acknowledge Judge Bryson’s complaint about the Rule 23 violation an effort to prevent disclosure of a rule violation by a JQC member;

- 5) were formal charges filed in whole or in part as part of an attempt to moot the issue of whether there was a violation of Rule 23 by a JQC member;
- 6) Did the Commission preside over a matter initiated by the complaint of its own Chair, leading to a biased result or, at a minimum, an appearance of impropriety that should have been avoided by appointing a panel from outside the JQC?⁴

Due process not only requires a fair hearing, it requires the “appearance” of fairness and impartiality. *In re Murchison*, 349 U.S. 133 (1955). Here, the manner in which the confidential proceedings were disclosed raises obvious questions about whether or not every member of the Investigative Panel was unbiased and whether every member of the Hearing Panel is unbiased. An immediate investigation is therefore necessary to ensure that each member of both panels is impartial. *See Goines v. State*, 708 So. 2d 656, 661 (Fla. 4th DCA 1998) (“The judicial system fails to present a plausible basis for respect when a judge’s impartiality can reasonably be questioned”).

⁴ Given the obvious concern any Respondent would have over receiving an biased investigative panel and the appearance of impropriety attached to the JQC presiding over a complaint brought by one of its own members, let alone the Chairperson, Respondent raised this issue with the Investigative Panel. The Investigative Panel did not respond. We hereby request that the Hearing Panel (or an independent investigator appointed by the Commission) determine whether a JQC member initiated the complaint in this case and, if so, dismiss the formal charges and appoint an independent, outside panel to review the investigative record to determine if formal charges are warranted.

In addition to the need to determine the issue of bias based on the facts of this particular case, the Commission should also act in its own interest. If the Commission is unwilling to hold its members accountable to its own rules, it cannot credibly present itself as the appropriate body to hold individual judges accountable to the rules that regulate the judiciary at large.

Conclusion

Wherefore, Judge Bryson respectfully requests that the Commission: 1) initiate an investigation to determine if a member of the Commission itself violated Rule 23; 2) make a detailed record of its findings such that the Supreme Court is able to determine on its own whether a breach occurred and, if so, by whom and for what reason; and 3) determine whether a JQC member brought the complaint in this matter and, if so, take corrective action as set forth herein. *See* f.n. 4.

Respectfully submitted,

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