

[J-16-2010]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, ORIE MELVIN, JJ.

IN RE: INTERBRANCH COMMISSION : No. 53 WM 2009
ON JUVENILE JUSTICE :
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APPLICATION OF: JUDICIAL CONDUCT : Application for Relief
BOARD OF PENNSYLVANIA :
: SUBMITTED: December 30, 2009

CONCURRING AND DISSENTING OPINION

MR. JUSTICE BAER

DECIDED: January 29, 2010

I concur in the invocation of this Court's King's Bench powers, recognizing the need for expediency and efficiency in resolving any disputes, current or future, between the Judicial Conduct Board (JCB) and the Interbranch Commission on Juvenile Justice (ICJJ). For the reasons that follow, however, I would deny the application of the JCB in full.

First, I observe that the JCB has failed to tailor its broad constitutional challenge sufficiently to the facts at hand, and further did not materially articulate an argument under the deliberative process privilege in the application before us. Indeed, I conclude that most of the arguments of both parties are not sufficiently developed at this juncture. Despite the JCB's broad assertions of confidentiality, I am struck by the absence of a legal impasse requiring this Court's action. Instead, at this moment, the ICJJ has merely requested documents and asked questions, and the JCB has refused to comply only in some instances. Although the JCB has sought this Court's intervention twice, the ICJJ has not

asked for assistance in compelling disclosure, nor has the ICJJ invoked its own statutory powers to compel compliance with the subpoena it issued. 71 P.S. § 1190.35e(6).¹ If the ICJJ views these documents and answers as necessary for it to perform its laudatory statutory purpose, it must say and do more. Conversely, if the ICJJ can complete its function without such information, there is no need for this Court to involve itself in the process.

Thus, I conclude that it would be prudent for us to allow the ICJJ to gain the information it believes it requires through the process it has followed to date. In light of a majority of this Court's rejection of the JCB's call for absolute confidentiality, it should cooperate absent assertion of a specific, legally cognizable objection; e.g. constitutionality, attorney-client, deliberative process, work product, etc. Both parties should recognize the other's legitimate governmental functions, and attempt accommodation. Then, only if necessary, the ICJJ can move to compel answers to specific questions and for the production of specific documents. The JCB can then raise their best, nuanced objections. This procedure will permit this Court to answer cogently the specific objections presented within a precise factual matrix, allowing us to decide these very important questions,

¹ The General Assembly empowered the ICJJ to issue and enforce subpoenas:

The commission shall have the power to issue subpoenas under the hand and seal of its chair The subpoenas may be served upon any person and shall have the force and effect of subpoenas issued out of the courts of this Commonwealth. Any person who willfully neglects or refuses to testify before the commission or to produce any books, papers, records, documents or data and information produced and stored by any electronic data processing system shall be subject to the penalties provided by the laws of this Commonwealth in such case.

71 P.S. § 1190.35e(6).

admittedly involving both parties' legitimate governmental interests, with the analysis they deserve.

Notwithstanding, and, indeed, I believe in consonance with the above discussion, I find myself able to join sections I, II, III-A, and III-B, of the Chief Justice's opinion mandating the JCB to provide the ICJJ, under seal, the first anonymous complaint. In addition to joining the rationale ably articulated by the Chief Justice, I note that I can conceive of no possible future objection, based upon privilege or otherwise, which would preclude disclosure. Indeed, on this narrow question, we have been presented with a precise request and a specific objection, both pertaining to a peculiar document, and thus have the tangible dispute and focused advocacy I discuss above in counseling patience before action. Concerning the remaining questions, I would deny the JCB's application for relief without prejudice to allow the parties to follow the procedure as explained herein, expecting that the ICJJ will bring a specific dispute before this Court with focused advocacy, if it believes the information sought and withheld is necessary for it to complete its statutory mandate, and further expecting that the JCB will respond in kind, before this Court undertakes the potentially difficult task of weighing the arguments and deciding the issue.