

[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 :
:
:
:
: Application For Relief
APPLICATION OF: JUDICIAL CONDUCT :
BOARD OF PENNSYLVANIA : SUBMITTED: December 30, 2009

CONCURRING AND DISSENTING OPINION

MADAME JUSTICE ORIE MELVIN

DECIDED: January 29, 2010

I concur with the Majority's invocation of this Court's King's Bench powers to resolve this Application for Relief. While I also concur with the majority's determination that Rule 18 of the Judicial Conduct Board (JCB) Rules of Procedure does not preclude the JCB from disclosing matters relating to the misconduct complaints filed against former Judges Conahan and Ciavarella, I write separately to express my disagreement with the Majority's holding that these complaints must be kept under seal and, further, with the notion that the confidentiality expressed in Article V, Section 18 is instantly applicable.

In my view, the confidentiality of proceedings before the JCB is not implicated under the unique circumstances presented in this matter because the JCB apparently has not and will not follow through with its constitutional duty to investigate possible

judicial misconduct involving Conahan and Ciavarella.¹ The tenor of Article V, Section 18 contemplates that the JCB will not merely receive a complaint against a judge and sit idly by, but it mandates that the JCB fully investigate that complaint to determine whether probable cause exists to file formal charges. The Majority Opinion addresses the question of confidentiality as if this was a typical proceeding before the JCB, where a complaint is lodged, an investigation pursued, a recommendation made, and the matter runs its course to a conclusion in the Court of Judicial Discipline (CJD). Unfortunately, those are not the circumstances presently before this Court.

I would agree that in such a typical case, the records compiled during an investigation would be confidential once the JCB begins its constitutional duty to investigate every complaint. Furthermore, they remain confidential until the JCB makes a determination that probable cause exists to file formal charges, and the matter is referred to the CJD; whereupon, the proceedings then become a matter of public record. Article V, Section 18 does not require or even suggest that the JCB records must have the status of a high state secret and never be disclosed. In fact, the language of Section 18(a)(8) repeatedly references an investigation by the board. See Pa. Const. Art V, Section 18(a)(8) (“Statements, testimony, documents, records or other information or evidence acquired by the board in the conduct of an investigation shall not be public information.” “All proceedings ... shall be confidential except when the subject of the investigation waives confidentiality.” (emphasis added)). Therefore, in my view the Constitution requires more than the mere filing of a complaint for the JCB to

¹ This lack of investigation distinguishes this matter from In re Subpoena on Judicial Inquiry and Review Board, 517 A.2d 949 (Pa. 1986), which both the Majority and the JCB rely upon in finding Section 18 applicable. While I agree that “a constitutional rule of law must be enforced as written,” Maj. Slip Op. at 7, there is nothing written in Section 18(a)(8) that describes what becomes of confidentiality when the constitutional duty to investigate is not undertaken.

invoke confidentiality. I submit that the JCB must at least proffer that it has or is in the process of fulfilling its constitutional charge to investigate.

Under the unique circumstances of this case, there is no pending investigation before the JCB, and, admittedly in light of the criminal prosecution, there will never be a determination by the JCB concerning whether or not formal charges should have been filed. Consequently, the CJD will not hold public hearings and reach a conclusion. Instantly, we should not decide the question of whether the records in the JCB's possession are subject to confidentiality as if there was a pending JCB investigation, or will be in the future, because those facts are not before us. Likewise, we should not decide whether a deliberative process privilege applies because, unlike in In re Hasay, 686 A.2d 809 (Pa. 1996), where a full investigation took place, the JCB will not even acknowledge that it conducted any type of investigation nor has it asserted that it has engaged in any deliberative process to determine the viability of the complaints against former Judges Conahan and Ciavarella. The JCB should not be permitted to hide behind the veil of confidentiality when it will not even acknowledge what investigation, if any, occurred in this matter.

So the question becomes just who or what are we protecting by maintaining confidentiality in this matter. Clearly the fact that complaints were lodged against these former judges is now a matter of public record, and, unlike the situation where the sanction is something less than removal or resignation, these judges are no longer in a position to harass or retaliate against any complainants. Certainly, if the complainants wish to remain anonymous, the Interbranch Commission on Juvenile Justice (ICJJ) can see to it that their names are not revealed by way of redaction. To my mind, it is illogical to conclude that the records requested, to the extent they exist, or the answers sought to questions of the participants in this case, are subject to the constitutionally

mandated confidentiality of JCB proceedings where, as apparently occurred here, the JCB does not initiate a full investigation into the validity of complaints. The JCB's procedures have been called into question by the "kids-for-cash" scandal, and, as the statutory body charged with determining what went wrong, the ICJJ needs to know if the JCB followed its own procedures in this case.

I believe the confidentiality provided by Article V, Section 18(a)(8) is concomitant with the JCB's constitutional mandate to fully investigate every complaint, and, thus, confidentiality cannot apply in the absence of an investigation. Consequently, I would conclude that where the JCB does not initiate an investigation, or does not continue to fully investigate the complaint to a conclusion, for whatever reason, then the records made or received by the JCB would not be exempt from disclosure under Article V, Section 18(a)(8), as that provision was never properly invoked by the JCB's fulfillment of its constitutional duty of investigation.

Therefore, I would deny the JCB's Application for Relief in this matter and permit disclosure of not only the complaints (without the need for them to be filed under seal except with regard to protection of the complainants' anonymity by redaction) but also all the investigative materials requested by the ICJJ, as well as the answering of questions of what did or did not occur relative to those complaints. To do otherwise risks the appearance of an attempt to shield members of the judiciary, and those charged with judicial oversight, from public scrutiny under the unique circumstances of this matter.