

No. 10-0001

IN THE SPECIAL COURT OF REVIEW

**INQUIRY CONCERNING JUDGE NO. 96,
THE HONORABLE SHARON KELLER**

THE EXAMINER'S MOTION FOR REHEARING

EXAMINER:

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TO THE HONORABLE JUSTICES OF THE SPECIAL COURT OF REVIEW:

The Examiner respectfully files this motion for rehearing to correct legal errors in this Court's October 11, 2010 Opinion and Judgment.

GROUND FOR REHEARING

1. In order to avoid a violation of the Texas Government Code, the Judgment's award of "costs, if any" to Judge Keller should be deleted.
2. This Court erred by rendering a judgment of dismissal.
 - A. There is no evidence that the Commission's Order was entered by fewer than seven votes.
 - B. The appropriate remedy is remand to the Commission, not dismissal.
3. This Court erred in concluding that a warning cannot be issued after a formal proceeding.

ARGUMENT

I. Because of the prohibition in Section 33.031 of the Texas Government Code, the Judgment's award of "costs, if any" to Judge Keller should be deleted.

In its October 11, 2010 Judgment, this Court ordered that "costs, if any, are assessed against the Commission." (Judgment at 2.) Section 33.031 of the Texas Government Code, however, expressly prohibits the award of costs or attorneys' fees in this proceeding. *See* TEX. GOV'T CODE Section 33.031, "No Award of Costs" ("Court costs or attorney's fees may not be awarded in a proceeding under this chapter.") Judge Keller initiated this review proceeding under Chapter 33 of the Texas Government Code by petitioning the Chief Justice of the Texas Supreme Court to appoint a Special Court of Review under Section 33.034(b). Therefore, the proceeding before this Court is governed by Chapter 33 of the Texas Government Code. The order assessing costs in this Court's Judgment exceeded this Court's authority. That portion of the Judgment should be rescinded as it violates Section 33.031.

II. This Court erred by rendering a judgment of dismissal.

A. There is no evidence that the Commission's Order was entered by less than seven votes.

There is no evidence to suggest that any Commission member dissented from the decision to sanction Judge Keller, or that the Commission's Order was entered by less

than seven votes.¹ The Commission did not disclose how individual members voted, or what viewpoints each expressed as to the severity of discipline that was appropriate. It would be purely speculative, therefore, for this Court to conclude that the Commissioners on remand, with the benefit of this Court's interpretation of the correct remedies available, would or would not have sufficient votes to censure Judge Keller. This is particularly so in light of the changes in the composition of the Commission between the time of its decision and the time of a remand: Since the time the Commission issued its decision, Martha Morales Hernandez, Hon. M. Sue Kurita, and Diane De La Torre Threadgill have been appointed as Commissioners, replacing Commissioners Bradford, Fields, and Lawrence. The Commission's earlier vote, based on its perception that Rule 10(m) allowed the Commission to show leniency, does not reveal how the Commission would now vote if given a narrower range of options.

¹ This Court stated: "Nothing in the record before us shows that the Commission had at least seven votes to take any action at all, much less a censure." (Opinion at 32 n.15.) A more appropriate observation is that nothing in the record shows how the Commissioners would have voted if they had been informed, prior to their vote, that the following portion of the Supreme Court's 18-year-old Rule 10(m) would be determined to be "inconsistent with the Texas Constitution and the Government Code": "... or in the alternative, the commission may dismiss the case or publicly order a censure, reprimand, warning, or admonition." When a reviewing court determines that a decision-maker has erred, the appropriate disposition is to remand for the decision-maker to determine the case in light of the guidance from the reviewing court. It is not appropriate for the reviewing court to infer or presume how the decision-maker would have, or would on remand, determine the case in light of the reviewing court's guidance.

B. Where this Court finds that the Commission erred by its reliance on an 18-year-old Supreme Court rule found to be “inconsistent with the Texas Constitution and the Government Code,” the appropriate remedy is remand to the Commission, not dismissal.

This Court did not reach the merits, whether by trial de novo or substantial evidence review. If the Commission erred by issuing a remedy outside of its constitutional or statutory power, the proper procedural step is to remand to the Commission to correct its procedural error in accordance with this Court’s opinion regarding the correct range of remedies that are available.

The Commission is capable of correcting its error, and on remand can apply the correct range of censure, removal, retirement, or dismissal this Court found is available in formal proceedings. Remand is therefore appropriate. *See, e.g.*, Tex. R. App. P. 44.4 (remand if lower court “can correct its action or failure to act”);² *compare State v. Marroquin*, 253 S.W.3d 783 (Tex. App.-Amarillo 2007, no pet.) (when appellate court is dealing with a void sentence which is outside the minimum or maximum permitted by law, “the only action available is to remand the case” to the trial court on “the issue of punishment”); TEX GOV’T CODE § 2001.174 (court should reverse or remand for further proceedings if appellant’s substantial rights have been prejudiced because the agency’s actions violate a constitutional or statutory provision, exceed its statutory authority, are made through unlawful procedure, or affected by other error of law).

² The appellate rules of procedure are applicable “to the extent practicable” and to the extent that they do not conflict with the statutory rules. TEX GOV’T CODE § 33.034(f).

Dismissal of the case is inappropriate as this Court has not reviewed the merits, and instead bases its ruling on a perceived procedural error at the Commission level as to the specific penalty authorized. (Opinion at 2.) When this Court declines to conduct a *de novo* review of the merits, the proceedings should be remanded to the Commission for reconsideration of the remedy appropriate for the violations that Judge Keller has been found to have committed. No new trial would be required: the Commission has already heard evidence, already made findings of fact regarding Judge Keller's conduct, and need only correct its error that resulted from its belief that the Supreme Court's 18-year-old Rule 10(m) authorized a wider range of outcomes than this Court has determined.

Seven or more members could have believed good cause existed to censure or remove Judge Keller, particularly in light of the lengthy catalog of violations the Commission found, but been willing to vote for Rule 10(m)'s more lenient "alternative" penalty in the interest of consensus with other Commissioners. The only way to determine how the Commission would vote under this Court's construction of the applicable statutes, is to remand. The Commission should be given the opportunity to assess which of the narrower range of remedies allowed under the Texas Constitution and Government Code is appropriate in response to Judge Keller's conduct.

This Court states that the Commission "implicitly acknowledges that it did not find good cause for its actions or have the required votes" to censure or to recommend removal or retirement of Judge Keller (Opinion at 32), but that assumption is incorrect.

When the Commission voted to sanction Judge Keller, it operated under the belief that it could impose any of the remedies outlined for “Formal Proceedings” under Rule 10(m), a fact made apparent by its selection of a public warning.³ There is no evidence of how the Commission’s individual members would have voted if they had they known this Court would find portions of Rule 10(m) invalid, or if they had not reached consensus on a sanction that would be subsequently found inappropriate.

III. This Court erred in concluding that a warning cannot be issued after a formal proceeding.

This Court determined that neither the Texas Constitution’s nor the Texas Government Code’s plain language bars the Commission from issuing a public warning or other sanction following a formal proceeding, and instead found both the Constitution and the statute to be “inconclusive” on that issue. (Opinion at 18-19.) Notwithstanding that fact, this Court reasoned that because a censure is given a more constrained right of review than is a sanction under Tex. Gov’t Code Ann. § 33.034, the Legislature must have intended that a warning cannot be issued following a formal proceeding. (Opinion at 25.)

The Commission respectfully urges that this Court’s opinion is in error.

³ The fact that the Commission in prior cases elected to pursue the first of the two “alternative” courses available to it under Rule 10(m) does not mean that the Commission concluded the second alternative is unconstitutional or can never be applied. Given the inherently unique fact patterns presented by judicial disciplinary proceedings, the fact that the first alternative was found more appropriate in prior fact situations, does not mean the Commission believed that the breadth of outcomes specified under Rule 10(m) was unconstitutional or otherwise unavailable to the Commission.

First, this Court’s conclusions flowed from this Court’s study of Section 33.034 and the consequences of the statutory appellate review method. Citing a precedent cautioning courts to “avoid absurd results in interpreting statutes” (Opinion at 25), the Court concluded that a warning is not an available consequence after a formal proceeding. The Court is urged to modify its opinion to state, at a minimum, that its conclusion is one of statutory interpretation rather than constitutional interpretation. That is, if the Legislature were to adopt a different statutory scheme, then this Court’s analysis at pages 20-25 of its Opinion would presumably be different. This Court should be clear that its decision was not derived from its construction of the Constitution, whose language is not conclusive as to any limitations on the Commission’s power to impose lenient outcomes following formal proceedings. (*See* Opinion at 18.)

Second, Rule 10 of the Texas Rules for Removal or Retirement of Judges, titled “Formal Proceedings,” expressly reaches the opposite interpretation under the second clause of subsection (m):

If, after hearing, upon considering the record and report of the special master, the commission finds good cause therefore, by affirmative vote of six of its members, it shall recommend to the review tribunal the removal, or retirement, as the case may be; **or in the alternative, the commission may** dismiss the case or **publicly order a** censure, reprimand, **warning**, or admonition. Six votes are required for a recommendation of removal or retirement.

(Emphasis added.)

Although this Court determined that Rule 10(m) “is inconsistent” with the Texas Constitution and the Government Code, the Supreme Court’s authority to promulgate Rule 10(m) is grounded in the Constitution itself, as part of the same constitutional provision analyzed in this Court’s opinion. TEX. CONST. art. V, § 1-a(11).⁴ The construction of the text of the Texas Constitution and Government Code should be harmonized to give effect to the Supreme Court’s interpretation of the Commission’s powers under the Texas Constitution, rather than strain to find an interpretation that defeats it.

Rule 10(m), promulgated under the Supreme Court’s constitutional authority, is consistent with other sections of both the Texas Constitution and Texas Government Code. The Texas Constitution provides that a judge engaging in misconduct or incompetence may be removed from office or “may be disciplined or censured, in lieu of removal from office,” and gives the Commission the specific authority to issue a public warning “after such investigation as it deems necessary.” TEX. CONST. art. V, § 1-a(6), (8). This Court’s Opinion removes the language actually used in the Article V, § 1-a(8) of the Constitution — “After such investigation as it deems necessary” — and replaces it with the phrase “In the event of informal proceedings.” (Opinion at 11.) The *actual text*

⁴ See, e.g., *In re Rose*, 144 S.W.3d 661, 671-72 (Tex. Rev. Trib. 2004) (“The Constitution also provides that ‘[t]he Supreme Court shall by rule provide for the procedure before the Commission....’ Tex. Const. art. V, § 1-a(11). The Court has done so in promulgating the Texas Rules for Removal or Retirement of Judges.”); *In re Bell*, 894 S.W.2d 119, 122 (Tex. Spec. Ct. Rev. 1995) (“The Texas Government Code, together with rules promulgated by the Texas Supreme Court by constitutional authority, outlines the procedure for conducting an investigation into alleged misconduct by a judge.”). Emphasis is added to both cites.

of the Texas Constitution, consistent with the unambiguous language in the Supreme Court's Rule 10(m) (also promulgated under constitutional authority) empower the Commission to issue a public warning.

The interpretation adopted by this Court would also lead to an unsound result. This Court puzzles over why the Legislature could give a more constrained right of review for a censure than for a sanction, and yet this Court adopts the more unsensible view that the Commission in a formal proceeding is permitted to act only at the two extreme ends of the spectrum: either dismiss the action, or remove or censure the judge, but without power to render any action in between.⁵ In Rule 10(m), the Supreme Court recognized that if the Commission could recommend removal after a formal proceeding, it could also issue a more lenient penalty "in the alternative." No sensible objective would be achieved by construing the ambiguous statutes to allow action only at the two ends of the spectrum.⁶

Cases cited by this Court do not override Rule 10(m), and instead recognize its authority. For example, this Court cited *In re Thoma*, 873 S.W.2d 477, 483-84 (Tex.

⁵ Just as importantly, the Legislature's decision to give a *de novo* review for a sanction, and a record review for a censure, cannot render Rule 10(m) unconstitutional. The Legislature can amend the statute to change the level of review given a censure. Such action, however, has no bearing on whether Rule 10(m) is consistent with the text of the Texas Constitution or not. The Texas Constitution specifically authorizes the Supreme Court to issue Rule 10(m), and nothing in the plain language of the Constitution forbids issuing a more lenient penalty than removal, following a formal proceeding.

⁶ If a formal proceeding is instituted, and improper conduct by the respondent judge is unquestionably found, this Court's ruling means that the judge must be censured or removed (even if the violations are worthy only of a lesser penalty), or must dismiss the action altogether (even though judicial misconduct unquestionably occurred). In short, this Court's interpretation means a judge would either receive a harsher penalty than (s)he deserved, or no penalty at all, despite the commission of violations. Neither is a sensible interpretation of the legislative intent behind the Texas Constitution or Government Code.

Rev. Trib. 1994) as holding that the Commission in a formal proceeding can only “dismiss the complaint, publicly censure the judge, or recommend the removal or the retirement of the judge.” In support of that statement, however, the *Thoma* court cited the same version of Rule 10(m) which is in effect today. Rule 10(m), again, expressly authorizes the Commission in “the alternative” to issue a public warning. Similarly, the court in *In re Lowery*, 999 S.W.2d 639, 652-53 (Tex. Rev. Trib. 1998, appeal denied), cited Rule 10(m) and recognized it allows the Commission to issue a public warning following a formal proceeding. In *In Re Bell*, also cited by this Court, the *Bell* court similarly stated that “[t]he Texas Government Code, together with rules promulgated by the Texas Supreme Court by constitutional authority, outlines the procedure for conducting an investigation into alleged misconduct by a judge.” 894 S.W.2d 119, 122 (Tex. Spec. Ct. Rev. 1995) (emphasis added).

In sum, despite the fact this Court finds “the plain language [of the Constitution and Government Code] is inconclusive,” this Court adopts statutory interpretations that would remove an entire clause from Rule 10(m), and implicitly finds that the Supreme Court ignored the Constitution when it issued that rule. However, just as the Texas Constitution “gives the Legislature the right to promulgate consistent laws and definitions” (Opinion at 18), the Constitution also authorizes the Supreme Court to promulgate the procedure for removing or otherwise sanctioning a judge. TEX. CONST. art. V, § 1-a(11). The Commission urges this Court to adopt an interpretation that

harmonizes the two provisions, giving effect to the “alternative” language in Rule 10(m) and the Supreme Court’s apparent different reading of the Constitution and Government Code, over an interpretation that strains to find the Supreme Court acted in conflict with the Constitution.⁷

CONCLUSION AND PRAYER

The Examiner respectfully prays that this Special Court of Review reconsider its October 11, 2010 Opinion and Judgment, that it rescind its order awarding costs, and that it remand this matter to the Commission for further proceedings in light of this Court’s Opinion regarding the remedies available following a formal proceeding. The Examiner further prays for such other and further relief to which the Examiner may be justly entitled.

⁷ Rule 10(m) does not conflict with Rule 1(e)’s and (f)’s definitions of “sanction” and “censure.” Rule 1(e) defines “sanction” so that when that particular phrase is used elsewhere in the rules, it refers to a sanction issued prior to a formal hearing. Rule 10(m), applicable on its face to “Formal Proceedings” does not use the phrase “sanction.” Instead, Rule 10(m) lists specific penalties (some of which are also listed in Rule 1(e)), and expressly authorizes the Commission to issue any of those as an alternative outcome to a formal proceeding. This Court can and should adopt an interpretation of Rule 1(e) that gives effect to both rules, not one which writes portions of Rule 10(m) out of existence.

Respectfully submitted,

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