

STATE OF KANSAS

BEFORE THE COMMISSION ON JUDICIAL QUALIFICATIONS

INQUIRY CONCERNING)
LAWTON R. NUSS,)
JUSTICE, KANSAS SUPREME COURT)

Docket No. 954

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DISPOSITION

On May 12, 2006, Panel B of the Commission on Judicial Qualifications issued a Notice of Formal Proceedings, pursuant to Rule 611(b) (2005 Kan. Ct. R. Annot. 591-592), alleging that Lawton R. Nuss, Justice of the Kansas Supreme Court, did engage in certain conduct which violated Canons 1, 2A, and 3B(7) of the Rules of the Supreme Court Relating to Judicial Conduct. See Rule 601A (2005 Kan. Ct. R. Annot. 555-584).

On August 10, 2006, a public hearing was held in Topeka, Kansas, before Panel A of the Commission on Judicial Qualifications, at which hearing the Panel accepted stipulations and heard evidence. Members of the Panel present for this hearing were: Hon. Jennifer L. Jones, Chair; Nancy S. Anstaett, Vice-Chair; Hon. J. Patrick Brazil; Hon. Theodore B. Ice; Christina Pannbacker; William B. Swearer; and Carolyn Tillotson. Edward G. Collister, Jr., Examiner, appeared in support of the Notice of Formal Proceedings. Respondent appeared personally and through counsel, J. Nick Badgerow and J. Steven Pigg.

Having heard the evidence and arguments of counsel, the Panel makes the following findings of fact, conclusions of law, and disposition of the complaint.

FINDINGS OF FACT

The Panel concludes the following facts are established by clear and convincing evidence. See In re Rome, 218 Kan. 198, 542 P.2d 676 (1975).

- 1. On February 8, 2006, at a legislative reception held in the Kansas Judicial Center, Respondent and Senator Peter Brungardt, long-time friends from Salina, agreed to have lunch at a future date.
2. A few days later, Senator Brungardt's staff called Respondent's office to arrange a mutually convenient date for lunch. March 1 was agreed upon.

3. In the interim, in anticipation of further proceedings in *Montoy, et al. v. State of Kansas, et al.*, Respondent was following media reports of school finance bills pending before the Kansas Legislature. In June 2005, the Kansas Supreme Court had rendered a decision but retained jurisdiction of the case to determine whether the Legislature complied with the Court's decision. See *Montoy, et al. v. State of Kansas, et al.*, 279 Kan. 817, 112 P.3d 923 (2005).
4. Respondent compiled a chart for his own use which showed dollar amounts in the Augenblick & Myers study, a Legislative Post Audit study, and a proposed House Bill reported in the *Topeka Capital-Journal* on February 24, 2006.
5. Respondent had questions about the accuracy of the dollar amounts in the newspaper article and, upon leaving his office on March 1 to meet Senator Brungardt for lunch, took the chart with him. He had not planned to take the chart with him; it was a spur of the moment decision.
6. During lunch at a Topeka restaurant, Respondent produced the chart and asked Senator Brungardt whether the numbers in the House Bill were accurate. Senator Brungardt was unfamiliar with the numbers and said he did not know. Conversation turned to other topics.
7. When Senator Stephen Morris joined the lunch, apparently at Senator Brungardt's invitation, the subject of the chart was again raised. No participant remembers who broached the subject this second time.
8. Senator Morris explained the cumulative effect of the numbers which would not have been apparent in the newspaper article about the bill.
9. By all accounts, the total combined time devoted to discussion of the chart was less than five minutes.
10. Some weeks later, questions were raised about the content and propriety of these conversations among Respondent and the Senators.
11. On April 20, 2006, Respondent recused from further participation in the *Montoy* case. The *Montoy* opinion was filed on July 28, 2006.
12. Also on April 20, 2006, Respondent self-reported a potential ethical violation to the Commission on Judicial Qualifications.

13. On April 24, 2006, Chief Justice Kay McFarland filed a complaint with the Commission on Judicial Qualifications and publicly called for an investigation of Respondent's conduct.
14. In testimony before this Panel on August 10, 2006, Respondent admitted that he had made a mistake in taking the chart with him to the lunch and questioning the senators about the accuracy of the numbers. Respondent apologized for his actions and assured the Panel that this type of conduct would not be repeated.

CONCLUSIONS OF LAW

1. The Notice of Formal Proceedings alleges that Respondent's conduct violated the provisions of Canon 1, Canon 2A, and Canon 3B(7) of Rule 601A of the Rules of the Supreme Court Relating to Judicial Conduct.
2. Canon 1 of the Code of Judicial Conduct, Rule 601A, provides:

“A Judge Shall Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.”

3. Canon 2A of the Code of Judicial Conduct, Rule 601A, provides:

“A Judge Shall Avoid Impropriety and the Appearance of Impropriety in
All of the Judge's Activities

A. A judge shall respect and comply with the law* and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”

4. Canon 3B(7) of the Code of Judicial Conduct, Rule 601A, provides in relevant part:

“A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.* A judge shall not initiate, permit, or consider ex parte communications, or

consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:”

....

“Commentary:

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted.

....

A judge must not independently investigate facts in a case and must consider only the evidence presented.”

5. The Panel unanimously finds that Respondent’s conduct, established by clear and convincing evidence, violated Canon 1, Canon 2A, and Canon 3B(7).
6. Respondent engaged in conversation with Senators Brungardt and Morris about information related to dollar amounts of state school finance studies and/or proposals at a time when there was pending before the Kansas Supreme Court a case which questioned whether the Kansas Legislature had met or would meet the level of financing required by Article 6 of the Kansas Constitution. Such conversation was a communication about the issue in the *Montoy* case without the presence of the parties in the case and amounted to an independent investigation of the facts in the case. A violation of Canon 3B(7) occurred.
7. Respondent’s conversation with members of the Kansas Senate about the subject of a pending case resulted in the appearance of impropriety which undermines public confidence in the judiciary in violation of Canon 2A.
8. Even if this Panel accepts Respondent’s counsel’s characterization of Respondent’s conduct as “a single simple mistake with no intent to do wrong,” Respondent’s conduct falls below the high standards required by the Code of Judicial Conduct and diminishes public confidence in the integrity and independence of the judiciary in violation of Canon 1.

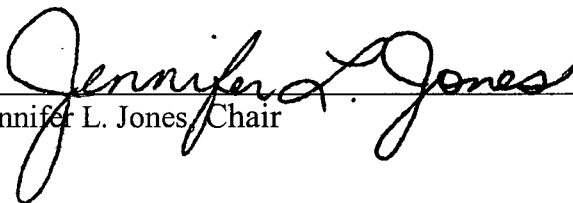
DISPOSITION

Pursuant to Supreme Court Rule 620 (2005 Kan. Ct. R. Annot. 595-596), based on the foregoing Findings of Fact and Conclusions of Law, the Panel unanimously admonishes Respondent for his conduct in this matter and orders that he cease and desist from future activity in violation of the above-cited Canons.

The Panel is mindful of Respondent's successful career as a Marine officer, lawyer, and now Justice of the Kansas Supreme Court. Many testified, by letter and personally, to his dedication and character. This proceeding does not call into question Respondent's past accomplishments nor is the object of the proceeding to punish the Respondent. The object of a judicial proceeding such as this one is to uphold the Canons of Judicial Conduct and, thereby, protect the parties to litigation and the public. The admonition and cease and desist order entered here accomplish that goal, given that the Panel finds no prejudice to the parties or the public as a result of Respondent's conduct.

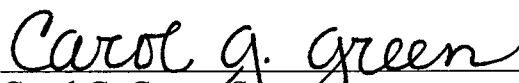
DATED this 18th day of August, 2006.

FOR THE COMMISSION ON JUDICIAL QUALIFICATIONS


Jennifer L. Jones, Chair

CERTIFICATE OF MAILING

I hereby certify that a true copy of the above-captioned Order was mailed to J. Steven Pigg and Teresa L. Sittenauer, FISHER, PATTERSON, SAYLER, & SMITH, LLP, 3550 SW Fifth Street, P. O. Box 949, Topeka, Kansas 66601-0949, J. Nick Badgerow, SPENCER FANE BRITT & BROWNE LLP, 40 Corporate Woods, Suite 700, 9401 Indian Creek Parkway, Overland Park, Kansas 66210-2005, Attorneys for Respondent, and Edward G. Collister, Jr., Collister & Kampschroeder, 3311 Clinton Parkway Court, Lawrence, Kansas 66047, Commission Examiner, by depositing same in the United States mail, postage prepaid, on the 18th day of August, 2006.


Carol G. Green, Secretary