

Exempt
1-21-11
CP

STATE OF NEW YORK
SUPREME COURT
COUNTY OF ONONDAGA

In Re:

JOHN DOE,

Petitioner,

vs.

NEW YORK STATE COMMISSION
ON JUDICIAL CONDUCT,

Respondent.

Hon: JAMES C. CHEMUNDO
AJSC

**TEMPORARY
RESTRAINING
ORDER**

and

ORDER TO SHOW CAUSE

Index No. _____

RJI No. _____

DECISION

The court has before it a Verified Petition from "John Doe," [John Doe being a fictitious name of a duly elected justice of a town court within the State of New York. Hereafter Petitioner]. Petitioner presents documentary evidence that the New York State Commission on Judicial Conduct [hereafter Commission] has filed a Formal Complaint against petitioner, dated May 20, 2010, pursuant to Judiciary Law §44(4), alleging petitioner has engaged in acts of unethical judicial misconduct. Petitioner demurs to the factual allegations contained in the Formal Complaint and avers the complaint alleges mere administrative failures; and mere

administrative failures do not constitute acts of unethical judicial misconduct.

Pursuant to Judiciary Law, Art 2-A, [§44], the subject matter jurisdiction of the Commission is strictly limited to prosecuting acts of unethical judicial misconduct. Administrative failures are the responsibility of the Office of Court Administration. Petitioner asserts the Commission is acting without, and in excess of, its jurisdiction. Therefore, Petitioner seeks an order, judgment and decree vacating the Formal Complaint dated May 20, 2010 and permanently enjoining the Commission from taking acts without and in excess of their statutory authority.

The court has received, reviewed and given due consideration to the Verified Petition dated January 20, 2011, together with all the exhibits and attachments.

The submissions confirm that following service of the Commission's Formal Complaint, Petitioner filed a Verified Answer dated June 24, 2010 including affirmative defenses showing the Commission does not have subject matter jurisdiction to prosecute administrative failures. As allowed by Commission Rule 22 NYCRR 7000.6(f)(ii), Petitioner moved to Dismiss the Formal Complaint upon the grounds that the undisputed factual allegations involve mere administrative

failures and the Commission does not have subject matter jurisdiction over administrative failures. The Commission's Staff Responded and opposed petitioners's motion to dismiss. The Commission issued an order, dated October 4, 2010, denying the motion to dismiss. The Commission provided neither explanation nor substantive decision for their determination.

Pursuant to this Special Proceeding under CPLR 7801, Petitioner seeks an Order, Judgment and Decree, in the nature of a writ of prohibition, vacating the Formal Complaint dated May 20, 2010. Petitioner asserts the Commission's factual allegations of the Formal Complaint are mere administrative failures. Pursuant to Judiciary Law §40, et. seq. and Matter of Gilpatric 12 NY3d 586 [2009] without allegation of both administrative failures plus "aggravating circumstances" the Commission does not have subject matter jurisdiction to prosecute petitioner. Therefore, Petitioner asserts a writ of prohibition lies under CPLR 7803(2) to prevent the Commission from proceeding without, and in excess of, its statutory jurisdiction.

Pursuant to Judiciary Law §104-b this court has the authority to grant the relief requested by petitioner.

Pursuant to Judiciary Law §45 and 22 NYCRR 7000.8, the facts which form the basis of this petition are subject to strict confidentiality rules. As such, Petitioner seeks an immediate Order authorizing this matter to be captioned and styled as John Doe vs. New York State Commission on Judicial Conduct and that an Order be issued sealing the Clerk's records, directing the Clerk not to release any information or documents from her file without further order of the court, and pursuant to Judiciary Law §4 directing that all proceedings in this matter be held in a courtroom closed to the public.

Pursuant to CPLR 6301, Petitioner asserts that unless this Court grants a Preliminary Injunction and Temporary Restraining Order, the Commission is doing or about to do an act in violation of Petitioner's rights respecting the subject matter of this action and that without a temporary order restraining Respondent from taking acts in violation of their statutory authority such acts will produce immediate and irreparable injury to Petitioner. Petitioner, therefore, seeks a

Preliminary Injunction and Temporary Restraining Order pending a hearing for a Permanent Order, Judgment and Decree enjoining and restraining respondent from taking action without, and in excess of, its statutory jurisdiction.

Pursuant to CPLR 2214(d) and 7804(c) Petitioner requests an Order compelling Respondent Commission to Show Cause before this Court why an Order, Judgment and Decree should not be issued vacating the Formal Complaint dated May 20, 2010 and permanently enjoining the Commission from taking action in excess of and without jurisdiction, together with such other further action and relief as to the Court may be just; and,

The Court having found that Petitioner has shown good cause for the issuance of an Order to Show Cause, together with an Order granting the relief requested;

NOW THEREFORE, IT IS,

ORDERED that pursuant to Judiciary Law § 45 and 22 NYCRR 7000.8, the Clerk of this Court shall immediately seal this application and all papers relating

to this matter. No documents, information or detail from these records shall be released to any individual or entity, other than one of the parties or the party's counsel, without further order of this Court. Pursuant to Judiciary Law §4 all proceedings shall be held in a court room closed to the public. And it is further,

ORDERED that consistent with Judiciary Law § 45 and 22 NYCRR 7000.8, the caption of this matter shall be styled as John Doe vs. New York State Commission on Judicial Conduct and all references to Petitioner herein shall be as "John Doe," it being a fictitious name for the Petitioner who is a duly elected town justice in the State of New York. And it is further,

ORDERED that pursuant to CPLR Article 63 a Temporary Restraining Order is hereby granted restraining the Commission from taking any acts in furtherance of prosecuting the Formal Complaint dated May 20, 2010, without further order of this court. The Temporary Restraining Order is granted upon the grounds that Respondent is doing, or about to do, an act in violation of Petitioner's rights and unless respondent is restrained petitioner will suffer irreparable injury. And, pursuant to CPLR Article 63, since none of the issues involved in this

proceeding involve assets of tangible value, petitioner need not post a bond or other financial undertaking. And it is further

ORDERED that the Commission shall show cause before this Court on the 10th day of MARCH, 2011 at 10:00 AM at a Term of this Court, to be held in a Closed Session, held at the Onondaga County Courthouse, 401 Montgomery Street, Syracuse, NY, why a writ of prohibition, as well as an Order, Judgment and Decree should not be granted vacating the Formal Complaint dated May 20, 2010 and permanently enjoining the Commission from taking actions without, and in excess of, its jurisdiction.

The Commission, shall file its Responding papers, if any, with the Court, and serve petitioner's attorney with a copy of same, by ^{Regular mail}~~personal~~ service upon his office, ^{OR} fax at 315.475.4225, or email at az@zipilaw.com, on or before 4:30 pm on the 18th day of February 2011.

Petitioner shall file its Reply papers, if any, with the court, and serve respondent's attorney, the New York State Attorney General, with a copy, by personal service upon his office, or by fax at 315.448.4853, on or before 4:30 pm on the 25th day of February 2011. And it is further

ORDERED that Petitioner shall serve a copy of this Order and all supporting papers on or before the 10th day of ~~January~~ February 2011, upon the following persons and/or entities in the manner described:

a] The offices of Jean M. Savanyu, in her capacity as Clerk of the New York State Commission on Judicial Conduct; and such service shall be made by delivering the aforesaid items to her office, via overnight express, at 61 Broadway, New York, NY 10006. Such service shall be deemed good and sufficient notice of these proceedings. And,

b] The New York State Attorney General, in his capacity as Constitutional attorney for the Commission; and such service shall be made by either personally serving any Assistant Attorney General; or, via overnight express, by delivering the aforesaid items to his offices at 615 Erie Blvd. East, Syracuse, NY 13204. Such service shall be deemed good and sufficient notice of these proceedings.

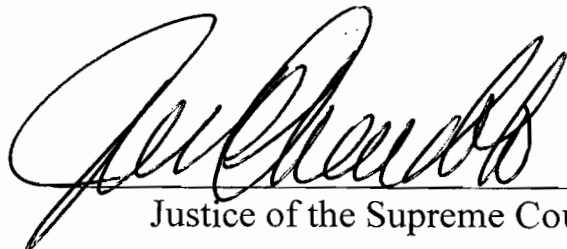
ENTER

Dated:

February 7
~~January~~, 2011

At:

Syracuse, New York


Justice of the Supreme Court