

BEFORE THE ARKANSAS COMMISSION ON JUDICIAL
DISCIPLINE AND DISABILITY

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JUDICIAL DISCIPLINE
AND
DISABILITY COMMISSION

IN THE MATTER OF L. T. SIMES,
Circuit Judge, First Judicial District Case No. 06-260/05-123

REPORT AND RECOMMENDATIONS OF PANEL

The matter of the allegations against Circuit Judge L. T. Simes was heard before a three-person panel of the Arkansas Judicial Discipline and Disability Commission (the "JDDC") on Thursday, July 28, 2010 and continued on Friday, July 29, 2010. The Commission was represented by David Sachar, the Associate Director of the Commission. Judge L. T. Simes was represented by George Hairston, Attorney at Law, New York, New York. Each party presented documentary evidence, oral testimony of witnesses, and made oral argument to this three (3) person panel.

The three-person panel was comprised of H. William Allen, Chris E Williams and Reginald D. Hamman.

Following the conclusion of the hearing, each party submitted proposed findings of fact and conclusions of law and the matter is now ripe for a report to the full Commission containing the findings and recommendations of the three-person panel.

FINDINGS OF FACT

1. Judge L. T. Simes is a full-time Circuit Court Judge elected in 1996, and has continuously served in this position since January 1, 1997 until his recent suspension on November 9, 2009, without pay, for the remainder of his term, by order of the Arkansas Supreme Court, in the case of *Judicial Discipline and Disability Commission v. Simes*, 2009 Ark. 543 (2009) (the "Chandler Case").

2. The relevant timeline is as follows:
- (a) Case No. 06-260 case was referred to the JDDC by the Supreme Court of Arkansas on June 29, 2006 in the conclusion of its decision in *Weaver v. City of West Helena*, 367 Ark. 159, (2006). As stated by the Court:

“In summation, the procedural requirements for the imposition of sanctions under Rule 11 were disregarded by Judge Simes, and the appellant was subjected to a de facto Rule 11 hearing of which he was given no notice. That hearing occurred before the court attempted to establish the falsity of the allegations in the motion for recusal, and the court ultimately failed to establish that the allegations were false. Judge Simes relied on improper bases in his order imposing the sanctions. For the foregoing reasons, we conclude that Judge Simes abused his discretion by imposing sanctions upon the appellant under Rule 11. Based on the record before us, it appears that Judge Simes has violated the Arkansas Code of Judicial Conduct. Accordingly, we direct the clerk of this court to forward a copy of this opinion to the Arkansas Judicial Discipline and Disability Commission.”

367 Ark at 165.

- (b) A Notice of Complaint to Judge Simes was sent by the JDDC on July 7, 2006 to which Judge Simes did not respond;
- (c) A second Notice of Complaint was sent to Judge Simes on August 7, 2006 to which Judge Simes did not respond;
- (d) On November 14, 2006, a letter from Johnny Weaver was sent to the JDDC, requesting his complaint (Case No. 05-112) against Judge Simes be dismissed;
- (e) Inaction on this case between August 7, 2006 and July 18, 2008, during the term of the JDDC’s previous Director, is unexplained;
- (f) During the pendency of this case other complaints have been filed against Judge Simes, which resulted in dismissals;

- (g) During the pendency of this case more serious complaints have resulted in public discipline;
- (h) On August 26, 2008, Judge Simes's request for additional time in which to respond to this case was granted;
- (i) A scheduling and discovery teleconference between the parties was held regarding the case on November 5, 2008;
- (j) Judge Simes request for certain copies of documents were mailed by the JDDC on November 5, 2008;
- (k) Judge Simes requested and was granted a continuance in the related cases 05-112/123 on January 12, 2009;
- (l) Judge Simes requested additional time to respond and the hearing was delayed until he filed his response on February 4, 2009;
- (m) The JDDC filed Notice of Initial Consideration on May 21, 2009;
- (n) Judge Simes requested on June 30, 2009, that the JDDC suspend further consideration of Case No. 06-260 until the Supreme Court takes action on the pending Chandler matter;
- (o) On December 3, 2009, the case was placed back on the JDDC docket after the disposition of the Chandler matter;
- (p) On February 19, 2010, Judge Simes was served with the Probable Cause Disposition;
- (q) On March 19, 2010, pursuant to a motion to dismiss Case Nos. 05-112 and 05-123 filed by the Executive Director of the JDDC, the JDDC (1) dismissed only those allegations in those cases which the Arkansas

Supreme Court found to be moot in the appellate case¹, and (2) denied the motion as to those allegations, which formed the basis of the Arkansas Supreme Court's reversal of the Respondent's imposition of Rule 11 sanctions in the *Weaver* Case. The JDDC, thereafter, merged what remained of Case Nos. 05-112 and 05-123 with Case No. 06-260;

- (r) On March 23, 2009 Judge Simes was served with Notice of Formal Disciplinary Hearing with Statement of Allegations included; and
- (s) The hearing date was re-scheduled to July 28, 2010, pursuant to Judge Simes's request for a continuance.

3. The latter part of 2004, the Helena Chief of Police, Vincent Bell was terminated by Mayor Johnny Weaver. The Civil Service Commission conducted a hearing related to the termination. The Civil Service Commission affirmed the termination of Chief Bell and he appealed the decision to Circuit Court. The case was assigned to Judge Harvey Yates, Circuit Case No. 04-398 (the "Yates case").

4. In early January 2005, the City Council filed a lawsuit against Mayor Weaver *City of West Helena v. Johnny Weaver*, No. CV-2005-04 (the "*Weaver* Case"), seeking a temporary restraining order to prevent Mayor Weaver from interfering in the day-to-day operations of the police department. This case was assigned to Judge Simes.

5. Mayor Weaver retained attorney Todd Murray to represent him in the Weaver Case.

¹ The Arkansas Supreme Court took "judicial notice of the fact that City of West Helena no longer exists as a corporate legal entity. On January 1, 2006, the adjoining cities of Helena and West Helena merged to form the new city of Helena-West Helena. Thus, the particular governmental positions and relationships at issue in the present case [*Weaver* case] are extinct, and our decision would have no practical effect upon the legal controversy here. For the foregoing reasons, we conclude that the points on appeal raised by the appellant, with the exception of the Rule 11 issue which represents an extant monetary obligation, are moot." *Weaver* at 162.

6. Judge Simes granted the City Council's request for a temporary restraining order, ex parte, and set a hearing for January 6, 2005.

7. On January 6, 2005, the day of the hearing on the temporary restraining order, Mr. Murray filed a motion for recusal or in the alternative, a motion to transfer or consolidate, alleging: (1) Judge Simes, prior to the filing of the Weaver Case, initiated personal contact with Mayor Weaver, expressed his dissatisfaction with the Mayor's decision to suspend/terminate Vincent Bell as police chief and asked the Mayor to "help" Chief Bell, evidencing a personal interest or bias in the matter in controversy; (2) Judge Simes failed to disclose to all parties his ex parte communications; (3) Judge Simes entered his ex parte order in violation of ARCP 65, which requires notice and an opportunity to be heard absent an emergency and/or threat of imminent irreparable harm, and without any facts to support the Order; (4) Judge Simes entered his ex parte order despite knowing that another proceeding was pending before another Circuit Judge involving the same question of whether or not Bell should be reinstated as police chief (the Yates Case); (5) Judge Simes made findings in his Order having reason to know that one or more of the finds findings were incorrect or unsupported by the law; (6) Judge Simes, or a member of the Judge's family, has an economic interest with one or more of the parties to this proceeding. (Motion for Recusal, Jan. 06, 2005).

8. The allegations in the motion for recusal were based on Mayor Weaver's complaint to the JDDC dated January 5, 2005;

9. Prior to taking up the temporary restraining order issue on January 6, 2005, Judge Simes addressed the motion for recusal. Judge Simes began the hearing on the motion for recusal by quoting the Model Rules of Professional Conduct to Mr. Murray. The motion for recusal disturbed Judge Simes, and he thought testified before the three member Panel that he

thought he was being personally attacked, and that Mr. Murray was trying to provoke him. Tr. 26, July 29, 2010;

10. Mr. Murray testified before the three member Panel that he was worried that Judge Simes was going to hold him in contempt of court for some reason, that he might be put in jail, assessed money sanctions, which would imperil his professional license. Tr. 85, 86, 93, July 28, 2010;

11. Mr. Murray also stated for the record during the Weaver Case that Judge Simes's "demeanor and your facial expressions toward me are very hostile at this point, . . .," During the hearing before the three member Panel, Mr. Murray testified that Judge Simes raised his voice to him several times. Weaver Case Tr. 24; Hearing Tr. 139;

12. Although, Judge Simes mentioned Rule 11 and read Model Rules of Professional Conduct 3.1 several times in the January 6 hearing, he did not give Mr. Murray notice that he was going to conduct a Rule 11 proceeding the following day;

13. During the hearing on the motion for recusal, Judge Simes never denied the allegation that he had initiated a conversation with Mayor Weaver regarding Chief Bell. Although, he stated at the JDDC Panel hearing that he knew the allegation was false, he later testified that "[he] had no recollection of ever having that conversation [conversation with Mayor Weaver regarding Chief Bell] with Mr. Weaver." Tr. 28, July 29, 2010;

14. The hearing on the motion to recuse commenced for a second day on January 7, 2005, and Judge Simes began the hearing by reading Rule 11 of the Arkansas Rules of Civil Procedure and Rule 3.1 of the Model Rules of Professional Conduct into the record;

15. Despite the fact that Judge Simes stated twice that he was there to hear a motion on recusal, he proceeded to initiate a Rule 11 proceeding, *sua sponte*, without giving notice to Mr. Murray or Mayor Weaver;

16. Judge Simes required Mr. Murray to be a witness in the proceeding without allowing Mr. Murray to be represented by counsel. Mr. Murray and Mayor Weaver were sworn in and questioned by Judge Simes;

17. Prior to examining Mr. Murray, at the direction of Judge Simes, Mayor Weaver, a party in the motion for recusal, and the subject of a potential contempt order under Rule 11, was escorted from the courtroom by the Sheriff, and was not permitted to return until he was called to the stand also to be questioned by the Court. Tr. 88, July 28, 2010;

18. Judge Simes misrepresented the testimony of Mr. Murray in his Order when he found that Mr. Murray had admitted to “judge shopping” when he responded to Judge Simes’s statement that there’s an issue in this case about judge shopping by saying “Yes, sir, there is, I think on both sides.” Despite Mr. Murray’s statement several times that he was not admitting to “judge shopping,” Judge Simes found that he had made such an admission. The Supreme Court characterized this as “a significant misrepresentation.” *Weaver*, 367 Ark. at 164;

19. Judge Simes based his Rule 11 sanctions against Mr. Murray not only on the written motion for recusal, but also on oral statements Mr. Murray and opposing counsel, Bill Lewellen, made during the hearing, e.g., the “judge shopping” statement, and Mr. Lewellen’s statement that Mayor Weaver had made inconsistent statements during his testimony;

20. Judge Simes in an Order dated April 26, 2005, found that Mr. Murray and Mayor Weaver had violated Rule 11 and issued sanctions against them;

21. Prior to the issuance of Judge Simes's sanction order, Mr. Murray withdrew from the motion for recusal the allegation that Judge Simes knew that a related case had been filed and assigned to Judge Yates. Nevertheless, Judge Simes improperly considered the withdrawn allegation in rendering his Rule 11 sanctions against Mr. Murray and Mayor Weaver. Further on this issue, while Murray had no proof that Judge Simes knew of the Yates case when he took the *Weaver* Case, Judge Simes was on notice once he saw the allegations in the motion for recusal that there was a potential related case in his circuit. Judge Simes acknowledged at the July 28, 2010 hearing before the Panel that he did not consider the simple alternative to recusal by granting the motion to transfer the *Weaver* Case to Judge Yates, as a related case. This fact indicated to the Panel that he had an improper interest in retaining the matter in his court in spite of the challenge to (or because of) his personal interest in the matter;

22. Judge Simes issued his denial of the motion for recusal at a January 26, 2005 hearing;

23. Judge Simes conducted the Rule 11 proceeding prior to deciding the motion for recusal;

24. The statement made by Executive Director David Stewart on November 5, 2009, after the disposition of the Chandler Case by the Arkansas Supreme Court that since the Court did not bar Simes from running for judge again, the Commission would move forward with two outstanding cases having to do with misconduct. *Arkansas Democrat-Gazette*, "Justices Suspend Simes," November 6, 2009, is not evidence of any retaliatory motive by the JDDC in disposing of the pending cases against Judge Simes;

25. Judge Simes's actions resulting in a finding of abuse of discretion by the Arkansas Supreme Court were taken in bad faith, and are cause for discipline under the Code of Judicial Conduct;

26. Judge Simes has four (4) prior public action letters from the JDDC: A public informal adjustment (O3-178), a letter of admonishment (04-206), a letter of reprimand (07-259) and a suspension from office (without pay) for the rest of his term (06-171). Judge Simes has had numerous complaints filed against him, which have resulted in dismissals for various reasons; and

27. The facts establish that there are no circumstances that mitigate the degree of any discipline or eliminate the cause for discipline completely.

CONCLUSIONS OF LAW

1. Viewed in the totality of circumstances, despite the unexplained reasons for the initial delay in processing the case, Judge Simes's failure to respond timely to the notices of complaint, Judge Simes's requests for additional time in which to respond to the complaint, his requests for suspension of the proceedings and continuances, Judge L. T. Simes was afforded due process and basic fairness in the disposition of this case. Further, any delay in the initial processing of Case No. 06-260 by the JDDC was subsequently waived by Judge Simes by his failure to respond to the notices of complaint served by the JDDC, his subsequent requests for additional time in which to respond to the complaint, request for suspension of the proceedings in this case until the disposition of the *Chandler* Case, and his requests for continuances. At the hearing of this matter on July 28-29, 2010, Judge Simes was afforded the opportunity to call and cross examine witnesses and to make oral argument. Judge Simes has failed to demonstrate any prejudice to him as a consequence of the initial delay of the processing of this case.

2. Due to the personal nature of the allegations in the motion for recusal, which resulted in the court initiated Rule 11 sanctions, and the fact that Judge Simes viewed the motion for recusal as a personal attack by Mr. Murray and Mayor Weaver, Judge Simes should have recused from the Rule 11 proceedings, or explored the alternative of transferring the *Weaver* Case to Judge Yates.

In *Allen v. Rutledge*, 355 Ark. 392 (2003) the Arkansas Supreme Court found that a circuit judge should have recused from a Rule 11 sanction because he was personally embroiled in the dispute. The Court in making its finding cites *Clark v. State*, 287 Ark. 221, 697 S.W.2d 895 (1985), in which the court held:

These remarks indicate that the judge became “embroiled in a personal dispute”, *Meyer, supra*, with the appellant. Even though the judge’s objectivity may not have been affected by the appellant’s attack, “justice must satisfy the appearance of justice.” *Offutt v. United States*, 348 U.S. 11 (1954). Accordingly, the trial judge under these circumstances should have recused from hearing the contempt charge. As stated by Chief Justice Taft in *Cooker v. United States*, 267 U.S. 517, 539 (1925):

[A]ll of such cases . . . present difficult questions for the judge. All we can say on the whole matter is that where conditions do not make it impracticable, or where the delay may not injure public or private rights, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place.

By our holding we do not intend that all contempts not committed in the immediate view and presence of the court, must be tried by a third party. But where direct personal attack is made on a judge which is the subject of a contempt charge by that judge, or contemptuous conduct occurs which necessitates a factual hearing on the allegations made against the judge (as seems to have been contemplated in this case), to ensure a fair and impartial hearing the judge must recuse.

Allen v. Rutledge at 403.

Judge Simes’s failure to recuse from conducting the Rule 11 proceedings against Mr. Murray and Mayor Weaver violates:

Canon 2. 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.

Commentary

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges.

Canon 3. A judge shall perform the duties of judicial office impartially and diligently.

B. *Adjudicative Responsibilities.*

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

3. Judge Simes subjected Mr. Murray and Mayor Weaver to a *de facto* Rule 11

hearing to which they were given no notice in violation of:

Canon 2. 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;

Canon 3: A judge shall perform the duties of judicial office impartially and diligently.

B. *Adjudicative Responsibilities.*

(2) A judge shall be faithful to the law and maintain professional competence in it.

4. Judge Simes conducted the Rule 11 proceedings before the court attempted to establish the falsity of the allegations in the motion for recusal, and the court ultimately failed to establish the allegations were false. Judge Simes proceeded to court initiated Rule 11 sanctions before the falsity of the motion for recusal allegations was established. Because Judge Simes

was the subject of the allegations it was improper for him to conduct the Rule 11 proceedings in violation of:

Canon 2. 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

Canon 3. A judge shall perform the duties of judicial office impartially and diligently.

B. *Adjudicative Responsibilities.*

(2) A judge shall be faithful to the law and maintain professional competence in it;

(7) 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. . . .

Commentary:

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

5. In his conduct of the hearing on the motion for recusal, which the following day became a Rule 11 proceeding, Judge Simes's facial expression and body language toward Mr. Murray gave an appearance of judicial bias in violation of:

Canon 3. A judge shall perform the duties of judicial office impartially and diligently.

B. *Adjudicative Responsibilities.*

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, . . .

Commentary:

A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding,

jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

6. Judge Simes relied on improper bases in his order imposing the sanctions. Ark. R. Civ. P. 11 applies only to assertions contained in papers filed with or submitted to the court. Judge Simes, not only used written allegations that Mr. Murray had withdrawn prior to his decision on sanctions, but also considered oral statements made by Mr. Murray and Mayor Weaver in making his determination on Rule 11 sanctions. Further, Judge Simes misrepresented the testimony of Mr. Murray in his Order when he found that Mr. Murray had admitted to “judge shopping” when he responded to Judge Simes’s statement that there’s an issue in this case about judge shopping. Judge Simes’s conduct violates:

Canon 1. 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;

Canon 3. A judge shall perform the duties of judicial office impartially and diligently.

B. *Adjudicative Responsibilities.*

(2) A judge shall be faithful to the law and maintain professional competence in it.

7. In determining the appropriate sanctions, the Arkansas Supreme Court set forth in *Judicial Discipline and Disability Commission v. Morris W. Thompson*, 341 Ark. 253, 278 (2000), several factors to be considered:

(a) whether the misconduct is an isolated instance or evidenced a pattern of conduct:

This is not an isolated instance; Judge Simes has 4 other complaints that resulted in public discipline action;

(b) the nature, extent and frequency of occurrence of the acts of misconduct:

The nature of Judge Simes's conduct in this matter is egregious in that the Bar should not be afraid to file good faith pleadings, motions, or other papers in the Court, including motions of recusal; Judge Simes's failure to recuse from the Rule 11 proceedings, and his failing to make inquiry as to whether the *Weaver* Case was subject to transfer as a related case was a willful and wanton disregard of his judicial duties; Judge Simes's initiating Rule 11 sanctions against Mr. Murray and Mayor Weaver without notice was a blatant disregard for due process; Judge Simes's intentional misrepresentation of Mr. Murray's testimony in support of Rule 11 sanctions causes harm to the public's confidence in the integrity and independence of judges;

The nature of Judge Simes's misconduct shows an overall bad faith in the carrying out of his judicial duties, and could have a chilling effect upon the members of the Bar who practice in his judicial district;

(c) whether the misconduct occurred in or out of the courtroom:

The misconduct that is the subject of this matter occurred in the courtroom while Judge Simes was presiding over the *Weaver* Case;

(d) whether the misconduct occurred in the judge's official capacity or in his private life;

The misconduct occurred in the judge's official capacity.

(e) whether the judge has acknowledged or recognized that the acts occurred;

Judge Simes has acknowledged that he presided over the Rule 11 proceeding, but maintains a different view of the facts and interpretation of the law.

(f) whether the judge has evidenced an effort to change or modify his conduct;

Judge Simes, based upon his demeanor before the 3 member Panel, does not appear to understand the seriousness of his misconduct. He has been a Circuit Judge for over 13 years; he has been publicly disciplined four times. The last discipline resulted in his suspension, without pay for the remainder of his term. Judge Simes appears to have a proclivity for making decisions that result in negatively affecting the integrity of the judiciary.

(g) the length of time on the bench;

Judge Simes has served as a circuit judge since January 1, 1997.

(h) whether there have been prior complaints about this judge;

As stated above, there have been four complaints, which have resulted in public discipline; each complaint resulting in more serious discipline, leading to the most recent discipline of suspension for the remainder of his term, without pay.

(i) the effect the misconduct has upon the integrity of and respect for the judiciary;

The integrity and respect for the judiciary is harmed when a judge acts as prosecutor and judge in a matter that involves him personally. The integrity and respect for the judiciary is harmed when a judge misrepresents the testimony of a witness, in order to support his findings and sanctions. The integrity and respect for the judiciary is harmed when a judge removes a party to a legal action from court proceedings in which the party is subject to potential sanctions by the judge. Rule 11 is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. Members of the Bar should not be in fear that if they file pleadings or papers with the court, in good faith, including moving for the recusal of a judge, that they will be subjected to court initiated Rule 11 sanctions, and without appropriate notice.

(j) the extent to which the judge exploited his position to satisfy his personal desires.

The evidence reflects that Judge Simes was motivated to keep this case and punish the parties out of a personal interest which takes his actions beyond merely making an error of law as found by the Supreme Court and subjects him to discipline.

RECOMMENDATION

Consistent with the Rules of Procedure of this Commission, the three-member panel unanimously recommends that the full Commission adopt the findings of fact and conclusions of law set forth herein, and that, pursuant to the factors enumerated by the Arkansas Supreme Court in *Judicial Discipline and Disability Commission v. Morris W. Thompson*, 341 Ark. 253, 278 (2000), proceedings be instituted to remove Circuit Judge L. T. Simes from his position as the Circuit Judge of the First Judicial District.

Respectfully submitted this 27th day of September 2010.

H. WILLIAM ALLEN, Attorney Member



HON. CHRIS E WILLIAMS, Judicial Member

REGINALD D. HAMMAN, Public Member


H. WILLIAM ALLEN, Attorney Member

HON. CHRIS E WILLIAMS, Judicial Member


REGINALD D. HAMMAN, Public Member