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IN THE SUPREME COURT OF PENNSYLVANIA

IN RE KATHLEEN GRANAHAN KANE	:	MISCELLANEOUS DOCKET ITEM
	:	
Petitioner	:	NO.:
	:	
	:	

ORDER

PER CURIAM:

AND NOW, this _____ day of _____, 2016, upon consideration of Petitioner's Application for Extraordinary Relief, if is hereby ORDERED that this Court's Order dated September 21, 2015 shall be vacated and Petitioner's license to practice law be immediately reinstated.

BY THE COURT:

_____ J.

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IN RE KATHLEEN GRANAHAN KANE	:	MISCELLANEOUS DOCKET ITEM
	:	
Petitioner	:	NO.:
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APPLICATION FOR EXTRAORDINARY RELIEF

Petitioner, KATHLEEN G. KANE, the elected Attorney General of the Commonwealth of Pennsylvania, respectfully requests this Court to assume plenary jurisdiction of this matter for the express purpose of reviewing the previous Order of this Court entered on September 21, 2015, by which Petitioner's law license was temporarily suspended.

I. STATEMENT OF JURISDICTION

This Court has jurisdiction over this Petition pursuant to its King's Bench powers granted onto it by Article V, Section 2 of the Constitution of the Commonwealth of Pennsylvania and pursuant to 48 Pa. Cons. Stat. §502 and §726; and Pa. R. of App. P. 3309.

II. INTRODUCTORY STATEMENT

On January 12, 2016, the Senate of Pennsylvania will convene in special session to consider whether Petitioner shall be removed from the office of Attorney General. The sole determinative issue to be resolved by the Senate is whether the temporary suspension of Petitioner's law license renders her incompetent to carry out the duties and obligations required of the Attorney General.

The prior decision of this Court, by which that license was suspended, was based solely upon allegations generated by the Office of Disciplinary Counsel, without affording the Attorney General any form of Due Process. A full participant in this *per curium* determination was Justice Michael A. Eiken who has since been temporarily suspended from this Court based largely upon evidence provided by Petitioner herein. Prior to the hearing which resulted in Justice Eiken's suspension, General Kane was required by subpoena to produce email evidence associated with Justice Eiken's account containing "sexually explicit, misogynistic, ethnically insensitive, racist or homophobic material".

There can be no doubt that the emails produced were a major factor in the Court's decision to immediately suspend Justice Eakin. "The emails demonstrate that Justice Eakin participated in a pattern of not only receiving emails which were insensitive and inappropriate toward matters involving gender, race, sexual orientation and ethnicity, but also sending and forwarding a number of such emails. In his testimony of December 21, 2015, Justice Eakin admitted sending and receiving the offending emails". Order of the Court of Judicial Discipline #13, J.D. 15, December 22, 2015.

Because Petitioner's evidentiary findings played a substantial role in causing Justice Eakin's temporary suspension, it is clear that Justice Eakin should not have participated in the decision to remove the law license of his accuser. A judge is required to disqualify himself "in any proceeding in which the judge's impartiality might reasonably be questioned". *Model Code of Judicial Conduct R.2.11A.*

The Senate of Pennsylvania is poised to present the Governor of Pennsylvania with a recommendation to remove Petitioner from the Office of Attorney General, to which she has been duly elected, based solely and exclusively on the consequences of the Order of temporary suspension handed down by this Court. Because the judgement of this Court which resulted in the suspension Order is incurably tainted, this Court must immediately vacate this Order and reinstate the law license of Petitioner, Attorney General Kathleen G. Kane. Justice Eiken's participation in a proceeding which jeopardizes her ability to maintain the office from which the evidence against Justice Eiken emanated, was not just a violation of the Code of Judicial Ethics, it was a direct violation of Petitioner's constitutional right of Due Process. Justice Eiken's participation was not just a lapse in judgment, but rather was a knowing and deliberate attempt to remove his accuser from the source of the evidence against him.

As the findings of the Court of Judicial Discipline have demonstrated, it is the emails stored within the hard drives of computers in the Office of the Attorney General discovered and made public by Petitions, that has caused Justice Eiken's removal from the bench.

III. ARGUMENT

A. By participating in an adjudication involving his accuser, Petitioner Kane, Justice Eakin has committed an impropriety offensive to the Model Rules of Judicial Conduct which all jurists are constitutionally mandated to follow.

There can be no doubt that the emails produced were a major factor in the Court's decision to immediately suspend Justice Eakin. The opinion of the Court of Judicial Discipline based its decision to suspend Justice Eakin, at least in part, upon the nature and content of the emails produced by Attorney General Kane. In his testimony of December 21, 2015, Justice Eakin admitted to sending and receiving the offensive emails. The emails demonstrate that Justice Eakin participated in a pattern of not only receiving emails which were insensitive and inappropriate toward matters involving gender, race, sexual orientation and ethnicity, but also sending and forwarding a number of such emails.

Because Petitioner's evidentiary findings played a substantial role in causing Justice Eakin's temporary suspension, it is clear that Justice Eakin should not have participated in the decision to suspend Petitioner.

Prior to this Court's decision to suspend Petitioner, the Commonwealth of Pennsylvania had officially adopted the Model Code of Judicial Ethics. Indeed, the Code thus became the "canon of…judicial ethics" referenced in Article V, Section 17 of the Pennsylvania Constitution which states in pertinent part:

> "Justices and judges shall not engage in any activity prohibited by law and shall not violate any canon of legal or judicial ethics prescribed by the (Pennsylvania) Supreme Court".

Thus, a violation of the Code is a violation of the Constitution.

Justice Michael Eakin was a full participant in the *per curium* September 21, 2015 decision of this Court by which Petitioner was temporarily suspended from the practice of law. The Justice participated in this decision knowing that it was Petitioner who had discovered evidence of email traffic on servers in the Office of Attorney General (OAG) emanating from and sent to Justice Eakin's Yahoo email account. These emails have, at various times, been described as pornographic, sexually explicit, misogynistic, ethically insensitive, racist or homophobic. Justice Eakin was well aware that it was similar email traffic unearthed by the Attorney General eight months prior that lead to the October 20, 2014 suspension of Justice Seamus McCaffery. In fact, in a well-publicized exchange that occurred between Justice Eakin and former Justice McCaffery at the time if the latter's suspension, Justice Eakin was explicitly informed that the Attorney General had unearthed a similar cache of emails involving Justice Eakin.

Justice Eakin had full knowledge of the nature and extent of the emails. They were his emails. He also was fully cognizant of the potential harm exposure of these emails could cause to him personally. He knew what happened to his colleague. Despite his knowledge of the potential for personal harm by further revelation of the content of these emails, Justice Eakin participated in a process which had the potential of removing the Petitioner from her office and thus preventing further exposure of Justice Eakin's emails and the course of conduct involved in the exchange of said emails.

The Code itself defines impropriety as:

> "Include(ing) conduct that violates the law, court rules, or provisions of this code, and conduct that undermines a judge's independence, integrity, or IMPARTIALITY". (emphasis added)

A prime objective of the Model Code of Judicial Conduct is to demand integrity, independence and impartiality of judges and in so doing promote public confidence in the fairness and integrity of the judiciary. The Supreme Court of the United States has recognized this objective as a "vital state interest…of the highest order". *Williams-Yulee v. Fla Bar*, 135 S.Ct. 1656, 1666 (2015) [quoting *Caperton v. A.T. Massey Coal Company*, 556 U.S. 868, 883-4 (2009)]. The United States Supreme Court has recognized that the recusal provisions in the "Codes of Conduct serve to maintain the integrity of the judiciary and the rule of law". *Caperton* at 889. Because they are essential to public confidence in the fairness and integrity of the nation's judges, the recusal provisions at issue have been universally adopted by all courts. No judge may participate "in any proceeding in which the judge's impartiality might reasonably be questioned". Model Code R. 2.11(A)(2007); Code of Conduct for United States Judges Canon 3C (2009)(same); Model Code Canon 3E(1)(2003)(same); *see also* 28 U.S.C. §455(a)(2000); *Liteky v. United States*, 510 U.S. 540, 548 (1994) (quoting in part 28 U.S.C. §455(a))(noting that "quite simply and quite universally, recusal [is] required whenever 'impartiality might reasonably be questioned'").

The standard for determining whether a judge's refusal to recuse himself or herself violates Due Process is whether the circumstances of the case "'would offer a possible temptation to the average…judge to…lead him not to hold the balance nice, clear and true.'" *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986) (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972)). The question is not whether the judge is actually, subjectively biased – though that is of course sufficient – but whether "the average judge in his position is 'likely' to

be neutral, or whether there is an unconstitutional 'potential for bias.'" *Caperton* at 881 (quoting *Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971)). This objective determination involves "'a reliable appraisal of psychological tendencies and human weakness.' [and whether] the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of Due Process is to be adequately implemented.'" *Id.* at 883-84 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Any potential for bias is unacceptable because in every judicial proceeding there must not be "even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955).

Between the time of Justice McCaffery's suspension and the Court's order against Petitioner, there had been at least two efforts undertaken to determine the nature and extent of Justice Eakin's emails captured on the servers of the OAG's office. When these investigations proved to be unavailing, Petitioner was widely quoted as stating that Justice Eakin had been "given a pass". During the eight month period between the time of Justice McCaffery's suspension and this suspension order, there was a continuing tension between Petitioner and Justice Eakin concerning the nature and extent of email evidence obtained by Petitioner against Justice Eakin. This alone created an atmosphere which should have dictated recusal. In *Mayberry*, supra, the Court held that a judge who had been exposed to abusive conduct in a prior proceeding, could not sit in judgment of the individuals charged with contempt in a subsequent contempt proceeding because he had become embroiled in a running bitter controversy with the person accused of contempt. *Id.* 465. With respect to the Attorney General and Justice Eakin there was an atmosphere of continuing tension as to where, how and when the full content of Justice Eakin's emails would be exposed.

Justice Eakin should not have been involved in the deliberation and decision to remove the law license of the Attorney General of Pennsylvania who herself was involved in an investigation of Justice Eakin's emails. Not only were the emails improper in content, they involved continuing contact between the Justice and prosecutors in the Attorney General's Office which, in and of itself, potentially undermines the impartiality of the Justice. At that hearing held before the Court of Judicial Discipline, Justice Eakin referred to the contacts with whom he was sharing inappropriate emails as the "old boys club". There can be no doubt because it was this very same type of investigation that led to the suspension and eventual resignation of Justice McCaffery, that Justice Eiken was well aware of the potential ramifications to him. It should have been obvious to him that his participation in the Petitioner's licensure proceeding could not help but give an appearance of impropriety and lead to questions regarding his ability to be impartial in the ultimate determination.

B. Participation of Justice Eakin in the adjudication which resulted in the temporary suspension of Petitioner's law license, deprived Petitioner of her right to Due Process of law

The Supreme Court of the United States has held that all relevant circumstances "must be considered" when deciding whether a party was denied Due Process because the decision maker was biased or appeared to be. *In RE: Murchison*, 349 U.S. 133, 136 (1955). "A fair trial in a fair tribunal is a basic requirement of Due Process". *Murchison,* supra, at 136. Thus, preserving fair and impartial courts is so fundamental, that it invokes the constitutional guarantee under the Due Process clause. At times "the probability of actual bias on the part of the judge…is too high to be constitutionally tolerable". *Caperton,* supra, at 872.

Judicial impartiality is not only crucial to protecting litigant's Due Process rights, but also in maintaining public confidence in the justice system. *Mistretta v. The United States,* 488 U.S. 361, 407 (1989). Indeed, the mere questioning of a Court's impartiality "threatens the purity of the judicial process and its institutions". *Potashnick v. Port City Construction Co.,* 609 Fed.2d. 1101, 1111 (5th Cir, 1980). As stated by the United States Supreme Court in *Murchison*, "justice must satisfy the appearance of justice". *Id.* at 136. The test under the Code is whether the conduct would create in "reasonable minds", a perception that a judge engaged in conduct that "reflects adversely on the judge's honesty, impartiality, temperament or fitness to serve as a judge". *Model Code of Judicial Conduct, R.1.2, Comment 5*.

The Due Process Clause requires such a stringent standard because "our system of law has always endeavored to prevent even the probability of unfairness". *Muchinson,* supra, at 136. Thus, to determine whether any given judicial conflict violates the Due Process Clause, the United States Supreme Court has asked whether "under a realistic appraisal of psychological tendency and human weakness, the interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of Due Process is to be adequately implemented". *Withrow v. Larkin,* 421 U.S. 35, 47 (1975). The findings of, and the actions taken by, the Court of Judicial Discipline provide ample proof of just how damaging the evidence amassed by the Attorney General of Pennsylvania is. The evidence was sufficient to cause the temporary suspension of Justice Eakin. There can be no question that there was at least a temptation presented to Justice Eakin by his participation in the licensure determination of Petitioner. It is

for this reason that the Due Process Clause of the Fourteenth Amendment requires judges to recuse themselves where there exists a constitutionally impermissible risk of bias. In *Caperton*, the United States Supreme Court recognized that there are certain extraordinary situations where the Constitution requires recusal. *Id.* at page 887.

By his participation in the decision to disqualify, even on a temporary basis, Petitioner from practicing law in Pennsylvania, Justice Eakin was, in effect, trying his accuser. The appearance of impropriety in such a situation is so great as to implement a Due Process requirement of recusal.

C. The participation of a potentially biased tribunal member taints the entire tribunal requiring any decision rendered by such a tribunal to be nullified.

The Supreme Court of the United States was presented with a matter which originated in the Supreme Court of Alabama in which it was found that a member of that nine-member court had a direct, personal, substantial and pecuniary interest in the case before him. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986). In that case, the court found that the participation of that justice violated appellant's Due Process rights. With regard to the remedy, the court noted that lower courts were divided as to whether a disqualified judges' participation in a decision by a multi-member tribunal required to the decision to be vacated. In that case, however, because the decision was 5 to 4, the disqualification of a single judge nullified the result. Thus that court left unanswered the question of whether the bias of a single member of a tribunal necessitates nullification no matter what the vote is.

Although the opinion of the Supreme Court in *Aetna*, supra, left unanswered, the question of whether the outcome would have been the same had the offensive justice's vote not been decisive, Justice's Brennan and Blackmun each wrote concurrences to the effect that that participation by a disqualified judge should nullify the result no matter what the vote. Specifically, Justice Brennan emphasized the collective and deliberative nature of the appellate decision making process in stating that:

> "[E]xperience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition. The participation of a judge who has a substantial interest in the outcome of a case of which he knows at the time he participates *necessarily* imports a bias into the deliberative process. This deprives litigants of the assurance of impartiality that is the fundamental requirement of Due Process.
> *Id.* at 831 (emphasis in original).

Justice Blackmun (joined by Justice Marshall) repeated these observations and further noted that:

> "[W]e…know, from our own experience on this nine-Member court, that a forceful dissent may lead Justices to rethink their original positions and change their votes. And to suggest that the author of an opinion where the final vote is 5 to 4 somehow plays a peculiarly decisive 'leading role'…ignores the possibility of a case where the author's powers of persuasion produce an even larger margin of votes.
> *Id.* at 832.

Justice Brennan's and Justice Blackmun's common-sense position now reflects the majority rule in federal and state courts nationwide. See *Stivers v. Pierce*, 71 F.3d 732, 747 (9th Cir. 1995); *Hicks v. City of Watonga*, 942 F.2d 737, 748-50 (10th Cir. 1991); *Antoniu v. SEC*, 877 F.2d 721, 725-26 (8th Cir. 1989); *Cinderella Career & Finishing Schs., Inc. v. FTC*, 425 F.2d 583, 592 (D.C. Cir. 1970); *Am. Cyanamid Co. v. FTC*, 363 F.2d 757, 767 (6th Cir. 1966); *Berkshire Emps. Ass'n of Berkshire Knitting Mills v. NLRB*, 121 F.2d 235, 239 (3d Cir. 1941); *Sullivan v. Elsmere*, 23 A.3d 128, 136 (Del. 2011); *Tesco Am. Inc. v. Strong Indus. Inc.*, 221 S.W.3d 550,

556 (Tex. 2006); *Powell v. Anderson*, 660 N.W.2d 107, 122-24 (Minn. 2003); *Nationwide Mut. Ins. Co. v. Clay*, 525 So. 2d 1339, 1340-41 (Ala. 1987); *but see Richardson v. Quarterman*, 537 F.3d 466, 474 (5th Cir. 2008); *Bradshaw v. McCotter*, 796 F.2d 100, 4-6 (5th Cir. 1986); *Rollins v. Horn*, No. Civ.A.00-1288, 2005 U.S. Dist. LEXIS 15493, * at 143-45 (E.D. Penn. July 26, 2005); *Goodheart v. Casey*, 565 A.2d 757, 195-97 (Pa. 1989).

Once a particular appellate judge has been disqualified from proceeding on the basis of bias, any decision in which he or she took part should be vacated as a matter of law. Attempting to determine the degree by which a disqualified judge tainted a proceeding is virtually impossible. A biased jurist may be just as likely to have engineered a unanimous result as a simple majority result. Appellate judges do not operate in silos and the effect of a biased judge's participation cannot be reduced to a "no harm no foul" determination. Simply, it is impossible to determine what effect Justice Eakin's position, which clearly was in favor of suspension, had upon the other participating justices. Under such circumstances, the only fair outcome is, in this instance, to vacate the order that was entered by which Petitioner's license to practice law was temporarily suspended and immediately reinstate her to the practice of law in the Commonwealth of Pennsylvania.

IV. CONCLUSION

It is clear that Mr. Justice Michael Eakin's participation in the decision to temporarily suspend the law license of Petitioner, was in violation of both the Model Rules and the Due Process Clause. Petitioner would suffer irreparable harm were she to be wrongfully removed from her dully elected office because of a tainted decision by this Court to suspend her law license. Petitioner has never had a hearing. She has never been found guilty of anything. Justice can only be served and injustices can only be prevented by her immediate reinstatement to the practice of law.

WHEREFORE, Petitioner requests this Honorable Court to vacate the Order of September 21, 2015 and immediately reinstate Petitioner's law license.

Dated: 01/12/16

/s/ James F. Mundy
James F. Mundy, Esquire
Attorney I.D. #: 08499

/s/ James J. Powell, III
James J. Powell, III, Esquire
Attorney I.D. #: 08431

527 Linden Street
Scranton, Pennsylvania 18503
(570) 961-0777

ATTORNEYS FOR PETITIONER

VERIFIED STATEMENT

I, KATHLEEN GRANAHAN KANE, Respondent, state under the penalties provided in 18 Pa.C.S. §4904 (unsworn falsification to authorities) that:

The facts contained in the attached Application for Extraordinary Relief Pursuant to Pa.R.D.E. 208(f)(1) are true and correct to the best of my knowledge, information and belief; and

Dated: Jan. 11, 2016

KATHLEEN GRANAHAN KANE
PETITIONER

IN THE SUPREME COURT OF PENNSYLVANIA

IN RE KATHLEEN GRANAHAN KANE	:	MISCELLANEOUS DOCKET ITEM
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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving an Application for Extraordinary Relief upon the persons via first class mail and electronic mail as indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

Paul J. Killion, (717) 783-0990
Paul.Killion@pacourts.us
Office of Chief Disciplinary Counsel
PA Judicial Center
601 Commonwealth Avenue
Suite 2700
Harrisburg, PA 17106

Paul J. Burgoyne, (215) 560-6296
Paul.Burgoyne@pacourts.us
Deputy Chief Disciplinary Counsel
1601 Market Street
Suite 3320
Philadelphia, PA 19103-2337

Harriet R. Brumberg, (215) 560-6296
Harriet.Brumberg@pacourts.us
Disciplinary Counsel
1601 Market Street
Suite 3320
Philadelphia, PA 19103-2337

Elaine M. Bixler, (717) 231-3380
Elaine.Bixler@pacourts.us
Office of the Secretary of the Board
601 Commonwealth Ave., Suite 5600
P.O. Box 62625
Harrisburg, PA 17106-2625

Dated: 01/12/16

/s/ James F. Mundy
James F. Mundy, Esquire
Attorney I.D. #: 08499

/s/ James J. Powell, III
James J. Powell, III, Esquire
Attorney I.D. #: 08431

ATTORNEYS FOR PETITIONER
527 Linden Street
Scranton, Pennsylvania 18503
(570) 961-0777