STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,

Petitioner/Appellant,

v

Geoffrey N. Fieger, P-30441,

Respondent/Appellee,

Case No. 94-186-GA

Decided: September 30, 2002

Appearances:

Steven P. Vella and Kimberly Uhuru, for Grievance Administrator, Petitioner/Appellant
Mayer Morganroth and Geoffrey N. Fieger, In Pro Per, for the Respondent/Appellee

BOARD OPINION

This matter is before us after remand from the Supreme Court. Following the Court's remand, we, in turn, remanded the matter to the panel for further proceedings consistent with the Court's order. The panel dismissed the sole remaining count based on In Re Chmura, 464 Mich 58; 626 NW2d 876 (2001). We affirm.

I. Procedural Background.

This is the fourth review proceeding before the Board in this matter. The first review involved the propriety of summary disposition in this case. In the second review, we remanded the case for hearing on the first two counts of the amended formal complaint (September 2, 1997 Attorney Discipline Board opinion, hereinafter "Fieger II"). The facts underlying Count One involved the hanging death of a prison inmate. The Grievance Administrator contends that Respondent made the following remarks about the Ionia County Prosecutor (Raymond Voet) in violation of MRPC 8.2(a):

> "Let him [the prosecutor] decide whatever he wants. As far as I'm concerned the prosecutor is engaged in a coverup," Geoffrey Fieger said Friday. "The prosecutor has done nothing in this investigation. He's covering up a murder." [Ionia Sentinel-Standard, February 20, 1993, p 1, 3.]

The Board remanded Count One (and Count Two) because a hearing was necessary to determine the context in which the statements were made.

At the close of the Administrator's case after the second remand, counsel for the Administrator voluntarily dismissed paragraphs 10(c)-(e) of the formal complaint, leaving only these allegations in paragraphs 10:

> a) He stated, "As far as I'm concerned the prosecutor is engaged in a cover-up.";
>
> b) He stated, "The prosecutor has done nothing in this investigation. He's covering up a murder."

The panel dismissed both of the remaining counts and in the third review proceedings, the Administrator argued that the panel erred in dismissing Count One. The Board disagreed in its May 3, 1999 opinion ("Fieger III") and upheld the panel's order of dismissal based on the Administrator's failure to establish respondent's "reckless disregard" for the truth or falsity of his statements.[1] Although the panel had also concluded, in the alternative, that the "cover-up" remarks were "a mere statement of opinion and therefore . . . not actionable," the Board "[did] not address this alternative ground (i.e., whether the statements could reasonably be interpreted as assertions of fact) because it [was] not dispositive." Fieger III, p 11.

The Administrator filed an application for leave to appeal from Fieger III with the Supreme Court. While the application was pending, the Court decided In Re Chmura, 461 Mich 517; 608 NW2d 31 (2000) (hereinafter "Chmura I"), a judicial misconduct case wherein the respondent judge was charged with making false and misleading campaign statements in violation of Code of Judicial Conduct Canon 7(B)(1)(d). The Court held that the Canon, as then drafted, violated the respondent judge's First Amendment rights and held the Canon facially unconstitutional.

The Court then adopted a saving construction of the judicial canon, amending it to provide that a candidate for judicial office "should not knowingly, or with reckless disregard, use or

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[1] The Board reaffirmed its holding in Fieger II that the "reckless disregard" language used in MRPC 8.2(a) and drawn from New York Times v Sullivan, 376 US 254; 84 S Ct 710; 11 L Ed 2d 686 (1964), does not impose a duty to speak as a reasonable person would under the circumstances. Rather, the Board held that under New York Times v Sullivan, and subsequent cases, "reckless disregard" means

> that the attorney "must have made the false publication with a 'high degree of awareness of . . . probable falsity,' . . . , or must have 'entertained serious doubts as to the truth of his [or her] publication.'" *Harte-Hanks Communications, Inc v Connaughton*, 491 US 657, 667; 109 S Ct 2678, 2686; 105 L Ed 2d 562 (1989). [Bd opinion, p 10.]

participate in the use of any form of public communication that is false." In discussing its decision to so amend the canon, the Court explained that it was joining "courts in other jurisdictions that have adopted the objective standard [for determining reckless disregard] in attorney disciplinary proceedings arising from a lawyer's criticism of a judge." 461 Mich at 542. In an order dated June 29, 2000, the Court remanded this case to us for reconsideration in light of Chmura I.

After the Court remanded this case to the Board, the Board ordered:

> that this matter is remanded to the hearing panel for a supplemental report as to Count I of the Formal Complaint. To the extent that the legal principles followed by the hearing panel in its report of April 13, 1998 are in conflict with In Re Chmura, supra, the hearing panel is instructed to reconsider its findings and conclusions and to file a supplemental report as to Count I. It shall be within the hearing panel's discretion to determine whether either party shall have an opportunity to present additional evidence or to present further oral argument or briefs. The hearing panel shall file its supplemental report and, if applicable, supplemental order with the Board. [Board order dated 12/04/00, p 2.]

Thereafter, the Court had occasion, following the remand to the Judicial Tenure Commission ordered in Chmura I, to revisit that case and issue a second opinion, In Re Chmura, 464 Mich 58; 626 NW2d 876 (2001) (hereinafter "Chmura II"). In its May 16, 2002 supplemental report the panel relied extensively on Chmura II, which, in turn, relies on the United States Supreme Court decision in Milkovich v Lorain Journal Co, 497 US 1; 110 S Ct 2695; 111 L Ed 2d 1 (1990). The Grievance Administrator's brief relies on Milkovich and Chmura II.

Both parties argue that Chmura II is dispositive and focus on what the panel termed "the multi-step analysis" in that opinion. The Grievance Administrator argues that the panel erred in concluding that respondent's comments were protected statements of opinion and/or "can reasonably be interpreted as communicating constitutionally protected 'rhetorical hyperbole', 'parody' or 'vigorous epithet'" and are therefore "not actionable." May 16, 2002 Supplemental Report (internal quotation marks omitted). The Administrator also argues that the panel should have found to the contrary and should have completed the remainder of the Chmura II analysis. Respondent's brief also relies heavily on Chmura II and argues that the panel correctly applied that case: "Because the panel determined that the statements at issue did not "involve objectively factual matters," there was simply no need to evaluate the statements under the remaining prongs of Chmura II . . . ." Respondent's brief on review, pp 14-15.

II. Standard of Review.

In reviewing a hearing panel decision, the Board must determine whether those findings have proper evidentiary support in the whole record. See, e.g., Grievance Administrator v August, 438 Mich 296, 304; 475 NW2d 256 (1991); In re Grimes, 414 Mich 483; 326 NW2d 380 (1982); and Grievance Administrator v T. Patrick Freydl, 96-193-GA (ADB 1998). The Board reviews questions of law *de novo*. Grievance Administrator v Jay A. Bielfield, 87-88-GA (ADB 1996).

The Court reiterated the familiar *de novo* standard of review for judicial discipline cases in Chmura II, 464 Mich at 70, and further noted that it was "necessary to review the record in the present case in its entirety to determine whether respondent's public communications violated Canon 7(B)(1)(d)," and then, in footnote 5, stated:

> a *de novo* standard of review is in accord with United States Supreme Court precedent that holds that in cases involving freedom of expression issues, appellate courts have "an obligation to 'make an independent examination of the whole record' in order to ensure that 'the [lower court's] judgment does not constitute a forbidden intrusion on the field of free expression.'" Bose Corp v Consumers Union of United States, Inc, 466 US 485, 499; 104 S Ct 1949; 80 L Ed 2d 502 (1984), quoting New York Times Co, 376 US at 284-286; see also Rouch v Enquirer & News of Battle Creek Michigan (After Remand), 440 Mich 238; 87 NW2d 205 (1992).

In Rouch, the Court held that "the sufficiency of evidence to support a finding of actual malice is a question of law," and that "an appellate court must independently review the record with regard to falsity." 440 Mich at 253-254. See also Garvelink v Detroit News, 206 Mich App 604, 608 (1994), lv den 448 Mich 944 (1995).[2]

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[2] In Garvelink, the Court of Appeals also stated:

> We are required to conduct an independent review of the column and pleadings to ensure against the forbidden intrusion on the field of free expression and to examine the statements and the circumstances under which they were made to determine whether they are of a character that the principles of the First Amendment protect. See [New York Times v Sullivan; Locricchio v Evening News Ass'n, 438 Mich 84, 110; 476 NW2d 112 (1991)]. Therefore, it is the function of this Court to review the column to determine whether it could reasonably be understood as describing actual facts about plaintiff. . . . Furthermore, where there are First Amendment implications such as whether a satirical column in a newspaper is capable of bearing a defamatory falsehood by implying the assertion of undisclosed facts, this is a question of law and the court must consider whether the alleged defamatory expression could reasonably be understood as describing actual facts about the plaintiff. See Hoppe v Hearst Corp, 53 Wash. App. 668; 770 P.2d 203 (1989). [Garvelink, 206 Mich App at 609-610.]

III. Burden of Proof.

In Chmura II, the Court held that:

> in cases involving a violation of Canon 7(B)(1)(d), the JTC, as the moving party, has the burden of proving, by clear and convincing evidence, that the communications in question are proscribed by the canon. Clear and convincing evidence is evidence that "produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct, and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." In re Martin, 450 Mich. 204, 227; 538 N.W.2d 399 (1995), quoting In re Jobes, 108 N.J. 394, 407-408; 529 A.2d 434 (1987). [Chmura II, 464 Mich at 71-72.]

The Court also emphasized the requirement that the falsity of a statement must be proved by clear and convincing evidence. See Chmura II, 464 Mich at 77:

> In its decision, the JTC asserted that respondent inaccurately characterized Detroit Mayor Coleman Young's role in the property tax base sharing (PTBS) legislation [footnote omitted] - legislation that respondent described as "Robin Hood" legislation. In particular, the JTC stated that there was "no credible evidence that Coleman Young, with or without the help of others from Lansing, planned, drafted or even actively supported the measure." However, in citing this lack of evidence on the respondent's part, the JTC improperly shifted the burden of proof to respondent on this issue. The burden of proof here does not lie with respondent but with the JTC. They failed to present clear and convincing evidence that proved the *falsity* of the communication. That is, they did not make any showing that Young did *not* support the PTBS legislation. [Emphasis in original.]

IV. The Chmura II Multi-Step Analysis.

The analysis set forth in Chmura II is summarized at the end of the opinion:

> The Code of Judicial Conduct, Canon 7(B)(1)(d), states that a judicial candidate "should not knowingly, or with reckless disregard, use or participate in the use of any form of public communication that is false." When analyzing whether a judicial candidate has violated the canon, we conclude that the communication at issue must have conveyed an objectively factual matter. Thus, speech that can be reasonably interpreted as communicating hyperbole, epithet, or parody is protected, at least under Canon 7(B)(1)(d). Similarly, an expression of opinion is protected under the canon as long as it does not contain provably false factual connotations. If the communication at issue sets forth objectively factual matters, the communication must then be analyzed to determine whether the statements communicated are literally true. If they are, the judicial candidate will not be in violation of Canon 7(B)(1)(d). However, if the public communication conveys an inaccurate statement, the

> communication, as a whole, must be analyzed to determine whether "the substance, the gist, the sting" of the communication is true despite such inaccuracy. Once it has been determined that a judicial candidate has, in fact, made a false public communication, the inquiry then focuses on whether such communication was made knowingly or with reckless disregard. [Chmura II, 464, Mich at 92-93.]

V. Do Respondent's Comments Contain a "Provably False Factual Connotation"?

The critical dispute in this review proceeding is over the question whether the communication at issue involves objectively factual matters. As to this prong of the analysis, our Court has said:

> When analyzing whether a judicial candidate has violated Canon 7(B)(1)(d), it is necessary that the communication be false. [n6 omitted] Chmura, supra at 541. However, before a judicial candidate's public communication is tested for falsity, the communication at issue must involve objectively factual matters. Milkovich v Lorain Journal Co., 497 US 1, 18-19; 110 S Ct 2695; 111 L. Ed. 2d 1 (1990). Speech that can reasonably be interpreted as communicating "rhetorical hyperbole," "parody," or "vigorous epithet" is constitutionally protected. Id. at 17. Similarly, a statement of opinion is protected as long as the opinion "does not contain a provably false factual connotation . . . " Id. at 20. We are mindful that in protecting hyperbole, parody, epithet, and expressions of opinion, some judicial candidates may inevitably engage in "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times Co, supra at 270. As a result of these attacks, "political speech by its nature will sometimes have unpalatable consequences." McIntyre v Ohio Elections Comm, 514 US 334, 357; 115 S Ct 1511; 131 L Ed 2d 426 (1995). Indeed, as is arguably true in the present case, even potentially misleading or distorting statements may be protected. [n7 omitted.] However, we believe that these rules are necessary in light of our "profound national commitment to the principle that debate [by judicial candidates] on public issues should be uninhibited, robust, and wide-open . . . " New York Times Co, supra at 270 n8 Once it has been determined that a communication contains objectively factual matters, those matters must then be tested to determine whether they are true or false. [Chmura II, 464 Mich at 72-73.]

Again, the statements herein are as follows:

> "Let him [the prosecutor] decide whatever he wants. As far as I'm concerned the prosecutor is engaged in a coverup," Geoffrey Fieger said Friday. "The prosecutor has done nothing in this investigation. He's covering up a murder." [Ionia Sentinel-Standard, February 20, 1993, p 1, 3.]

The Grievance Administrator alleges that these remarks violate MRPC 8.2(a), which is similar to the canon construed in Chmura II, and which reads:

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicative officer, or public legal officer, or of a candidate for election or appointment to judicial or legal office.

In Chmura II, the Court stated:

> Lastly, the JTC contends that respondent's use of the word "stole" in exhibit 1 falsely conveyed to the electorate criminal behavior on the part of Coleman Young. Again, we respectfully disagree. The word "stole" in respondent's communication did not reasonably communicate a statement of fact concerning criminal activity. Instead, it was merely a colloquial reference unquestionably, in our judgment, understood by readers in the context of a political brochure. It was, in the language of Milkovich, 497 U.S. at 17-20, rhetorical hyperbole." Viewing the word in context suggests that respondent chose the word to summarize the effect of the PTBS legislation. The task was obviously to convey the view that this legislation would redistribute school funds from one district to another. This is the language of the rough-and-tumble world of politics. It is core political speech. It is consumed by an often skeptical and wary electorate and it does not, in our judgment, fairly implicate the proscriptions set forth in Canon 7(B)(1)(d). [Chmura II, 464 Mich at 81.]

Moreover, the Court announced that "when a statement is found to have a potentially non-false interpretation, the inquiry under Canon 7(B)(1)(d) must end." Chmura II, 464 Mich at 84. In analyzing the campaign literature admitted as Exhibit 3 in the Chmura matter, the Court held:

> With regard to exhibit 3, the JTC determined that respondent's communication swept too broadly by falsely attaching blame to James Conrad for certain decisions made by 37th District Court judges--specifically, that Conrad was responsible for releasing criminal defendant James Craig Cristini numerous times after imposing only minor punishments. Although we agree with the JTC that this statement could be interpreted as communicating that Conrad was specifically responsible (when he was not) for the subsequent crimes committed by Cristini, the brochure nevertheless is also subject to a more benign interpretation. [n15 omitted.]
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> It is often the case that affiliation is described by a possessive construction. In describing an institution as "John Doe's," one interpretation might be that John Doe is in charge of, and responsible for, that institution; an alternative interpretation might be that John Doe is merely associated in some manner with the institution. *The JTC determined that the rhetorical question "could Jim Conrad's Court have stopped it?" could only mean that Conrad himself was the individual responsible for the judicial decisions made in the Cristini*

> *matter. We agree that such a reference would be false. However, an alternative interpretation is that respondent's rhetoric was merely to communicate Conrad's significant association with a court which, in respondent's judgment, had conducted itself irresponsibly in its dealings with Cristini*. As court administrator, Conrad had significant administrative duties within the court and was an integral part of its day-to-day operations. Indeed, respondent's political message was, in essence, a response to what was the primary political thrust of the Conrad candidacy, namely, that Conrad as court administrator and magistrate, had significant administrative and quasi-judicial duties within the 37th District Court that would recommend his promotion to judge. [n16 omitted.] By this understanding, it was not altogether inaccurate to refer to the court as "Jim Conrad's Court." As it is the case, as earlier discussed, *when a statement is found to have a potentially non-false interpretation, the inquiry under Canon 7(B)(1)(d) must end*. [Chmura II, 464 Mich at 83-84; emphasis added.]

We conclude that the panel did not err in dismissing Count One based on Chmura II. Respondent's statements need not be interpreted as actual assertions that the prosecutor affirmatively concealed evidence that the inmate was murdered or that the prosecutor conducted no investigation whatsoever.[3] There is no question that these remarks can be read as hyperbole and as epithets. They could be gross exaggerations to convey the view that the prosecutor's investigation into the inmate's death reached the wrong conclusion.[4] Thus the statements "are subject to a more benign interpretation," Chmura II, 464 Mich at 83, than that given by the Administrator. And, "when a statement is found to have a potentially non-false interpretation, the inquiry under [MRPC 8.2(a)] must end." Chmura II, 464 Mich at 84.

Accordingly, we affirm the hearing panel's order of dismissal.

Board Members Wallace D. Riley, Theodore J. St. Antoine, Nancy A. Wonch, William P. Hampton, and Billy Ben Baumann, M.D., concur in this decision.

Board Members Ronald L. Steffens, Marie E. Martell and Rev. Ira Combs, Jr., dissent and would conclude that the statements involve objectively factual matters and would remand this matter to the hearing panel for further proceedings under In Re Chmura, 464 Mich 58; 626 NW2d 876 (2001).

Board Member George H. Lennon was absent and did not participate.

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[3] Indeed the inconsistent assertions that the prosecutor "did nothing" and "covered up a murder" should serve to alert readers that the statements cannot be taken literally.

[4] The evidence relating to Count One is summarized at pages 7-11 of our opinion in Fieger III.