IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

IN RE: ANN H. LOKUTA, JUDGE OF THE COURT OF COMMON PLEAS, ELEVENTH JUDICIAL DISTRICT, LUZERNE COUNTY	:	No. 1 MAP 2010
	:	Appeal from the order of the Pennsylvania Court of Judicial Discipline dated January 4, 2010 at No. 3 JD 06.
APPEAL OF: ANN H. LOKUTA, JUDGE	:	

CONCURRING OPINION

MR. JUSTICE BAER **DECIDED: January 14, 2011**

I concur in the result reached by the Majority Opinion; however, I write separately to articulate my analysis of the recusal issue, the scope of the remand order, and the strength of the argument in favor of a new evidentiary hearing on sanctions. Before turning to these specific issues, I address overarching considerations relating to the history of this case and why I am ultimately able to join the determination of the Majority Opinion. I also briefly review the procedural history of this case.

In many ways, this Court and the Court of Judicial Discipline (CJD) are sailing in uncharted waters. We have never been faced with the horrific corruption we now know existed in Luzerne County, perpetrated primarily by former president judges, Michael Conahan and Mark Ciavarella. During the same general timeframe that this perversion of justice was being perpetrated, approximately thirty individuals presented testimony of atrocious judicial behavior on the part of Judge Lokuta. We are now presented with a claim

by Judge Lokuta that the corruption of the former president judges tainted the testimony of all of the other witnesses at her trial, justifying a new sanction hearing.

Her current claim is at least superficially supported by her persistent assertions during trial that former judge Conahan had orchestrated her prosecution. That claim, which once seemed farfetched, now appears to be at least plausible. Indeed, a natural reaction, following the disquieting revelations, is to conclude that the corruption of the former president judges and their alleged lackeys, William Sharkey, the former court administrator, and Jill Moran, the former prothonotary, must have infected the trial, where all four were substantive witnesses against Judge Lokuta and most other witnesses were to some extent under the former president judges' power.

It is noteworthy that this Court has made extraordinary, but entirely justified, rulings in other cases infected by the former president judges. It would certainly be within reason to do the same in a case involving the removal of an elected, seventeen-year veteran of the bench of Luzerne County. Thus, my initial, knee-jerk inclination was to vacate the potentially tainted proceedings against Judge Lokuta, and to award her a new trial.

After an intense review of the record and careful consideration of all of the arguments, however, I conclude that such a result is not supportable. To the contrary, it is my conclusion that, notwithstanding my comments below, the CJD provided Judge Lokuta with a full and fair proceeding, and the Judicial Conduct Board proved its case against her. Even after disregarding the testimony of Conahan, Ciavarella, Sharkey, and Moran, the conclusions of the CJD remain fully supported by testimony of over twenty witnesses. Indeed, while implying that the events the witnesses described never occurred, Judge Lokuta is careful not to assert directly that the testimony presented was false, instead, claiming that the witnesses "embellished" their testimony in an effort to please the president judges. As discussed below, she fails to produce any specific evidence supporting her bald contention that these witnesses "embellished" any of their testimony during her trial, nor her

unspoken implication that they committed perjury. Accordingly, after reviewing the record, I join with my colleagues in affirming the CJD's ultimate determinations.

In its detailed 226-page opinion of October 2008,[1] prior to the revelations of corruption, the CJD found that Judge Lokuta repeatedly breached numerous aspects of the Judicial Code and the Pennsylvania Constitution, including the following litany of violations:

> (1) "that [Lokuta] was habitually and egregiously late for court and frequently was not in the courthouse at work when she should have been," In re Lokuta, 964 A.2d 988, 1005 (Pa.Ct.Jud.Disc. 2008);
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> (2) that Judge Lokuta's conduct in the courtroom impeded the work of court reporters, court clerks, attorneys, and deputy sheriffs, such that "[t]heir ability to function was so severely affected by [Lokuta's] ill-treatment of them and by her volatile and unpredictable behavior in her courtroom that they developed an aversion to assignment to her courtroom," id. at 1033;
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> (3) that Judge Lokuta's in-chambers behavior was similar to her courtroom behavior such that "one gets the picture of something out of Lewis Carroll or Dickens rather than of the chambers of a judge of the court of common pleas," id. at 1062;
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> (4) that Judge Lokuta inappropriately criticized the president judges in open court, such that "Reading the words spoken by [Lokuta] in open court one first is startled by their thoroughly derogatory content, and by the animosity with which they are delivered. Reading on, however, the exercise soon becomes a tiresome one, finally a reader finds himself embarrassed-for[Lokuta]." " id. at 1066;
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> (5) that Judge Lokuta created a disturbance in the halls of the courthouse, witnessed by several courthouse employees, when a deputy court administrator refused to meet with her immediately because he had to attend an appointment with his wife's oncologist following her mastectomy, and then

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[1] This opinion was authored by Conference Judge Richard A. Sprague. He and his firm represented Robert Powell and PA Child Care. Mr. Powell and PA Child Care have been tied to the corruption in Luzerne County. The recusal issue discussed herein is premised upon the supposition that Conference Judge Sprague's representation of Powell and PA Child Care should have required his recusal in the instant matter.

falsely accused the deputy administrator of physically abusing her and her tipstaff and demanded disciplinary action for something he did not do; id. at 1089;

(6) that Judge Lokuta failed to cooperate with the president judges and failed to do the work of the court, specifically, "The record is permeated with credible testimony from a variety of witnesses who corroborate [Lokuta's] recalcitrance regarding caseload and cooperation," id. at 1094;

(7) "the extensive use of court personnel to carry out the personal business and chores of a judge at the judge's residence and elsewhere, is so extreme as to constitute conduct which brings the judicial office into disrepute," where the conduct included requiring a law clerk to scrub floors in her house on county time, id. at 1103;

(8) in regard to the Violet O'Brien case, "this judge's bias against this lawyer was such that it undoubtedly affected his clients' case," id. at 1105; and

(9) in regard to the Bonner case, that Judge Lokuta instructed her law clerk to draft an opinion in favor of a party whose family has supported her politically, id. at 1116.

Based upon these findings and a rejection of Judge Lokuta's defenses, the CJD concluded that Judge Lokuta should be subject to judicial discipline. Judge Streib, joined by Judge O'Toole, "join[ed] in the majority of the Court's Opinion," dissenting only to the final two conclusions, relating to the O'Brien and Bonner cases, based upon the dissent's conclusion that the relevant law clerk's testimony on those issues was not credible. Id. at 1136 (Streib, J., dissenting). Importantly, however, the dissent agreed with the conclusion that Judge Lokuta should be subject to judicial discipline. Indeed, only Judge O'Toole dissented from the CJD's December 2008 decision to remove Judge Lokuta from office. Judge O'Toole, instead, advocated for a sanction of a one-year suspension without pay, followed by a three-year probationary period.

At the conclusion of these proceedings and following the revelations regarding the corruption in Luzerne County, Judge Lokuta timely filed various applications in this Court. After careful consideration, we remanded the case to the CJD for:

> the limited purpose of that court considering Petitioner's claims in the nature of after-discovered evidence, arising from the recent revelations of corruption in Luzerne County. The Court of Judicial Discipline is to determine whether the new evidence requires a further hearing and/or whether it affects the existing determination of the Court of Judicial Discipline to remove Petitioner from judicial office.

In re Lokuta, 600 Pa. 504, 504 (Pa. 2009).

The CJD heard argument on May 13, 2009, on the scope of the remand, among other matters. Without dissent, the court concluded that Judge Lokuta would not be allowed discovery, but would be permitted ninety days to investigate the connection, if any, between the corruption and her trial. Transcript (Tr.), 5/13/09, at 95-6. Following the ninety-day period, Judge Lokuta submitted documents in August, September, and October 2009. After briefing, the CJD issued a *per curiam* order, on October 27, 2009, holding that Judge Lokuta's new evidence claim did not warrant further hearing on the merits of its October, 2008, decision finding her in violation of the Judicial Code, but that the CJD would permit Judge Lokuta to present argument as to whether the new evidence affected the CJD's determination to remove her from office. Judges O'Toole and Streib, while presumably joining all other aspects of the CJD's order, noted that they would have allowed an evidentiary hearing, in addition to oral argument, on the question of whether the new evidence affected the CJD's determination to remove Lokuta from judicial office.

The CJD heard argument in November, 2009, on the sanction question, and subsequently ruled in a 4-3 majority opinion that an evidentiary hearing was not required and that the new evidence did not affect the decision to remove Judge Lokuta from office. In re Lokuta, 989 A.2d 942, 958 (Pa.Ct.Jud.Disc. 2010). Judge Streib, joined by Judges Musmanno and O'Toole, dissented, concluding that the new sanction hearing was justified

based upon the evidence of pervasive corruption in Luzerne County, which "demonstrate[d] that this was no ordinary judicial environment and no environment to which any judge should be exposed. That, to [the dissent], is a serious mitigating factor which does indeed militate in favor of an altered sanction in this case." Id. at 960 (Streib, J., dissenting).

While I join the analysis of the Majority in most respects and, as stated at the outset of this concurrence, the disposition in full, I write separately to the issues of denial of recusal, the scope of remand, and the argument in favor of a new sanction hearing.

Turning first to the question of Conference Judge Sprague's denial of Judge Lokuta's motion for recusal, I agree that this Court should affirm the denial, but I differ regarding the applicable standard of review. The Majority utilizes the standard set forth in Joseph v. Scranton Times L.P., 987 A.2d 633, 634 (Pa. 2009), and Interest of McFall, 617 A.2d 707, 712-713 (Pa. 1992), which provide that "an appearance of impropriety is sufficient justification for the grant of new proceedings before another judge" and that "[t]here is no need to find actual prejudice." Maj. Op. at 8. The cases cited, as properly described by the Majority Opinion at 9-10, involve situations where the involved judges apparently hid information relevant to the recusal issue from the potentially aggrieved parties. Importantly, because the information was unknown to them, the parties did not file motions for recusal. Unlike in Joseph and McFall, Judge Lokuta presented Conference Judge Sprague with motions for recusal, and Conference Judge Sprague addressed and denied the allegations raised. In such cases, an appellate court reviews the judge's denial on an abuse of discretion standard, determining whether a fair and impartial trial occurred:

> It is incumbent upon the proponent of a disqualification motion to allege facts tending to show bias, interest or other disqualifying events, and it is the duty of the judge to decide whether he feels he can hear and dispose of the case fairly and without prejudice because we recognize that our judges are honorable, fair and competent. Once this decision is made, it is final and the cause must proceed. The propriety of this decision is grounded in abuse of discretion and is preserved as any other assignment of error, should the

> objecting party find it necessary to appeal following the conclusion of the cause. If the cause is appealed, the record is before the appellate court which can determine whether a fair and impartial trial were had. *If so, the alleged disqualifying factors of the trial judge become moot.*

Reilly by Reilly v. Southeastern Pennsylvania Transp. Authority, 489 A.2d 1291, 1300 (Pa.1985) (emphasis in original). I review Judge Lokuta's arguments in accord with this standard and criteria.

As referenced at footnote 1, Judge Lokuta claims that Conference Judge Sprague should have recused due to his representation of Robert Powell and PA Child Care, who have been implicated as central figures in the corruption in Luzerne County. Judge Lokuta asserts that the need for recusal was demonstrated by Conference "Judge Sprague's evidentiary rulings that effectively closed the door on the development of a public record potentially harmful to Powell, PA Child Care, Conahan, and Ciavarella." Brief for Lokuta at 13. As evidence of his partiality, she asserts, "Judge Sprague issued his Order as to the admissibility of trial exhibits largely sustaining the JCB's objections to Judge Lokuta's exhibits." Brief for Lokuta at 13. She also asserts, "[i]t is now reasonably evident that, had Judge Lokuta been permitted to properly explore the relationships among Powell, PA Child Care, Conahan, and Ciavarella, a record would have been created tying Judge Sprague's clients to Conahan and Ciavarella's criminal enterprise and corrupt influence." Brief for Lokuta at 17. While she makes these broad allegations regarding Conference Judge Sprague, she fails to provide citations to the record in support of her claims.

Rather than presenting a "summary denial" complete with "venomous rhetoric" as Judge Lokuta claims, Brief for Lokuta at 14, Conference Judge Sprague in his May 13, 2009, Memorandum Opinion and Order denying the Second Recusal Motion provided a thirteen-page detailed and scholarly analysis to refute Judge Lokuta's arguments in favor of recusal. I discuss only a few representative aspects of his denial. Conference Judge Sprague observed that a review of the word index to the 3,893 pages of the trial transcript

revealed only one unrelated mention of Robert Powell and no mention of PA Child Care. May 13, 2010 Memorandum Opinion at 9-10. My review of the record confirms Conference Judge Sprague's assertion, and thus refutes Judge Lokuta's claim that Conference Judge Sprague prevented her from developing a connection between his clients and the former president judges. Additionally, my review of the record sheds light upon Judge Lokuta's claim that Conference Judge Sprague "largely sustained the JCB's objections" to her trial exhibits. Judge Lokuta fails to note that while Conference Judge Sprague sustained twenty-one of the JCB's thirty objections to trial exhibits, he did nothing to impede Judge Lokuta's introduction of over one thousand exhibits, as compared to the approximately thirty exhibits introduced by the JCB. Order of February 28, 2008. Without further development by Judge Lokuta, the sustaining of twenty-one objections does not demonstrate a need to overturn a denial of recusal. For these reasons, I conclude that Conference Judge Sprague presented valid reasons for denying the motion for recusal, and Judge Lokuta fails to present evidence that she was denied a fair and impartial trial.

The second issue upon which I diverge from the Majority Opinion involves the scope of our remand order. The Majority Opinion approves the CJD's narrow reading of the order limiting Judge Lokuta to claims in the nature of after-discovered evidence that relate only to corruption revealed shortly before the remand order, and concomitantly prohibiting inquiry into any revelations of misconduct in Luzerne County discovered after this court's ordered remand. Maj. Op. at 12-13. Indeed, in the aftermath of the May 13, 2009 oral argument regarding, *inter alia*, the scope of remand, the CJD defined the phrase from the remand order -- "claims in the nature of after-discovered evidence, arising from the recent revelations of corruption in Luzerne County," -- to apply solely to "those filings that have been placed on the public record in Luzerne County, meaning the pleas of guilt by Judge Conahan, Judge Ciavarella, Mr. Sharkey, and even including the agreement involving Moran, but it is the position of this Court that all arguments are to be from those matters."

Tr., 5/13/09, at 46.[2] Thus, the CJD's interpretation of our remand order was arguably even narrower than as described in the Majority Opinion.

Judge Lokuta asserts that the CJD's interpretation was an "artificially narrow interpretation of the scope of the remand." Brief for Lokuta at 19. She contends that the remand should have extended to "the growing body of evidence in the public record speaking directly to Conahan and Ciavarella's corrupt influence over others." Brief for Lokuta at 19. I agree that it would have been better to allow investigation concerning any information even potentially related to a connection between the culture of corruption created by the former president judges and the prosecution of Judge Lokuta, in that this Court's remand was to permit full exploration of the unprecedented corruption in Luzerne County, its impact upon the CJD's removal of Judge Lokuta, and the nexus between the two.

Nonetheless, I agree with the Majority Opinion's affirmance of the decision below, despite the narrow scope of review on remand, because Judge Lokuta was unable to show any prejudice resulting from the CJD's restrictive interpretation of our remand order. While she appropriately presents damning evidence of the former judges' power and corruption, she fails to discredit the vast majority of the copious evidence from more than twenty witnesses who testified for day upon day to the litany of improper judicial conduct described at the beginning of this concurrence. Moreover, she fails to allege what evidence she would have presented to the CJD if she had been allowed. Accordingly, I agree with the Majority Opinion to the extent that it concludes that the CJD's interpretation of this Court's remand order does not justify overturning the decision.

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[2] After the Court issued its order regarding the scope of review upon remand, Ciavarella and Conahan withdrew their guilty pleas. The Court acknowledged that this limited Judge Lokuta on remand to exploration of only "matters that involve the criminal activity of those individuals." Tr.,11/17/09, at 5.

Finally, I consider the issue of the appropriateness of a new sanction hearing following the revelations of the corruption in Luzerne County. The Majority addresses this issue as a question of the sufficiency of the evidence and appropriately observes, "[q]uestions of credibility and conflicts in the evidence presented are for the trial courts to resolve, not our appellate courts." Maj. Op. at 27. Nonetheless, I am compelled to note the argument in favor of a new sanction hearing convincingly articulated by Judge Streib in her dissent following our remand:

> Indeed, it is most ironic that Judge Lokuta would be criticized by this Court for isolating herself and her staff from the very people who have now been indicted for misusing their public office and position to commit crimes that strike at the heart of our judicial system. And, it is also most ironic that these same people are called by the Board to bear witness against Judge Lokuta, but yet she is precluded from presenting evidence regarding their far more serious misdeeds and criminal activities.
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> More importantly, however, I find Judge Lokuta's proffered evidence most pertinent to the sanctions imposed by this Court as a result of the charges brought against her by the Board. That evidence demonstrates that this was no ordinary judicial environment and no environment to which any judge should be exposed. That, to me, is a serious mitigating factor which does indeed militate in favor of an altered sanction in this case. Accordingly, I dissent from the majority's determination that the evidence proffered by Judge Lokuta does not meet the requirements of after-discovered evidence and would not, in any event, have affected the outcome of this case.

In re Lokuta, 989 A.2d at 960 (Streib, J., dissenting).

Although on a personal level I agree with Judge Streib and would have voted with the dissent if a member of the CJD, my personal judgment does not supplant my obligation to consider whether there was sufficient evidence to support the CJD's majority decision to deny a new sanction hearing. I believe there was such evidence, and therefore, that the majority of the CJD acted within its sound discretion in denying such hearing, necessitating my vote to affirm.

Accordingly, I am constrained to join the majority of my colleagues in affirming the decision of the Court of Judicial Discipline.