

SUPREME COURT NO. 200,149-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN THE MATTER OF THE
COMMISSION OF JUDICIAL CONDUCT PROCEEDINGS AGAINST

RICHARD B. SANDERS,
SUPREME COURT JUSTICE

JUSTICE SANDERS' REPLY TO OPPOSITION TO MOTION FOR
DISCRETIONARY REVIEW

Attorney for Justice Sanders

Kurt M. Bulmer, WSBA # 5559
Attorney at Law
740 Belmont Pl. E., # 3
Seattle, WA 98102

(206) 325-9949

BEFORE THE
SUPREME COURT
OF THE
STATE OF WASHINGTON

In re)	Supreme Court No. 200,149-1
)	
RICHARD B. SANDERS)	REPLY TO OPPOSITION TO
)	MOTION FOR DISCRETIONARY
Supreme Court Justice.)	REVIEW
_____)	

Justice Sanders is seeking discretionary review of an order denying him discovery. The Commission opposes that review. The issue presented at this stage of the proceeding is whether review should be granted, not whether Justice Sanders will prevail if review is granted. Those portions of the Commission's Oppositions Motion which seek either directly or indirectly to address whether or not Justice Sanders would prevail on appeal should be disregarded. The only question at this point is whether review should be granted.

The Commission opposes the acceptance of review on two grounds. First it essentially argues that the Supreme Court lacks jurisdiction to consider interlocutory review. Second it argues that even if there is jurisdiction there is no need for review.

JURISDICTION

The Commission's apparent position is that the State Supreme Court is without jurisdiction to review any Commission on Judicial Conduct actions unless a sanction recommendation is made. The Commission's argument is that its actions are immune from any review until it makes a decision. Until that time the Commission asserts that it

is free to act in an unfettered manner and that any due process errors, procedural errors or any other error are cured by a judge's¹ right to have the record reviewed de novo.

The Commission apparently recognized that its argument of absolute freedom to act however it wants is untenable. It qualified its argument in a footnote on page 3 of the Commission's Opposition to Motion for Discretionary Review where it is admitted:

Although it is possible to conceive of extraordinary and irreversible threatened error justifying such relief, such is not demonstrated in the instance case.

Despite the Commission's assertion elsewhere in its argument that there is no possible way for there to be interlocutory review, it grudgingly had to recognize that in fact there could be circumstances where review could be granted.

In short, the Commission's true argument is not that the Supreme Court lacks jurisdiction but rather that accepting review is a matter of degree. It admits that there may be times when jurisdiction would be present but argues that this is not such a time. This misses the point of jurisdiction. Either a court does or does not have jurisdiction. If it does not then it cannot act. If it does have jurisdiction then it may or may not choose to exercise that jurisdiction. The heart of a motion for discretionary review is a request that a court accept review. In this case, the Supreme Court has jurisdiction and should accept review.

Despite its acknowledgment that there may be circumstances in which the Court would have jurisdiction other than on a sanction review, the Commission nonetheless seems to take the position the Court only has jurisdiction after a sanction had been recommended. The Constitution, rules and law are not so limiting.

¹ The DRJ, at Rule 1, provide for the convention that justices and judges both be referred to as "judges". That same convention is used herein.

The Commission on Judicial Conduct is part of the judicial system and is created at § 31 of Article 4 of the Washington State Constitution. Article 4 is, of course, the Judicial Article. § 4 of Article 4 specifically provides that “The supreme court shall have ... appellate jurisdiction in *all* actions....” [Emphasis added.] The same article of the Constitution that creates both the Supreme Court and the Commission on Judicial Conduct grants the Supreme Court appellate jurisdiction in all actions.

Part 6 of § 31 of the Constitution provides for the right of a judge to have de novo review when a sanction is recommended. This is the granting of an absolute right of review and provides an important constitutional safeguard before a judge is sanctioned.

There is, however, nothing in § 31 of the Constitution limiting appellate review to only that circumstance. If the Constitution had meant to limit the general appellate jurisdictional authority granted by § 4 of Article 4, then it would have specifically stated that in § 31 but there is no such limiting language. All § 31 does is grant a specific right to a judge for de novo review but it does not take away any jurisdictional authority of the court.

The Commission argues that motions for discretionary review are not permitted because they are not provided for in the “scope” portions of Rule 1 of the DRJ. Rule 1 provides that where the Commission has recommended discipline, retirement or that a judge not be reinstated that such decisions will be considered by the Supreme Court in the manner provided by the DRJ. The rule does not say that these are the only situations in which the court has jurisdiction or in which the DRJ are appropriate for use. In fact the rules have a broader application. For example, Rule 12 provides that the Commission can, with the acceptance of the judge, impose an informal admonishment or reprimand.

There is nothing in the Constitution which allows such result and it has nothing to do with the Court's consideration of an appeal yet the Supreme Court grants to the Commission this authority. Nothing in DRJ 1 limits the Court's authority to consider a matter on interlocutory review.

The Commission also argues that DRJ 8 dealing with motions is not applicable since the rule mentions some RAP rules but not the specific rules regarding discretionary review. The rules mentioned in DRJ 8 are RAP 17(3) and 17.4. These are "mechanical" rules providing what must be included in a motion, how a motion is filed, supporting papers, etc. Nothing in DRJ 8 excludes consideration of a motion for discretionary review.

DRJ 8 is exactly the relevant rule. It provides that a party may seek relief other than on the merits of the case by use of this rule. Justice Sanders is seeking such relief in this instance.

The Commission does not argue Justice Sanders' alternate assertion of jurisdiction under RAP 5 and 6. These rules should apply under the Supreme Court's general constitutional jurisdiction provisions discussed above. These portions of the RAP provide for discretionary review of a trial court's decision. The Commission is an "agency of the judicial branch" which serves in the role of trial court. The Commission's own rules recognize under its "General Provisions" that the civil rules can be applicable:

Except as otherwise provided in these rules, the rules of evidence applicable to civil proceedings and the rules of civil procedure shall apply in all public proceedings under these rules.

CJCRP 8. The Court should recognize that it has inherent jurisdictional authority under the Constitution for the actions of an agency of the judicial system and that it can consider a discretionary review motion under either DRJ 8 or RAPs 5 and 6.

The Commission further argues that the Constitution allows the Commission itself to establish when and under what conditions its decisions will be reviewed. They base this argument on the language found at part 10 of § 31:

The Commission shall establish rules of procedure *for commission proceedings* including due process and confidentiality of proceedings.

[Emphasis added.] In reliance upon this language the Commission then argues that CJCRP 22(b)(3) provides that discovery disputes cannot be appealed before the entry of the final order.

The Constitution does not say that the Commission can establish what the rules of procedure will be for bodies other than the Commission. The Commission apparently argues that the “for commission proceedings” language in the Constitution means that it decides when and if its matters are subject to scrutiny by others. The Constitution does not give it such authority. The Commission has some authority to determine how its internal proceedings will go forward and if it wants to restrict internal appeals apparently it can do so. But the Commission says its authority is greater than that. It takes the extraordinary position of arguing that that it can determine for the Supreme Court what the Court can consider. In other words, the Commission’s position is that it tells the Supreme Court what to do. There is no authority for this and the Commission’s constitutional authority stops at how it handles its own internal procedures not how they are to be handled by other courts.

The Commission argues that nothing it does can be reviewed until it makes a final decision. Yet the Supreme Court has, in fact, taken jurisdiction in the past and has issued orders to the Commission regarding how it must proceed in an ongoing and pending case. Attached hereto as Appendix L is an Order of the Supreme Court issued in the Honorable Robert D. Moilanen case in 1992. (Also included in Appendix L are relevant pleadings in connection with the motion filed with the Court but please note there was apparently a Reply to the Commission's Response we were not presently able to locate.)

In *Moilanen* the Court took jurisdiction and ordered a pending Commission on Judicial Conduct case stayed to allow Judge Moilanen to conduct discovery and, most importantly, the Court directed:

The motion to compel discovery of Commission records is otherwise denied, but without prejudice to consideration by the court of any request for review following a Commission decision on Judge Moilanen's motion to compel discovery.

In short, the Court not only accepted jurisdiction, it considered a motion on a case pending before the Commission and issued an order regarding it. The Court also expressly left open the right of Judge Moilanen to seek review of his discovery motion while the Commission's case was still proceeding below should he want to.

In *Moilanen* the Supreme Court's jurisdiction was sought alternately under inherent authority or DRJ 8, and if the court did not accept review under one of those options the motion asked that it be converted to a writ of mandamus. *See* jurisdiction argument on page 2 of the Motion to Compel included as part of Appendix L. The Commission challenged the motion before the court as "patiently frivolously." The court did not convert the action to a mandamus action so it accepted review under either inherent jurisdiction or DRJ 8 and proceeded to rule.

Despite the Commission's argument that there is no jurisdiction for the Court to consider a discretionary appeal, the Commission has recognized in its own response that there may be situations where the Court has jurisdiction. The argument that the Court has no jurisdiction is not supported by the Washington State Constitution, the Supreme Court's rules or its past history. This Court has jurisdiction.

NEED FOR REVIEW

The Commission next argues that even if there is jurisdiction there is no need for review. It then presents in its arguments and attachments information it has supplied to Justice Sanders. The argument seems to be that it has given Justice Sanders all the information he needs and, therefore, no discretionary review is required. This is simply an attempt to argue the merits of the issue to be reviewed, not whether discretionary review should be granted in the first instance to review those merits.

Except for a quick cite from a 1986 law review article by Mr. Crooks to the effect that discretionary review "should" be had only if it rendered further proceedings useless, the Commission ignores the reasons why review should be granted.

As discussed in Justice Sanders' Motion for Discretionary Review at pages 13 – 19 discretionary review should be granted. We will not repeat those arguments here but summarize them for review:

1. There has been obvious error which render further proceeding useless – If Justice Sanders is correct in his arguments then without the necessary discovery Justice Sanders is being denied due process which means that upon later review his case would either have to be dismissed or remanded

for a new trial. This means the present proceedings are useless as they are presently postured.

2. The Commission has committed probable error which has substantially altered the status quo and substantially limits the freedom of Justice Sanders to act. Justice Sanders, an elected public official, stands accused of ethical impropriety. The failure of the Commission to provide discovery and to permit Justice Sanders to pursue his claims of procedural due process violations and prejudice against him by the Commission alters his status quo and limits his freedom to defend himself.
3. The Commission's denying access to obviously relevant evidence on some of the most basic parts of the allegations against Justice Sanders and in making an effort to protect itself from criticism by denying access to potentially embarrassing information raises a significant question of law under the Constitution. Justice Sanders is being denied his constitutional right to fair access to the courts. He needs discovery because "It is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff's claim or a defendant's defenses." *Doe v. Blood Center*, 117 Wn.2d 772, 819 P.2d 370 (1991).
4. This matter involves an issue of public interest which should be determined by an appellate court. A member of the highest court of this state is accused of improper conduct of his office. If this matter proceeds a public hearing will be held. Such a hearing should not be heard on undeveloped discovery nor should the public or Justice Sanders be placed

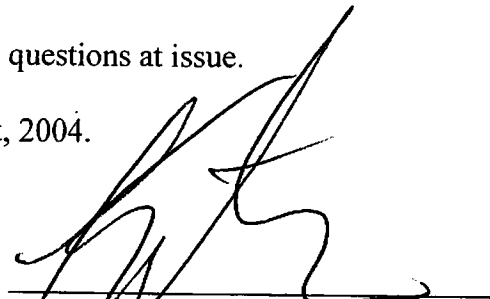
in the position of an unnecessary second hearing if he prevails on a later argument that he was entitled to the discovery he seeks.

The Commission completely fails to address any of these issues and instead seeks to convince this Court that it has provided enough discovery so interlocutory review is unnecessary. Essentially, the Commission continues its posture of saying that it will decide what Justice Sanders' needs and continues to assert that his attempts to determine his own faith by seeking what he feels is necessary lacks merit. The Court should reject the Commission's position that the Commission alone knows what is best.

CONCLUSION

This Court has jurisdiction under the State Constitution and under its own rules. It should, as it has in the past, exercise that jurisdiction. Justice Sanders has presented several valid reasons why review should be granted. The Commission ignores these, choosing instead to argue that it has provided what it feels is necessary and that this should be enough. This may be an argument to make once review has been granted but it is not the issue here. The issue here is whether review should be granted so the Court and the parties can then address the underling issues. As demonstrated above, fairness, the public good and the constitutional rights of Justice Sanders all compel a review by this Court of the orders denied below. Review should be granted and an order issued directing the parties to address the substantive questions at issue.

Dated this 17th day of August, 2004.



Kurt M. Bulmer, WSBA # 5559
Attorney for Justice Sanders