

IN THE SUPREME COURT FOR THE STATE OF OREGON
INQUIRY CONCERNING A JUDGE

Re: The Honorable Vance D. Day,

Respondent.

Commission on Judicial Fitness and Disability
12139, 1486

Commission on Judicial Fitness and Disability
12139

S063844

THE HONORABLE VANCE D. DAY'S REPLY BRIEF

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1. The Commission Did Not Meet Its Burden of Proof.

Resolution of this case begins and ends with the standard of review and burden of proof. This is not an appeal from the denial of a directed verdict motion, where the Commission must only find some evidence to support its position, when viewed in the light most favorable to it. That is not the standard of review.

This Court reviews the record *de novo*. *In re Schenck*, 318 Or 402, 405, 870 P2d 185 (1994). To adopt the Commission's recommendations, there must be clear and convincing evidence of a wilful violation of the judicial code, meaning the purported violations must be "highly probable." *In re Miller*, 358 Or 741, 744, 370 P3d 1241 (2016). The phrase "highly probable" is missing from the Commission's response brief ("CRB").

The Commission has not met its burden of proof. Instead, it selectively cites its own evidence, ignores impeachment evidence, and fails to meaningfully address any of Judge Day's witnesses and exhibits. The Commission also takes serious liberties with the facts and record cites.¹

¹ The CRB provided Judge Day his first opportunity to see the record cites that purportedly support the Commission's "findings." Many of the cites do not support the asserted facts. In the space provided, Judge Day has pointed out many of these errors, but far from all. Because review is *de novo*, and the Commission is not entitled to any presumptions and in fact has the burden of proof, this Court should not accept any of the Commission's factual assertions at face value.

Adherence to the standard of review requires rejection of the Commission's recommendation.

2. The Court Should Not Defer to the Commission's Credibility Findings.

The Commission attempts to satisfy its burden mostly through self-serving statements about the credibility of a few witnesses, including Judge Day. Where there was a divergence between two witnesses' recollection of events, instead of concluding that neither version was "highly probable," the Commission simply decided their witness was truthful, and labelled Judge Day a liar.

On *de novo* review, this Court defers to credibility findings only when they go beyond "mere recitals" and are based on a fact-finder's actual perception of a testifying witnesses' demeanor. *Schenck*, 318 Or at 420-21. Furthermore, when a credibility finding "is based on a comparison on the substance of the witnesses' testimony with the substance of other evidence, then this court on *de novo* review is as well equipped as is the Commission to make that determination." *Id.*²

² Judge Day reiterates his challenge to the wisdom and constitutionality of deferring to the Commission's credibility findings, when it brought and prosecuted the charges, expanded them without notice, and then made "findings" to support their charges. Deferring to the Commission in this manner defeats the purpose of *de novo* review, because it allows a prosecuting entity to turn its own allegations into indisputable facts.

The Commission's credibility findings were based mostly on issues other than the demeanor of a testifying witness. The Commission also ignored impeachment and other evidence that bears on credibility. The Court should not allow the Commission to back-fill its record with self-serving credibility findings.

A. The Soccer Incident.

The Commission found two soccer referees, Deuker and Allen, to be "very credible," and concluded Judge Day was a liar. The Commission's credibility finding was based on Deuker's "earnest" and "nervous" demeanor, and Allen "presented as a very straightforward, honest and genuine person in his demeanor on the witness stand." ER-70.

The Commission's statements about "demeanor," however, must be considered in light of its preposterous statement that Deuker and Allen had "no motivation to misrepresent what occurred." ER-70. This Court is in an equal position to determine whether either had a motivation to misrepresent what occurred.

It takes little imagination to hypothesize a motivation for these witnesses to lie about a dispute between them and a judge, who had accused them of improper conduct, about an incident being investigated by a government commission. As the previous Commission concluded, "the best defense is a

good offense” aptly illustrates an obvious motivation for these witnesses to present themselves as victims.³

The Commission also concluded that Judge Day’s testimony was “internally inconsistent and inconsistent with his written response to the Commission” and was “contrary to virtually every other witness.” ER-70. This Court is in the same position as the Commission to determine if Judge Day’s testimony was inconsistent in some material way that might lead one to conclude he is a liar. Indeed, in footnote 28, the Commission states that its credibility determination “likely” refers to documents not cited in the Commission’s opinion. Even then, the purported inconsistencies are unidentified. If all the Commission can do is point to a “likely” source for a credibility finding, that finding is not entitled to deference.

The Commission also noted that Judge Day’s testimony was “measured and controlled” but when challenged, his “facial expressions and responses were tinged with sarcasm.” Put another way, the Commission did not appreciate Judge Day’s reaction to its reopening of a trivial event that took place years ago, which had been rejected by a different Commission.

³ The Commission also noted that Allen’s testimony was “consistent and was corroborated by other witnesses, who were, likewise, disinterested observers.” It is impossible to evaluate this statement because the “other witnesses” and “disinterested observers” are not identified.

The Commission found it significant that Judge Day smiled “smugly” when Allen testified. That is, the Commission’s primary credibility finding about Judge Day occurred when he was not testifying. Was the entire Commission looking at Judge Day during Allen’s testimony? And what exactly was Judge Day not credible about – does the Commission mean that his non-testimonial reaction made Allen’s testimony credible? This Court should not defer to the Commission’s credibility findings about the soccer incident.

B. Interactions with Shehan.

The Commission found the testimony of Brian Shehan to be “credible,” and claimed he too had “no motive to lie,” despite his hatred of Judge Day and his criminal risk for possessing a handgun while in the VTC. The Commission also ignored significant evidence that Shehan’s testimony was inaccurate in many respects.

For example, Darin Campbell is a taxi driver who drove Shehan to appointments for over a year and a half. Tr 625. Shehan confided in Campbell. Tr 629, 630. Shehan told Campbell to lie for him, if Shehan needed an “alibi,” including that he had been invited to go shooting, but “he didn’t want to fall into that trap, because firearms were outside the terms of his probation.” Tr 628, 632, 630. Shehan also told Campbell that he owned a handgun. Tr 636-37. Shehan was concerned that he might get into trouble for possessing the gun. *Id.* Shehan had every motivation to lie.

The Commission ignored additional evidence of Shehan's lack of credibility, which this Court must consider on *de novo* review. For example, Shehan suffers from PTSD and TBI, which causes him to be paranoid, lack insight and dramatize information. Tr 982-983, 1151. He topped the VTC's "risk and needs list." Tr 1723. Also notable is that Shehan testified that he laughed while talking with Megan Curry about target shooting, and there is no evidence that he told Curry that Judge Day purportedly had given him permission to handle a gun. *Id.*⁴

The Commission also found Shehan's testimony credible, even though he testified via telephone, and therefore the Commission could not observe him, and Judge Day could not effectively cross-examine him or use exhibits.⁵ The Commission somehow still found that Shehan's "demeanor" was "genuine,

⁴ The Commission ignored evidence that TC members were invited to submit photos of themselves for an anniversary slide show. Tr 638. Shehan submitted one of himself defecating, *Id.*, ER-300. This Court should reject Shehan's claim of being "exploited" or made to feel like a "dancing monkey" in light of the photos Shehan voluntarily submitted. Ex 71, p 42, Tr 1116.

⁵ The Commission now accuses Judge Day's counsel of "witness intimidation." CRB 42. To be clear: the Commission did not tell Judge Day's counsel that Shehan intended to testify by telephone until the day of his testimony. Either the Commission knew this and hid it from Judge Day, or Shehan chose not to show up. Judge Day then obtained a commission to depose Shehan, and Shehan evaded service. Shehan hired an attorney and agreed to attend a deposition, but he never showed. The Commission's conclusion from these facts is not that Shehan has something to hide but, rather, that counsel is engaging in "witness intimidation." ER-240-46,250, 255-66, 308-13.

sincere, heartfelt, and he displayed authentic emotion at appropriate times.”

ER-73.

Shehan, of course, did not “display” anything to the Commission. He could have been looking smug during his entire testimony. This is why telephone testimony is not permitted in cases when the “ability to evaluate the credibility and demeanor of a witness or party in person is critical to the outcome of the proceeding” and when the “issue or issues the witness * * * will testify about are so determinative of the outcome that face-to-face cross-examination is necessary.” ORS 45.400(3)(a), (b); *see also Murphy v. Tivoli Enterprises*, 953 F2d 354, 359 (8th Cir 1992) (requiring “live witnesses wherever possible, so that the jury may observe the demeanor of the witness to determine the witness's veracity.”).

ORS 45.400 might not apply here, but the policy behind it is relevant to the weight this Court should give the Commission’s finding that Shehan “displayed” authentic emotion. ORS 45.400 exists because it is impossible to make an accurate credibility determination over the telephone. There should be no exception in judicial fitness cases, where a judge’s position and reputation are at stake.

Nor should the Court give any weight to the Commission’s conclusory statement that Judge Day’s and _____ testimony was inconsistent and therefore not credible. This Court is in the same position as the

Commission to determine the existence and weight of any purported inconsistency.

C. Judge Pellegrini.

The third credibility finding concerns what Judge Day said to Judge Pellegrini about why he supported another candidate for the judicial position. CRB 33. This was not part of any misconduct charged in the Complaint. Judge Day testified that he opposed Judge Pellegrini's appointment because the court could use a civil litigator on the bench. Tr 2307-09. The record includes multiple contemporaneous documents corroborating Judge Day's account. ER-219-232. The Commission ignored this evidence, choosing again to make the conclusory finding that Judge Day is a liar. ER-86.

The Commission's conclusory finding is entitled to no weight, as it does not explain the basis for the finding, provides no details about Judge Pellegrini's or Judge Day's demeanors, and does not account for the documents objectively supporting Judge Day's testimony.

D. The Commission Ignored Evidence of Judge Day's Character.

The Commission ignored evidence about Judge Day's reputation in the community, which generally speaks to his credibility.

- Judge Tracy Prall has known Judge Day for 15 years, and believes he is truthful and respectful, she never observed him discriminate, and he genuinely cares about the VTC. Tr 868-871; 888-889.

- Judge Susan Tripp testified that she never observed Judge Day discriminate based on sexual orientation, he is a “good egg” and a “stand-up guy.” Tr 114-15,121.
- Judge Thomas Hart has known Judge Day since law school, and believes he is honest, does not discriminate, and is respected by his fellow judges. Tr 141-42, 150, 163.
- Judge Donald Abar has known Judge Day for over 20 years, and believes he is a sincere, honest person, he “walks what he talks,” does not discriminate, he is “one of the first people that always volunteers to help out others,” he genuinely cares about veterans, and he puts his “heart and soul” into whatever he does. Tr 1083-85, 1088, 1094.
- Judge Lindsay Partridge believes Judge Day is “a man of great integrity.” Tr 2130.
- Judge Dennis Graves believes Judge Day is an honest person. Tr 458-459.
- Attorney Keith Bauer believes Judge Day is “truthful and candid.” Tr 1668.
- VTC Team Member Deputy Steve Cooper believes Judge Day had tremendous respect for veterans, did an “outstanding job” and was a “really good judge.” Tr 1354, 1370-1371.

- VTC Probation Officer Austin Herman believes Judge Day cared about VTC participants and tried to help them. Tr 1442.
- VTC Team member Joseph Glover believes Judge Day never was degrading toward veterans and tried to help them. Tr 1466, 1471.
- VTC graduate Jeff testified that Judge Day was “the first person in 35 years that gave me respect” as a veteran, and has “done more for veterans in Marion County than I've ever seen or ever heard of anybody doing***. He should be given a medal for it.” Tr 1573,1582.
- VTC graduate Tim testified that Judge Day was professional in his treatment of veterans; “he saved my life” and gave him the tools to become successful. Tr 1594,1597.
- VTC graduate Gary believed it “would be a disservice to veterans around if -- if he's taken off Veterans Court. I think he understands more than a lot of people” and has “an ultimate respect” for veterans. Tr 1608.
- VTC graduate Alan never saw Judge Day degrade or humiliate veterans. Tr 1618.
- VTC Mentor and combat veteran Wayne Crowder testified that Judge Day cared about veterans, “[m]ore than any judge I've ever seen.” Tr 1697.

- VTC Mental Health Assessor Gary Cohen testified that Judge Day worked hard to try to help the individual participants and never was demeaning or inappropriate. Tr 1714-1715.
- Scott Delbridge, a VTC Mental Health Counselor testified that Judge Day cared about his work with veterans and that he tried hard to connect with them. Tr 1842-1844. Delbridge never saw Judge Day do or say anything inappropriate. *Id.*
- County Commissioner Kevin Cameron testified that the VTC brought him to tears because “it was pretty amazing, the things that were happening in that court.” Tr 2150.

Judge Day should be entitled to some modicum of respect given this testimony and his service for veterans. This Court should give it significant weight on *de novo* review, even if the Commission gave it none.

3. This Court Should Reject Counts 1 and 2 as Previously Dismissed.

The first two counts must be rejected because they arise out of the same 2012 soccer incident that the Commission already investigated and dismissed. At the time, the Commission found: “The judge’s recitation of events rings more true***than those of the complainants. I suspect that Deuker was using the approach that the best defense is a good offense ***. I do not believe that the judge was using his position inappropriately or unethically, or acted inappropriately in a public place.” Ex 655, p. 2. The Commission adopted this

credibility determination when it issued its final order dismissing the Complaint. ER-299. Because the Commission considered the evidence and issued a final order, all the elements of claim preclusion exist.

The Commission incorrectly argues that its previous dismissal was not a conclusive determination of a controversy between the parties. CRB 36. The Commission's own rules allow for dismissal of a judicial fitness complaint without prejudice only in accordance with Rule 17(g). OB 65-66. The Commission's 2012 dismissal of the complaint does not fit within the rule. Rather, the Commission received a complaint, investigated it, discussed it in a formal meeting, and issued an official letter formally advising Judge Day that the matter had been dismissed. This is a final decision.

The Commission argues that claim preclusion does not apply because Judge Day "got away" with something or he committed "fraud." The Commission cannot point to any evidence of "fraud," of course; it simply repeats its own opinion that Judge Day "lied to the Commission in his initial response to the soccer complaints." CRB 35-37.

The Commission's argument is circular. The same divergence of factual accounts existed in 2012; only the Commission is different. ER-299. Ex 655. The Commission was not permitted to reopen a final determination to allow it to make a different credibility determination than did the first Commission — that is the very purpose of claim preclusion. *Drews v. EBI Companies*, 310 Or

134, 141, 795 P2d 531 (1990) (the policies behind claim preclusion include “achieving finality to a conclusion of a dispute,” and “protecting limited dispute-resolution resources from repeated expenditure upon the same overall dispute”). If the Commission could reopen the complaint simply because it had a different view of the same facts, it is hard to imagine when claim preclusion might exist.

The Commission’s citation to the Restatement (Second) of Judgments § 26 (CRB 36) is inapposite, because that exception applies when a defendant fraudulently hides claims, not when there is a difference in opinion about who to believe about the same disputed facts. The Commission does not allege that Judge Day hid any evidence. It simply has a different interpretation of the same evidence.

Finally, equitable estoppel does not apply here. Judge Day provided the Commission his recollection of events. The Commission investigated both sides of the story, and found Judge Day more credible. That a new Commission wishes to make a different determination does not support reopening these Counts.

In any event, the Commission’s representation of the conflicting evidence as being Judge Day’s word against all the other witnesses is inaccurate. *De novo* review supports dismissal of these claims. (OB 26-29,69-82).

4. Ethics Rules Not Charged in Complaint Must Be Rejected.

The Commission asks this Court to find Judge Day guilty of charges not included in the Complaint. *See* OB 77, 83, 97, 102, 108, 118. The Commission argues that “Judge Day does not claim in his brief that he did not have actual knowledge that these [uncharged] rules were in play,” but does not explain what it means for a rule to be “in play.” CRB 52.

The Commission relies on its Hearing Memorandum, but that memorandum cited a number of ethics rules that “*may* be implicated in this case.” Hearing Memo, pp. 8,10 (italics in original, omitted in the CRB). More importantly, the Commission served its memorandum on Judge Day on the morning of trial. The Commission’s notice that a laundry list of ethical rules “*may* be implicated,” provided on the first day of a two week trial, does not supplant the requirement that charges be alleged in a Complaint.

Moreover, the Commission’s rules allow it to amend its Complaint, but it chose not to do so, despite an invitation from the Commission panel. CR 10b, ER-143-45, Tr 1279. Under its own rules it had no authority to “recommend” a finding against Judge Day on uncharged violations.

5. The Commission Failed to Prove The Charged Violations Were Highly Probable.

This Court should only address Counts 3-6, 9 and 12, and the violations actually charged in the complaint.⁶ The evidence in the record does not make any of the charged violations “highly probable.”

6. Counts 3-5 are Not Supported by Clear and Convincing Evidence.

Judge Day has steadfastly maintained his recollection of the events involving Shehan at the home. testimony is consistent with Judge Day. Tr 1492-1506. Shehan had ample reason to lie. Such conflicting evidence makes it impossible to conclude that the alleged violations are highly probable.

One of the Commission’s primary witness on this issue was Lambert. Notably, the Commission did not expressly find her credible, and for good reason.⁷ As the VTC Coordinator, it was Lambert’s job to keep VTC members informed. Tr 1029-30. It therefore is significant that Lambert did not inform any VTC member that Judge Day purportedly had given Shehan permission to handle a gun at the house, on January 5, 2014, or with

⁶ The Commission correctly found counts 7, 8, 10, 11, and 13 unproven and does not argue otherwise in its appellate brief. CRB 3. This Court should accept the Commission’s recommendations dismiss these charges.

⁷ The Commission rejected Count 11 that related specifically to Lambert.

Judge Day, by contrast, consistently and openly recited his version of events. When he was reminded that Shehan should not have handled the gun in the Judge Day immediately informed the VTC team of what had happened. Tr 1377, 1726. Judge Day also told Attorney Wren (Tr 1415, 1423-1424), DDA Orrio (Tr 1901-1902), and Probation Officer Herman (Tr 1455-1456). Witnesses uniformly testified that Judge Day did not say anything that matched Lambert's accusations, which were not made until eight months later. Orrio, Tr 1932; Wren, Tr 1418, 1425; Cohen, Tr 1732; Herman, Tr 1456-1457; Cooper, Tr 1377-1378.

The question left unaddressed by the Commission is, if Shehan's version of events was so credible, why did Lambert say nothing about it for eight months after she heard Judge Day's version? She did not correct Judge Day at the weekly VTC meetings, even though she knew at that time that Shehan owned his own gun, and he "was still worried weeks and months afterwards that he was still going to end up in trouble for having a gun." Tr 1160. Space

does not permit a full discussion of her testimony. *De novo* review of the record will reveal that it was inaccurate and unreliable.⁸

The Commission did not prove that its cynical version of events was highly probable. It had no legitimate reason to assume that Judge Day was a liar who acted with ill intentions. The evidence shows that Judge Day is an honest, hard working judge, who helped establish a program to work with troubled veterans. Many veterans have a very different view of Judge Day than does Shehan. None of this evidence was given any weight by the Commission.

Judge Day self reported this incident, and the Commission decided to adopt as true the worst of all possible motivations. At best, the Commission's version of events is possible, but it is far from "highly probable."

7. Count 6 is Not Supported by Clear and Convincing Evidence.

In Count 6, the Commission contends that that Judge Day's purported "unsolicited, and often unwanted, personal out-of-court contacts with BAS were completely inappropriate." As with the other counts, the Commission's version

⁸ DDA Orrio described that Lambert became "very upset and was very resentful that the judge had the ultimate say." Tr 1919. And that he watched "her try to control the judge and being nasty about it when she couldn't." *Id.* Orrio also saw how Lambert interacted with the VTC team and Judge Day and described her as controlling and emotional, irrational, nasty, vindictive whenever the team disagreed with anything she wanted. Tr 1918.

of events is a selective recitation of facts that easily could be viewed in a less cynical light, and therefore is not highly probable.

Judge Prall and Wren, Shehan's defense attorney testified that Judge Day had a sincere interest in trying to help Shehan. Tr 889; 1412. Wren did not see anything inappropriate about Judge Day's interactions with Shehan. Tr 1413. Fred Ross, a VTC mentor, also never saw Judge Day treat Shehan inappropriately. Tr 1555.

The Commission scolds Judge Day for being enamored with Shehan, but Judge Prall said that the entire VTC contingent was somewhat "star struck" by the Navy SEALs. Ex 71, p 52. The Commission itself is enamored of him, finding his telephone testimony to be the most credible testimony.⁹ More importantly, the Commission leaves out significant context, which is that the

⁹ Given the space limitations, it is impossible to refute all of the Commission's uncharged criticisms of Judge Day regarding the VTC. For example, the CRB notes that Judge Day required veterans to stand in "parade rest." (CRB 12, and fn 7). The VTC team took many of its procedures, including this one, from US DOJ training. Tr 1448-49,1546,1711-12. The Commission also recounts Judge Prall's statements about her philosophy on *ex parte* contact with VTC parties, but fails to note that others, including Judges Ochoa and Graves also engage in out-of-court contact with some litigants in their specialty courts. Tr 436,437, 443, 494, 902-03; Ex 71, p 53. The Commission then speculates about the VTC contract which attorney Mark Fucile sent to the commission, which is not subject of any charges. CRB 27. Contrary to the Commission's speculation, DDA Orrio attended the team meeting where the revision to the contract was made, agreed with those revisions, and explained why they were necessary. Tr 1926-27, OB 100.

VTC team was concerned about Shehan's mental health, and rightly or wrongly, made sure he had social interaction during the holidays when suicide risk is high. OB 46, Ex 71 p 52.

The Commission represents that the record shows that Judge Day "repeatedly" invited Shehan to Day family events, when in fact there were only two events – Thanksgiving and the day after Christmas. Judge Ochoa also had Shehan to his house during this time. Tr 358. Shehan initiated contact with Judge Day and thanked him for it. Ex 28. On November 30, 2013, Shehan texted Judge Day: "I was floored by the grub. Thank you so much. ***it was very thoughtful and I don't take that for granted." *Id.*

The Commission focuses on the wedding that Shehan attended with Judge Day. It claims Judge Day picked Shehan up from his home, when in fact Judge Ochoa had taken Shehan to appointments and then left him at the courthouse. Tr 414, 1497, 2303. Judge Day needed to stop at the wedding, and he asked Shehan if he wished to stay in the car, but Shehan chose to attend the ceremony. Tr 2303. Shehan did not recall one way or the other. Tr 1104. Two witnesses who do not know Judge Day refuted Shehan's testimony, testifying that Judge Day did not introduce Shehan using his SEAL nickname, but that Shehan volunteered that information, and talked proudly at the wedding about being a SEAL. Tr 1338-93, 1394-97, OB 103-05.

The Commission also omits critical facts about the VTC Conference in Washington D.C. Judge Day did not initiate the request to connect with Shehan's friends, but instead followed up on Shehan's offer of their contact information. OB 47-48; Ex 28, DAY000618.

Judge Prall, who also attended the conference, told the Commission that the VTC team "knew in advance of attending the conference that Shehan might be suicidal. They had been encouraged to meet some of Shehan's Navy SEAL friends who were also there to talk about how VTC could help him." Ex 71 p 52. Judge Prall described how she and Judge Day met two friends who "were on the same SEAL team as Shehan and they described experiences that they thought would help the VTC group understand Shehan and help him." *Id.* The Commission's cynical portrayal of VTC conference as an ego mission for Judge Day is baseless.

Further, in addition to ignoring the fact that rules relating to contact with parties in specialty courts like VTC are relaxed, the Commission fails to distinguish between true *ex parte* contacts, of which there are only two at issue here, both dependent on the credibility of Shehan, and out-of-court contacts not concerning a pending matter. *See*, OB 105-06.

Judge Day did candidly acknowledge that he became too close to Shehan in responding to concerns about Shehan's well-being, but when he heard of Shehan's discomfort, the contact stopped. Tr 2251-51, 2321. The

Commission's conclusion that Judge Day therefore "had to have known full well what he was doing [with Shehan] and that it was wrong" (CRB 47) is not highly probable. The Commission simply assumes the worst of Judge Day, despite substantial evidence to the contrary.

8. Count 9 is Not Supported by Clear and Convincing Evidence.

Count 9 concerns the "Hall of Heroes," which was meant to honor veterans. The Commission's statement that Judge Day alone "sought and obtained donations from attorneys, some of who appeared before him" is based on conclusory statements from Brown, Curry and Lambert each of whom were not credible. CRB 29. The Commission ignored the fact that the funds went to the Partnership for Veterans (PVR) non-profit, and the testimony from the individuals who donated.

The Commission concluded that Judge Day solicited funds from Kevin Mannix. CRB 29. Judge Day did not solicit from Mannix, rather, Mannix supported the project and volunteered to contribute to it. There was no *quid pro quo*, and he likely mailed his contribution directly to the foundation. Tr 1686-1688.

Keith Bauer testified that he supported the project and volunteered to contribute funds to it, and he dropped his check off with court staff who he understood would forward it to the foundation. Tr 1672,1678.

Paul Ferder testified that there was discussion between multiple attorneys and judges about the war memorial, and he wished to give money to place Paul DeMuniz in the Hall of Heroes. Tr 2114-17. Ferder recalled a communication about what it would cost, but could not testify who the communication was from. Tr 2117.

Regardless to whom the checks were handed, they all went to PVR, and the Commission's statement that Judge Day knew that "donors expected something in return" is false and unsubstantiated. CRB 30. The Commission's assertion that "[o]n at least one occasion, Judge Day solicited funds during a status conference involving a matter pending trial before Judge Day in Judge Day's chambers" (CRB 30) cites Tr 1169-70, which relates to the VTC contracts, and has nothing to do with solicitation of funds.

There is no charge before this Court, and no basis in fact, for a claim that Judge Day personally benefitted from the art work collections.¹⁰ The Commission has not proven Count 9 by anything approaching clear and convincing evidence.

¹⁰ To the extent the Commission's brief implies (CRB 32) that Judge Day personally benefited from art display funds, this uncharged claim is untrue, as explained in detail at OB 116.

9. Count 12 is Unsupported as a Matter of Law and Fact.

Judge Day will not repeat the evidence regarding his decision not to perform same-sex marriages, based on his sincerely-held religious conviction. Judge Day will address CRB’s argument that *In re Neely*, 390 P3d 728 (Wyo. 2017), the 3-2 decision from the Wyoming Supreme Court, supports its decision. CB 51 n.38. This Court should not follow *Neely*, which disciplined a judge for conduct relating to refusal to perform same sex marriages based on her religious views.

A. OCPC 3.3(B) Fails Strict Scrutiny Review.

Neely misapplies *Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015) and *Republican Party of Minnesota v. White*, 536 U.S. 765 (2010) to uphold an analogous judicial rule.¹¹ *Yulee* and *White* require application of strict scrutiny,¹² and render OCJC 3.3(B) unconstitutional as applied. (OB 140).

i. Marriage Ceremonies Are Not A Judicial Duty.

Like Wyoming, Oregon law requires marriage contracts to be solemnized by various governmental and non-governmental individuals. ORS 106.010-

¹¹ *Neely* also rejected vagueness arguments by improperly applying a “relaxed” review, 390 P3d at 744, when a more stringent analysis is required when protected speech is affected. *Spargo v. New York State Comm'n on Judicial Conduct*, 244 F Supp 2d 72, 90 (ND NY 2003); *see also Foti v. City of Menlo Park*, 146 F3d 629, 638 (9th Cir. 1998).

¹² *Yulee* rejected lesser scrutiny review for judicial speech regulations. 135 S Ct at 1665.

106.120. Most of these individuals are not subject to the OCJC, *see* Rule 1.2, nor is judicial training required. While Oregon could solemnize marriages without judges, it allows judges to participate in them. ORS 106.120.

Contrary to *Neely*'s holding, *White* and *Yulee*'s compelling state interests do not apply in this context. Impartiality—bias for or against a party—is derived from due process. *White*, 536 U.S. at 775-76. Solemnizing marriages cannot implicate due process because there is no adversarial relationship among the parties. Nor is it implicated when all same-sex couples have access to marriage—*Obergefell* does not require compelled solemnization.¹³ *See Obergefell. v. Hodges*, 135 S. Ct. 2584, 2607 (2015) (holding only that “[t]he Constitution*** does not permit the State to bar same-sex couples from marriage ***.”). Judicial impartiality—and OCJC 3.3(B)—only apply to judicial duties, which solemnizing marriage is not.¹⁴

That Judge Day's announced to his staff his views in opposition to same-sex marriage on religious grounds does not erode public confidence in the integrity of the judiciary. *Yulee* expressly upheld the right to announce views

¹³ Indeed, Title VII requires accommodation where, as here, “the fundamental function of the position” is not undermined. *Neely*, 390 P3d at 741. *See Obergefell*, 135 S. Ct. at 2607 (stating that the First Amendment ensures that advocacy and speech opposing same-sex marriage can continue).

¹⁴ A task does not become a “judicial duty” simply because a judge does it. Otherwise, a judge could be disciplined for menial tasks, making the Code both vague and overbroad. *Spargo*, 244 F Supp 2d at 90-91. But the Code limits its application to specific circumstances of proscribed or required judicial conduct. *See* OCJC 1.1.

on disputed legal and political issues and was careful to ensure this right was unaffected when it analyzed a personal solicitation ban. *Yulee*, 135 S Ct at 1670. Disciplining those who announce their views on same-sex marriage serves no state interest under *White* and *Yulee*.

ii. Judge Day Did Not Undermine Public Confidence in the Integrity and Impartiality of the Judiciary.

Even if the *White* and *Yulee* interests apply, important factual distinctions exist between this case and *Neely*. While Judge Neely announced her same-sex marriage views in response to a federal decision, *Neely*, 390 P3d at 733-34, Judge Day mirrored the law at all times. When he took office in 2011, same-sex marriages were prohibited. Oregon Const., Art. XV, Sec. 5a. When a non-binding Oregon federal district court decision held this prohibition unconstitutional in May 2014, Judge Day initially chose to screen applicants, but ultimately chose to decline marriage ceremonies altogether in summer, 2014—he did not wait until the *Obergefell* decision in 2015 which finally resolved this nationally disputed legal issue.

No same-sex couple was denied a marriage ceremony on account of Judge Day's never-applied, short-lived approach to an issue that implicated his deeply-held religious convictions. OB 59-60.

If this Court follows *Neely*, it should take note of the punishment the Wyoming court thought was appropriate – a public censure and requirement

that the judge either perform all marriages or none at all. *Id.* at 753. Judge Day already made the latter decision, long before the law was settled, and before these proceedings started.

The Commission, by contrast, chose the ultimate penalty of deciding to remove Judge Day from the bench, a punishment generally reserved for judicial incompetence, *In re Field*, 281 Or 623, 634-37, 576 P2d 348, *reh'g den*, 281 Or 638 (1978), and not imposed on judges found to have more numerous and/or egregious violations than those charged here. *In re Schenk* (suspension for multiple violations), *In re Gustafson*, 305 Or 655, 756 P2d 21(1988)(censuring for 13 wilful violations based mishandling of criminal cases), *In re Roth*, 293 Or 179, 645 P2d 1064 (1982)(censuring for conduct amounting to criminal mischief).

iii. Judge Day Has Not Engaged In Discriminatory Conduct Warranting Discipline.

Judge Day's briefly-employed plan related to same sex marriage did not result in discrimination of anyone. Neither the OCJC nor the State can regulate conduct that did not occur, anymore than it can incarcerate someone for a future crime. *See Neely*, (stating that disciplinary proceedings are punitive) 390 P3d at 753-54. The Code does not authorize punishment for discrimination that did not occur, nor does the state have a compelling interest in doing so. Judge Day cannot be, nor appear to be, partial when the parties are unknown. *White*, 536 US at 775-76. The Commission seeks a punitive advisory opinion about

conduct that did not occur. Advisory opinions are unlawful. *Brown v. Or State Bar*, 293 Or 446 (1982).

CONCLUSION

This Court should reject the Commission's recommendations, and find no violations. Alternatively, if violations are found, in no event do the facts support the drastic sanction of removal.

Respectfully submitted this 22nd day of May 2017.

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**CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH
AND TYPE SIZE REQUIREMENTS**

Brief length

The Court granted a Motion to exceed the length limit for this Brief. The Order granting that Motion is dated May 15, 2017, and permits a Brief of up to 6,000 words. I certify that (1) this Brief complies with that Order and (2) the word count of this Brief (as described in ORAP 5.05(2)(a)) is 6,000 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f)

DATED this 22nd day of May, 2017.

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CERTIFICATE OF FILING AND SERVICE

I certify that on the 22nd day of May, 2017, I filed the THE HONORABLE VANCE D. DAY'S REPLY BRIEF with the State Court Administrator by Electronic Filing. I further certify that on the same date, I caused the foregoing to be served upon the following counsel of record by electronic filing:

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