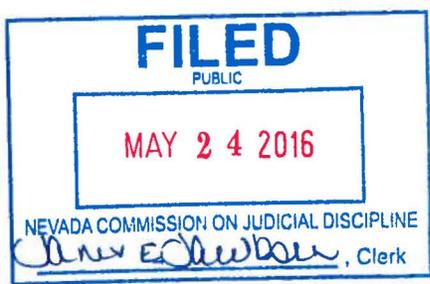


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Prosecuting Officer for the
Commission on Judicial Discipline

BEFORE THE NEVADA COMMISSION ON JUDICIAL DISCIPLINE
STATE OF NEVADA

In the Matter of the

Honorable Ann Zimmerman, Justice of the
Peace, Las Vegas Township, Las Vegas,
Nevada.

Respondent.

CASE NO.: 1503-922

**OPPOSITION TO RESPONDENT'S
MOTION TO DISMISS FORMAL
STATEMENT OF CHARGES AND
VERIFIED COMPLAINT**

COMES NOW Prosecuting Officer Kathleen M. Paustian, Esq., and files this Opposition
to Respondent's Motion to Dismiss Formal Statement of Charges and Verified Complaint
("Motion" or "Motion to Dismiss"). This Opposition is based on the pleadings and documents
on file and on any argument of counsel should this Commission set the Motion for hearing.

DATED this 24th day of May, 2016.

By: *Kathleen M. Paustian*
Kathleen M. Paustian
Prosecuting Officer for the NCJD

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I.
ANALYSIS

A. Plaintiff's Motion Is Not Timely Filed and Must be Struck.

Pursuant to Commission Rule 17: "Within 20 days after service of the formal statement of charges, the respondent shall file with the commission ...an answer. The answer must set forth in ordinary and concise language all denials, affirmative defenses and mitigating factors upon which the respondent intends to rely at the hearing."

At this point it is important to review the relevant points of chronology in this case:

- The prohibited actions in this case began on or before December 14, 2010.
- Douglas Dutcher filed his Verified Complaint on September 25, 2013.
- The Formal Statement of Charges was filed on July 14, 2015.
- The Respondent Judge answered on September 3, 2015.
- *The Judge filed her Motion to Dismiss on May 23, 2013.*

If Respondent found the Charges fatally deficient, under Commission Rule 17, she was obligated to state her affirmative defenses regarding same within 20 days of service. Instead, she filed a standard denial Answer on September 3, 2015. She filed this Motion to Dismiss with the affirmative defense of the statute of limitations almost ten (10) months late, on May 23, 2016. Under the applicable Rule, this Commission must strike her pleading as untimely and give it no consideration.

Also, given that the Formal Hearing is set for June 24, 2016, there is basis in fact for the observation that this Motion may be brought for the purpose of delaying the hearing. This observation is a valid issue to be taken into account when deciding the fate of the pending Motion.

1 **B. Respondent's Motion Does Not Establish That the Verified Complaint Is**
2 **Barred by the Statute of Limitations in NRS 1.4655(2)**

3 Respondent relies on NRS 1.4655(2) which states:

4 The Commission shall not consider complaints arising from acts or omissions that
5 occurred more than 3 years before the date of the complaint or more than 1 year
6 after the complainant knew...of the conduct, whichever is earlier,
7 except that:

8 (a) Where there is a continuing course of conduct, the conduct will be deemed to
9 have been committed at the termination of the course of conduct;

10 (b) Where there is a pattern of recurring judicial misconduct and at least one act
11 occurs within the 3-year or 1-year period, as applicable, the Commission may
12 consider all prior acts or omissions related to that pattern; and

13 (c) Any period in which the judge has concealed or conspired to conceal evidence
14 of misconduct is not included in the computation of the time for the filing of a
15 complaint pursuant to this section.

16 The Complaint passes the test for the three (3) year statute of limitations. The acts in
17 question began with the hearing on December 14, 2010. The Complaint was filed on September
18 25, 2013, well within the 3 year limit provided for in NRS 1.4655(2).

19 However, Respondent alleges Complainant Dutcher knew of the conduct in question by
20 December 22, 2010 and had to file within a year of that knowledge. On that date, Mr. Dutcher
21 wrote Judge Zimmerman a letter asking her to set a hearing to let him be heard, upon notice, to
22 correct her actions at a December 14, 2010 hearing where, without notice to Mr. Dutcher as the
23 Plaintiff, she acted on a demand from the attorney for the Defendant that the Court remove a
24 bench warrant for the arrest of the Defendant.¹

25 This December 22, 2010 letter was part of Mr. Dutcher's on-going futile battle to have
26 the Judge adjudicate matters in court, with Mr. Dutcher present, after having received proper
27 notice. Specifically, it states:

28 ...I am by this letter requesting that the Court set a noticed hearing for my motion
 to reinstate the bench warrant, by giving both sides of this case a fair notice of
 what is going on.

¹ The Judge was aware that the Motion did not include a Certificate of Service on Plaintiff Dutcher and heard the acknowledgment of counsel for the Defendant that he had not obtained service of the Motion on the Plaintiff.

1 This letter does not invoke the “whichever is earlier” limitation clause in NRS 1.4655(2),
2 due to the exceptions to the clause in 1.4655(2) (a), (b) and (c). In other words, the 1 year
3 limitation section of 1.4655(2) is not invoked due to the Judge’s refusal to correct her breach of
4 the Revised Code of Judicial Conduct, Canon 2, Rule 2.2, requiring impartiality and fairness
5 when conducting judicial duties and Rule 2.6 requiring her to give all parties the right to be
6 heard, as well as Rule 2.9 prohibiting ex parte communications. It is also not invoked because
7 the Respondent failed to fully inform the NCJD investigator as to controlling facts in the case in
8 violation of Rule 2.16 requiring cooperation, candor and honesty with the NCJD. These ongoing
9 acts and omissions meet exception (a) in NRS 1.4655(2) because there is a continuing course of
10 conduct which can be deemed to have been committed at the termination when Mr. Dutcher filed
11 his Complaint. It also falls under exception (b), because the continued omissions of the Judge
12 constitute a “pattern of recurring judicial misconduct” and at least one of these wrongful acts or
13 failures to act fell within the 3 or 1 year periods, allowing the Commission to “consider all prior
14 acts or omission related to that pattern ;” It also falls under the subsection (c) exception due to
15 the allegation that the Judge concealed evidence, exempting this period from any computation of
16 time for filing the Complaint.

17 There is also common law support under the “continuing violation doctrine” that the
18 applicable statute of limitations is tolled during on-going violations of the applicable law. While
19 the Nevada Supreme Court has not considered this issue, by analogy, other courts have
20 developed this doctrine in the law of employment discrimination. In *Richards v. CH2M Hill,*
21 *Inc.* 29 P.3rd 175, 26 Cal. 4th 798, 111 Cal Rptr. 2d 87 (2001), the California Supreme Court
22 applied four (4) alternative analysis to the doctrine. Under the first analysis, the Ninth Circuit in
23 *Williams v. Owens-Illinois*, 665 F.2d 918(1982) held events prior to the limitations period were
24 actionable, because they violated the employee’s rights up to the point where the applicable
25 limitations period began. Secondly, the *Richards* court relied on equitable tolling as discussed
26 by Judge Posner in *Moskowitz v. Trustees of Purdue University*, 5 F.3d 279, 281-2 (7th Cir.
27 1993), which held “if it is only with the benefit of hindsight, after a series of discriminatory acts,
28

1 that the [employee] can realize that he is indeed a victim of unlawful discrimination, he can sue
2 in regard to all of the acts...even if the statute of limitations has run on all of them.” The third
3 analysis applies the multifactor test in *Berry v. Board of Sup's of L.S.U.*, 715 F.2d 971 (5th Cir.
4 1983): (1) did the alleged acts involve the same subject matter, connecting them in a continuing
5 violation; (2) were the actions frequent and (3) did the action/s have a degree of permanence
6 which trigger an awareness on the part of the victim of the duty to assert his rights. The fourth
7 approach is found in the Ninth Circuit case of *Counts v. Reno*, 949 F. Supp. 1478 (D. Hawaii
8 1996) which examined whether the separate acts are closely enough related to form a continuing,
9 or ongoing, violation which tolls the statute of limitations. Under the *Berry* or *Counts* roadmaps,
10 the actions of the Respondent Judge were ongoing, continuing, violations as she refused to
11 correct her error, despite the efforts of Complainant Dutcher. As a result, the one (1) year
12 application of the statute of limitations was tolled during the Dutcher's unsuccessful efforts to
13 reverse the Judge's actions which harmed him and violated the Canons. Mr. Dutcher had three
14 years to file his claim and he met that requirement.

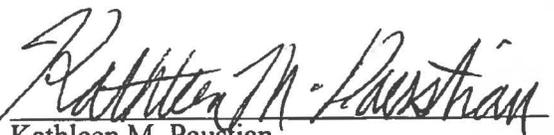
15 II.

16 CONCLUSION

17 Respondent's attempt to dismiss this case fails. The three (3) year provision in the
18 applicable Statute is met. Even if the Commission decides to apply the one (1) year provision, it
19 is obliterated by the three exceptions and the analogous case law. The Verified Complaint and
20 resultant Formal Statement of Charges must stand and this case shall proceed to hearing.
21

22 DATED this 24th day of May, 2013.

23
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25 By:


Kathleen M. Paustian
Special Counsel for the NCJD

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a copy of the foregoing **OPPOSITION TO RESPONDENT'S MOTION TO DISMISS FORMAL STATEMENT OF CHARGES AND JUDICIAL COMPLAINT** via e-mail and U.S. mail, postage prepaid, the 24th day of May, 2013 addressed to the following:

Daniel J. Albrechts, Esq.
Daniel J. Albrechts, Ltd..
601 South Tenth Street, Suite 202
Las Vegas, NV 89101
Albrechts@hotmail.com
Counsel for Respondent


Kathleen M. Paustian, Esq.