

BEFORE THE SPECIAL COURT OF REVIEW
APPOINTED BY THE CHIEF JUSTICE OF
THE SUPREME COURT OF TEXAS

MEMORANDUM OPINION

No. A-08-0001

In re Hon. Luis **AGUILAR**, Former District Judge,
120th Judicial District Court,
El Paso County, Texas

Opinion by: Karen Angelini, Presiding Justice

Sitting: Karen Angelini, Justice, Fourth Court of Appeals
Dori Contreras Garza, Justice, Thirteenth Court of Appeals
Bob Pemberton, Justice, Third Court of Appeals

Delivered and Filed:

DISMISSED

This is an appeal of the State Commission on Judicial Conduct's public reprimand by default of the Honorable Luis Aguilar, former judge of the 120th Judicial District Court, El Paso County. In accordance with the procedures set out in the Texas Government Code, this special court of review considered allegations of judicial misconduct against Judge Aguilar in a trial de novo

hearing.¹ *See* TEX. GOV'T CODE ANN. § 33.034(a), (c), (e) (Vernon 2004). After considering the evidence, we find that the Commission did not meet its burden to establish by a preponderance of the evidence that Judge Aguilar willfully or persistently engaged in sanctionable judicial misconduct. We, therefore, dismiss the charges before us and the related complaint.

I. FACTUAL AND PROCEDURAL HISTORY

A. Proceedings Before the State Commission on Judicial Conduct

On November 16, 2006, attorneys Thomas Stanton and Corey W. Haughland, and their client, Donald V. Labruzzo, filed a complaint against Judge Aguilar with the State Commission on Judicial Conduct. The Commission sent Judge Aguilar a copy of the complaint on December 13, 2006, and directed him to respond in writing to ten questions about the complaint. Three additional complaints against Judge Aguilar were also pending, and he had previously been directed to respond to these complaints as well.

Judge Aguilar's last day as judge of the 120th Judicial District Court was December 31, 2006, having been defeated in a primary run-off election in April 2006. Attorney Joseph L. Hood, Jr., who was representing Judge Aguilar on the pending complaints, failed to respond to the complaints as directed. On February 7, 2007, the Commission sent Hood a letter warning him that if no responses were received, the complaints would be considered by the Commission without responses. No responses were filed.

During its regularly scheduled meeting in February 2008, the Commission considered the unanswered complaints, and voted to sanction Judge Aguilar by default and issue a public reprimand against him. The Commission's public reprimand included the following findings:

¹The special court of review was appointed by the Chief Justice of the Texas Supreme Court. *See* TEX. GOV'T CODE ANN. § 33.034(c) (Vernon 2008).

17. In February 2005 through September 2006, Judge Aguilar presided over a civil suit [*Alvarez v. Labbruzzo*] brought by a Mexican corporation and its principal against a Texas corporation and its principal.
18. Judge Aguilar engaged in a series of *ex parte* communications with plaintiffs' counsel, and signed *ex parte* orders in favor of the plaintiffs.
19. Judge Aguilar improperly held the defendant principal in contempt of court without sufficient grounds and without proper notice.
20. Judge Aguilar laughed at and ridiculed one of the defendants, and used profanity toward him during an in-chambers conference about the case.
21. Judge Aguilar was asked to respond to the allegations made against him in this complaint, but failed and/or refused to do so.

Thereafter, Judge Aguilar retained another attorney to represent him before the Commission, and for the first time, responded in writing to the complaints addressed by the public reprimand. Additionally, Judge Aguilar appealed the Commission's public reprimand, and this special court of review was appointed to review the Commission's sanction and hear evidence from the Commission and Judge Aguilar.

B. Proceedings Before the Special Court of Review

On September 5, 2008, the Commission filed a charging document which consists of two charges. In the first charge, the Commission alleges Judge Aguilar engaged in sanctionable misconduct by failing to respond to the Commission's inquiries about the four complaints filed with the Commission. In the second charge, the Commission alleges Judge Aguilar engaged in sanctionable misconduct as set out in the complaints filed with the Commission. On September 16, 2008, Judge Aguilar filed an answer to the charging document, denying the allegations against him.

After discovery was conducted, two agreed motions to dismiss were filed. These motions were granted, resulting in the dismissal of three of the four complaints against Judge Aguilar.² Allegations arising from the only remaining complaint—the complaint designated CJC No. 07-0249-DI and initiated by Stanton, Haughland, and Labbruzzo—were tried to the special court of review on November 21, 2008.

At the trial de novo hearing, examiners presented evidence and argument on the Commission's behalf. *See* TEX. GOV'T CODE ANN. § 33.001(a)(5) (Vernon 2004). The evidence consisted exclusively of documentary evidence, including Judge Aguilar's written response to the complaint, witness deposition transcripts, and documents from the *Alvarez v. Labbruzzo* case, including reporter's records of hearings, pleadings, and orders. Further, the Commission took the position that Judge Aguilar's initial failure to respond to the Commission's inquiries was attributable to his former attorney, essentially abandoning the first charge in the charging document. The evidence and argument at the trial de novo hearing focused exclusively on the allegations raised in the only remaining complaint, CJC No. 07-0249-DI.

II. SPECIAL COURT OF REVIEW PROCEDURE

A special court of review functions much like a trial court in a civil case. *In re Jenevein*, 158 S.W.3d 116, 118 (Tex. Spec. Ct. Rev. 2003). The review conducted by a special court is "by trial de novo as that term is used in the appeal of cases from justice to county court." TEX. GOV'T CODE ANN. § 33.034(e) (Vernon 2004). Thus, a special court of review is not bound by the Commission's findings, conclusions, or order. To the extent practicable, the special court of review procedure is governed by the rules of law, evidence, and procedure that apply to the trial of civil actions generally.

²The dismissed complaints were designated as CJC No. 06-0041-DI, CJC No. 06-0132-DI, and CJC No. 07-0075-DI by the Commission.

Id. 33.034(f). After hearing the evidence, the special court of review is authorized to dismiss the charges, affirm the Commission's decision, impose a lesser or greater sanction, or recommend that formal proceedings be instituted by the Commission for censure or removal. TEX. R. REM'L/RET. JUDG. 9(d) (West 2008). The decision of the special court of review is not appealable. TEX. GOV'T CODE ANN. § 33.034(i) (Vernon 2004); TEX. R. REM'L/RET. JUDG. 9(c) (West 2008).

III. STANDARD AND BURDEN OF PROOF

At the trial de novo hearing, the burden is on the Commission to prove by a preponderance of the evidence that the respondent willfully committed the charged violations. *In re Davis*, 82 S.W.3d 140, 142 (Tex. Spec. Ct. Rev. 2002) (citing *In re Bell*, 894 S.W.2d 119, 131 (Tex. Spec. Ct. Rev. 1995)). A judge may be disciplined for willful or persistent conduct that is clearly inconsistent with the proper performance of his duties, or that casts public discredit upon the judiciary or the administration of justice. *Id.* at 148; *Bell*, 894 S.W.3d at 126; *see also* TEX. CONST. art. V, § 1-a(6). Willful or persistent conduct that is clearly inconsistent with the proper performance of a judge's duties includes the willful violation of a provision of the Code of Judicial Conduct, or the failure to cooperate with the Commission. *See* TEX. GOV'T CODE ANN. § 33.001(b)(2), (5) (Vernon 2004). In this context, the term "willful" has been defined as the improper or wrongful use of the power of his office by a judge acting intentionally, or with gross indifference to his conduct, involving more than an error of judgment or a lack of diligence. *In re Barr*, 13 S.W.3d 525, 534 (Tex. Rev. Trib. 1998) (citing *In re Thoma*, 873 S.W.2d 477, 489-90 (Tex. Rev. Trib. 1994)).

IV. DISCUSSION

The backdrop for this proceeding is a controversy involving Plásticos Promex, U.S.A., a maquiladora operating in Juarez, Mexico, that was owned and operated by shareholders Labbruzzo, Carlos Camarillo, Juan Alvarez, and Harbrook Tool & Manufacturing, Inc. A dispute over ownership percentages arose, and the parties filed several lawsuits. Judge Aguilar presided over one of these lawsuits, *Alvarez v. Labbruzzo, et al.* The *Alvarez* lawsuit involved a shareholder oppression claim brought by Alvarez, and a counterclaim for wrongful imprisonment brought by Labbruzzo. By all accounts, the *Alvarez* suit was hotly contested and aggressively litigated.

Labbruzzo ultimately sought to have Judge Aguilar recused. Labbruzzo's first recusal motion was denied. Labbruzzo's second recusal motion was granted in November 2006, approximately one month before Judge Aguilar left the bench.

In this proceeding, the Commission contends Judge Aguilar engaged in sanctionable judicial misconduct while presiding over the *Alvarez* suit because he: (1) displayed a lack of patience, dignity, and courtesy toward Labbruzzo and his attorneys in violation of Canon 3B(4); (2) failed to follow established and proper procedures in violation of Canon 2A; (3) denied litigants the right to be heard in violation of Canon 3B(8); and (4) failed to perform his judicial duties without bias or prejudice in violation of Canon 3B(5). *See* TEX. CODE JUD. CONDUCT, Canon 2A; Canon 3B, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. B (Vernon 2005).

A. Allegations of Lack of Patience, Dignity, and Courtesy

Canon 3B(4) of the Texas Code of Judicial Conduct provides: "A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials and

others subject to the judge's discretion and control." *See id.*, Canon 3B. The first clause of Canon 3B(4) states that a judge "shall" be patient, dignified, and courteous; the second clause of Canon 3B(4) states that a judge "should" require similar conduct of others. The distinction is significant. In defining its terminology, the Texas Code of Judicial Conduct provides that the use of "'[s]hall' or 'shall not' denotes binding obligations, the violation of which can result in disciplinary action." *Id.*, Canon 8. On the other hand, under the Code the use of "'should' or 'should not' relates to aspirational goals," but is not "a binding rule under which a judge may be disciplined." *Id.*, *see In re Jones*, 55 S.W.3d 243, 247 (Tex. Spec. Ct. Rev. 2000) (distinguishing mandatory and aspirational portions of Cannons 2A and 3B(2)).

Notwithstanding the allegation that Judge Aguilar violated Canon 3B(4), the Commission acknowledges in its trial brief that "a few isolated instances of insensitive, callous behavior, on their own, would likely not support a finding a sanctionable misconduct." We agree. Moreover, a finding of sanctionable misconduct is not warranted merely because a judge speaks in a firm or commanding tone, uses humor, or displays momentary frustration. As one reviewing court has stated:

While we recognize that a judge shall require order and decorum in proceedings before the court, and shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, we are ever mindful that judicial accountability does not require that judges be mere robots or be of precisely the same character with precisely the same personal qualities and attitudes. There must always be room in the judiciary of the State of Texas, which serves a pluralistic society, for differences in judicial style. There must always be room for the colorful judge as well as the more conventional judge. Differences in style and personality do not of themselves suggest misconduct. To the end that a courtroom may truly be a temple of justice and not the personal domain of the woman or man who happens to be presiding, any differences in style must always result in justice administered according to law and must be in accord with minimum standards of propriety. Canons 3B(3) and (4) of the Texas Code of Judicial Conduct seek to set those minimum standards.

Barr, 13 S.W.3d at 538-39.

1. El Cerrezo Prison Incident

The Commission alleges Judge Aguilar violated Canon 3B(4) by ridiculing Labbruzzo and his wrongful imprisonment claim during a status hearing held on August 1, 2005. In his wrongful imprisonment claim, Labbruzzo alleged Alvarez arranged for him to be wrongfully taken into custody in the presence of his wife and children and imprisoned at the El Cerrezo Prison in Juarez, Mexico. During the status hearing, the following exchange took place between Judge Aguilar, Haughland, and one of Alvarez's attorneys, Luther Jones:

Mr. Haughland: Well, there's an issue as to whether or not Mr. Alvarez breached his fiduciary duty by trying to start a competing entity in Mexico in the same business.

There's also wrongful imprisonment claims, since Mr. Alvarez had Don Labbruzzo jailed in the El CeReSo prison.

The Court: But how do I get jurisdiction over what happened in Juarez?

Mr. Haughland: There's Texas case law squarely on point. The Esterowitz case.

The Court: I take it he—

Mr. Haughland: The exact same thing was done.

The Court: Your client went to El CeReSo—

Mr. Haughland: What?

The Court: Your client went to El CeReSo?

Mr. Haughland: Yes. That's correct, Your Honor.

The Court: El CeReSo. How do you—"El CeReSo."

(Laughter)

Trying to communicate here.

(Laughter)

The Court: Let's just call it the Pokey, then, all right? Shall we just call it the J-town Pokey?³

(Laughter)

All right. All right.

Mr. Jones: And we probably will have procedural objections to you hearing that, but we'll read the case and see what it says. I don't think the Court has jurisdiction over that, but . . .

The Court: I'm just trying to oversimplify what we're going to be facing here.

Mr. Jones: But be that as it may, we look forward to trying that, if you do have jurisdiction.

The Court: Well—

(Laughter)

Mr. Jones: With great relish.

The Court: Well, I was just trying to over simplify it, I — it just seemed, in my simple mind, that if percentages are established, CPA assigns a value . . .

Mr. Jones: (Nods head.)

The Court: It's not going to be that simple, I take it?

Mr. Jones: We'll be asking for our fair share of the value. This is a — this is a stockholder appraisal suit.

The Court: But I thought they just give you a value based on the ownership percentages?

Mr. Haughland: What now?

The Commission cites the foregoing conduct as an example of what it asserts was Judge Aguilar's poor judicial demeanor constituting a violation of Canon 3B(4). The Commission further

³Slang for "jail;" the origin of the word is unknown. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1991).

asserts Labbruzzo found Judge Aguilar's conduct to be offensive and belittling, although they have not provided deposition testimony or an affidavit from Labbruzzo.

We cannot conclude from the evidence before us—which again, was presented solely in written form—that Judge Aguilar ridiculed Labbruzzo or that he commented on Labbruzzo's claim. From this record, it is not apparent whether the laughter noted in the transcript was attributable to Judge Aguilar or other individuals in the courtroom. Further, the transcript does not show the laughter was directed at Labbruzzo or his wrongful imprisonment claim. In fact, it could be concluded that the laughter was directed at Judge Aguilar and his difficulty in pronouncing the name of the prison.

The record also shows Haughland, who was present at the hearing, did not object or express any concern on the record about the comments made or the laughter that ensued. Additionally, one of Alvarez's attorneys, Marjorie Jobe, was present when the alleged misconduct took place. Jobe testified that she did not perceive Judge Aguilar's conduct as ridiculing Labbruzzo or his wrongful imprisonment claim and did not believe a reasonable person could do so. We find that the Commission has failed to meet its burden to show that Judge Aguilar's demeanor at the hearing falls below the minimum standards of judicial propriety.

2. Alleged Impatience and Sarcasm at the August 1, 2006 Hearing

Next, the Commission alleges Judge Aguilar violated Canon 3B(4) when he was "impatient and sarcastic" with Stanton at a hearing held on August 1, 2006. At the trial de novo hearing, the Commission argued Judge Aguilar's animosity toward Stanton was "palpable" even from the "cold record." The evidence presented on this issue includes the reporter's record and the depositions of Stanton, Jobe, and Jones. Again, we cannot say from the evidence before us that Judge Aguilar's demeanor was impatient and sarcastic during this hearing, and therefore, we must conclude the Commission failed to prove this allegation by a preponderance of the evidence.

The reporter's record from the hearing shows the following events transpired. At the beginning of the hearing, Stanton moved for a continuance because his co-counsel, Haughland, had a conflicting setting in a different court. Judge Aguilar noted that the motion for continuance had not been set for hearing and reminded Stanton that obtaining a setting was the movant's responsibility. Despite the absence of a setting, Judge Aguilar heard the motion for continuance and denied it. In denying the motion, Judge Aguilar noted Haughland was part of a large firm and his co-counsel, Stanton, was present.

Thereafter, Stanton presented his motion to reconsider the special master's fees previously ordered by Judge Aguilar. Stanton raised numerous objections to the special master's fees, including allegations of duplicate billing entries. Stanton had subpoenaed the special master, who was present in the courtroom. At one point, Judge Aguilar suggested Stanton call the special master as a witness; however, Stanton did not do so. When Stanton concluded his arguments, Jobe was given an opportunity to respond. Jobe emphasized a prior hearing in which Judge Aguilar had ordered the payment of the special master fees.

Stanton eventually called the special master as a witness, and he was sworn. However, Judge Aguilar then called a recess. Upon reconvening, Judge Aguilar denied the motion for reconsideration, and again ordered the defendants, including Labbruzzo, to pay the special master's fees. Judge Aguilar directed Jobe to prepare an order for his signature.

Stanton then requested the opportunity to make a record of the questions he would have asked the special master. Judge Aguilar commented that the weather was deteriorating quickly, the interstate was being closed due to flooding, and he needed to leave to pick up his children who were in a low-

lying area. Judge Aguilar granted Stanton's request and left the courtroom. Stanton remained in the courtroom, along with Jobe, Jones, and court personnel and made the record he had requested.

In addition to the reporter's record, the evidence on this issue includes the deposition testimony of Stanton, Jobe and Jones. In his deposition, Stanton testified Judge Aguilar's demeanor toward him at the August 1, 2006, hearing as "very sarcastic, very aggressive." In her deposition, Jobe testified Judge Aguilar's tone at the same hearing was firm, but not sarcastic. Jobe observed that Judge Aguilar's behavior was consistent with what she would expect from any judge enforcing settings and punctuality in the courtroom. Jones, too, was present at the hearing, and in his deposition testimony he observed that Judge Aguilar appeared frustrated at the hearing, but he also felt Judge Aguilar displayed the customary attitude any judge would display under similar circumstances.

We find that the Commission failed to carry its burden to show Judge Aguilar's demeanor at the hearing, especially when considered in light of the surrounding circumstances, rises to the level of sanctionable misconduct.

3. Alleged Use of Profanity

As another example of Judge Aguilar's alleged poor judicial demeanor, the Commission contends Judge Aguilar used profanity in chambers and in the presence of counsel for both parties sometime in the fall of 2006. Stanton testified in his deposition that Judge Aguilar informed him that "this f***ing case is going to be tried before I leave the bench." Stanton also testified that one of Alvarez's lawyers was present when the remark was made. Nevertheless, both Jobe and Jones denied hearing Judge Aguilar use the quoted language. We find the Commission did not establish by a preponderance of the evidence that Judge Aguilar used profanity on the occasion in question.

After reviewing the complained-of conduct, we find the Commission did not establish by a preponderance of the evidence that Judge Aguilar lacked the patience, dignity, and courtesy required of a judge. We, therefore, conclude Judge Aguilar did not violate Canon 3B(4).

B. Allegations of Failure to Follow Established and Proper Procedures

Canon 2A states: “A judge shall comply with the law and should act at all times in a way that promotes public confidence in the integrity and impartiality of the judiciary.” TEX. CODE JUD. CONDUCT, Canon 2A.

The Commission alleges Judge Aguilar violated Canon 2A by his failure to follow proper and established procedures in handling certain matters in the *Alvarez* case. First, the Commission alleges that Judge Aguilar failed to follow the law when he appointed a special master. Second, the Commission alleges Judge Aguilar failed to follow the law when he purportedly found Stanton, Haughland, and Labbruzzo, and the other defendants in contempt for failure to pay the special master’s fees. Third, the Commission alleges Judge Aguilar failed to follow the law in his handling of the second recusal motion.

Mere legal error does not rise to the level of a violation of Canon 2A. *Barr*, 13 S.W.3d at 544-45. The reason for this limitation is that the principle of judicial independence requires that judges be able to rule as they deem appropriate without the fear of retaliation or discipline. *Id.* at 544. “So long as judicial rulings are made in good faith, and in an effort to follow the law as the judge understands it, the usual safeguard against error or judicial overreaching lies in appropriate appellate review.” *Id.* at 545. Although most legal errors can be corrected on appeal, a judge may be disciplined for egregious legal errors, legal errors grounded in bad faith, or a persistent pattern of legal errors. *Id.* Thus, in order to find Judge Aguilar violated Canon 2A, we must find that he ruled or acted contrary

to clear and determined law about which there is no question or uncertainty, and that the legal error was egregious, made as part of a pattern or practice of legal error, or made in bad faith. *See id.*

As a preliminary matter, the evidence before us shows Labbruzzo filed four petitions for writ of mandamus against Judge Aguilar in the El Paso court of appeals. One mandamus petition complained of the purported contempt proceedings and order. Another mandamus petition complained of the order appointing a special discovery master. All of the petitions were denied in memorandum opinions. *See In re Labruzzo*, No. 08-06-00296-CV, 2006 WL 3371961, at *1 (Tex. App.—El Paso, Nov. 22, 2006, orig. proceeding); *In re Labbruzzo*, 225 S.W.3d 634, 634 (Tex. App.—El Paso 2006, orig. proceeding [mand. denied]); *In re Labbruzzo*, 225 S.W.3d 206 (Tex. App.—El Paso 2005, orig. proceeding); *In re Labruzzo*, 224 S.W.3d 277, 277 (Tex. App.—El Paso 2005, orig. proceeding). Additionally, the evidence shows Labbruzzo filed a petition for a writ of mandamus in the supreme court challenging the purported contempt order. This petition was also denied.

1. The Order Appointing Special Master

The Commission contends Judge Aguilar engaged in sanctionable judicial misconduct when he appointed a special discovery master in the absence of a Rule 11 agreement. We disagree. The Texas Supreme Court has held a trial court may appoint special discovery masters with the consent of the parties. *Simpson v. Canales*, 806 S.W.2d 802, 811 (Tex. 1991) (orig. proceeding). However, the law is not clear and determined that such consent must necessarily be memorialized in the form required under Rule 11. *See Tollett v. Carmona*, 915 S.W.2d 562, 564 n.5 (Tex. App.—Houston [14th Dist.] 1995, orig. proceeding) (“Since the issue was not raised in *Simpson*, the opinion in that case does not indicate whether such consent must comply with Texas Rule of Civil Procedure 11 to be

enforceable, or whether mere acquiescence by the parties, *i.e.*, of the type alleged in this case, would suffice.”). Additionally, trial courts may appoint special discovery masters “in exceptional cases, for good cause.” TEX. R. CIV. P. 171; *Simpson*, 806 S.W.2d at 811.

Here, the evidence on this issue includes the reporter’s record of hearings held by Judge Aguilar on February 15 and 16, 2005. Prior to these hearings, Alvarez had moved for the appointment of a receiver, and Labbruzzo had opposed the appointment of a receiver. It is apparent from the reporter’s record that a disagreement arose about whether the parties had reached an agreement for the appointment of a special master in lieu of a receiver. Judge Aguilar heard evidence on the matter. Thereafter, Judge Aguilar ordered the appointment of a special master, which he had the discretion and authority to do regardless of the parties’ agreement.

Given the circumstances presented, we cannot say the order appointing special master was contrary to clear and determined law, and that the legal error was egregious, made as part of a pattern or practice of legal error, or made in bad faith. *See id.* We, therefore, find the Commission has failed to establish that Judge Aguilar’s appointment of a special discovery master amounted to a willful violation of Canon 2A.

2. The Purported Contempt Order

Next, the Commission alleges Judge Aguilar failed to follow the law when he found Labbruzzo and his attorneys in contempt of court and sanctioned them for failing to pay the special master fees as previously ordered by the court. The Commission contends Judge Aguilar violated Canon 2A because he failed to follow established and proper constructive contempt procedures. Nevertheless, the record indicates the proceeding and the resulting order involve sanctions, rather than constructive contempt.

Both sanction and contempt proceedings enable a court to enforce its orders by imposing a penalty for failure to comply with a court order. *In re Acceptance Ins. Co.*, 33 S.W.3d 443, 450 (Tex. App.—Fort Worth 2000, orig. proceeding); *Hayes v. Hayes*, 920 S.W.2d 344, 346 (Tex. App.—Texarkana 1996, writ denied). However, by definition an order of contempt is executed through incarceration or monetary fines. *Acceptance*, 33 S.W.3d at 450; TEX. GOV'T CODE ANN. § 21.002 (Vernon 2008).⁴ Additionally, monetary fines for contempt are not payable to the opposing party. *Acceptance*, 33 S.W.3d at 450.

At the hearing held on August 1, 2006, no one mentioned the imposition of monetary fines or incarceration as a possible penalty. The resulting order, signed by Judge Aguilar on August 3, 2006, finds the defendants are “in contempt of the orders of the court related to the prompt payment of the Special Master fees.” The order requires the defendants to pay the special master fees by a specific date and time, orders them to pay the special master fees associated with attending the hearing “as sanctions,” and orders them to pay Alvarez’s attorney’s fees “as sanctions.” However, the order does not impose monetary fines or incarceration as a penalty and therefore, is not a contempt order. *See id.* (holding an order was not a contempt order when neither monetary fines nor incarceration were sought or granted as a penalty). We find the Commission has failed to establish that Judge Aguilar willfully violated Canon 2A as alleged.

⁴Section 21.002 of the Texas Government Code provides in part:

(a) Except as provided by Subsection (g), a court may punish for contempt.

(b) The punishment for contempt of a court other than a justice court or municipal court is a fine of not more than \$500 or confinement in the county jail for not more than six months, or both such a fine and confinement in jail.

TEX. GOV'T CODE ANN. 21.002(a), (b) (Vernon 2008).

3. The Recusal Motion

In their trial brief, the Commission cites Judge Aguilar's handling of the second motion to recuse as another example of his failure to follow proper and established procedures. At the trial de novo hearing, however, the Commission acknowledged there was no sanctionable misconduct arising from the recusal procedure followed by Judge Aguilar. We, therefore, need not address the recusal procedure.

In sum, the preponderance of the evidence does not establish that Judge Aguilar willfully or persistently failed to comply with the law; and therefore, we find Judge Aguilar did not willfully or persistently violate Canon 2A.

C. Allegations of Denial of the Right to be Heard

Canon 3B(8) states: "A judge shall accord every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." TEX. CODE JUD. CONDUCT, Canon 3B(8).

At the trial de novo hearing, the Commission conceded there was no evidence to support allegations that Judge Aguilar engaged in a series of ex parte communications with Alvarez's counsel or signed improper ex parte orders in favor of Alvarez. Instead, the Commission alleged Judge Aguilar violated Canon 3B(8) because he granted, without a hearing, Alvarez's motion for release of discovery documents in the custody of the special master. We note the motion itself requests a hearing, and attached to the motion are several documents, a proposed order setting a hearing, a proposed order requesting a submission date, and a proposed order granting the motion. Judge Aguilar signed the proposed order granting the motion.

We agree with the Commission that Labbruzzo and the other defendants were initially denied the right to be heard on this matter. However, we find that Judge Aguilar's conduct in this instance does not rise to the level of sanctionable judicial misconduct. Sanctionable judicial misconduct must be willful, which requires a showing of intentional or grossly indifferent conduct. *See Davis*, 82 S.W.3d at 148. A judge acts intentionally when he acts with the conscious objective of causing the result; gross indifference is indifference that is flagrant, shameful, and beyond all measure of allowance. *Barr*, 13 S.W.3d at 534. The Commission has made no showing of intentional or grossly indifferent conduct. To the contrary, the initial failure to set the motion for hearing appears to have been a mistake. In his written response to the Commission, Judge Aguilar stated he signed the order granting the motion because a timely response was not filed, and he believed the motion was unopposed. Judge Aguilar further stated that, based on Stanton's earlier representations to the court, including Labbruzzo's motion requesting disclosure of communications from Alvarez to the special master, he was under the impression that all of the materials in the custody of the special master were fully discoverable.

Additionally, we find it significant that Judge Aguilar immediately set Labbruzzo's motion for reconsideration for hearing by written submission. The Texas Rules of Civil Procedure allow trial courts to rule on motions by submission rather than by oral hearing when no oral hearing is necessary. *See Martin v. Martin, Martin & Richards, Inc.*, 989 S.W.2d 357, 359 (Tex. 1998) ("Unless required by the express language or the context of the particular rule, the term 'hearing' does not necessarily contemplate either a personal appearance before the court or an oral presentation to the court.").

We, therefore, find the Commission has not established by a preponderance of the evidence that Judge Aguilar willfully or persistently violated Canon 3B(8).

D. Allegations of Bias or Prejudice

Canon 3B(5) of the Code of Judicial Conduct provides: “A judge shall perform judicial duties without bias or prejudice.” TEX. CODE JUD. CONDUCT, Canon 3B(5).

To support their allegation that Judge Aguilar failed to perform his judicial duties without bias or prejudice and thereby violated Canon 3B(5), the Commission relies on many of the incidents we have discussed earlier in this opinion: the purported contempt hearing, the order releasing corporate documents, and the handling of the second motion to recuse. The Commission cites these incidents as examples of Judge Aguilar’s alleged loss of professional distance and his personal embroilment in the *Alvarez* litigation. For additional support, the Commission points to Judge Aguilar’s ultimate recusal from the *Alvarez* case.

During the course of this proceeding, we have had the opportunity to review a significant portion of the trial court proceedings in the *Alvarez* case, including numerous hearing transcripts, pleadings, and other court documents. Notably, the reporter’s record of the recusal hearing was not offered into evidence at the trial de novo hearing and is not before us. We cannot infer Judge Aguilar engaged in sanctionable judicial misconduct from the order of recusal alone or the other evidence before us. Based on our review of the evidence presented at the trial de novo hearing, we do not perceive that Judge Aguilar willfully or persistently failed to perform his judicial duties without bias or prejudice. We, therefore, find the Commission did not establish by a preponderance of the evidence that Judge Aguilar violated Canon 3B(5).

V. CONCLUSION

We find the Commission has failed to meet its burden to establish Judge Aguilar violated the standards governing judicial conduct. Accordingly, the charges before us and the related complaint are dismissed without sanction.

Karen Angelini,
Presiding Justice

BEFORE THE SPECIAL COURT OF REVIEW
APPOINTED BY THE CHIEF JUSTICE OF
THE SUPREME COURT OF TEXAS

JUDGMENT

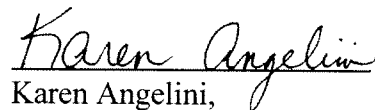
No. A-08-0001

In re Hon. Luis **AGUILAR**, Former District Judge,
120th Judicial District Court,
El Paso County, Texas

BEFORE JUSTICE ANGELINI, JUSTICE GARZA, AND JUSTICE PEMBERTON

In accordance with the court's opinion of this date, judgment is RENDERED in favor of the respondent, the Honorable Luis Aguilar, and complaint CJC No. 07-0249-DI filed with the State Judicial Conduct Commission is DISMISSED without sanction to the respondent.

SIGNED January 12, 2009.


Karen Angelini,
Presiding Justice