

IN RE LOZANO, S.Ct. No. 29,264 (Filed June 8, 2010)

**IN THE MATTER OF JAVIER LOZANO,
Municipal Court Judge, Village of Columbus, New Mexico**

NO. 29,264

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

June 8, 2010, Filed

INQUIRY CONCERNING A JUDGE
NO. 2009-025

COUNSEL

Randall D. Roybal, Elizabeth A. Garcia, Robin S. Hammer, Albuquerque, NM, for
Judicial Standards Commission

Javier Lozano, Columbus, NM, for Respondent

FORMAL REPRIMAND

PER CURIAM.

{1} This matter came before the Court on a petition for discipline filed by the Judicial Standards Commission (Commission) concerning the Honorable Javier Lozano (Respondent), the municipal judge in Columbus, New Mexico. In a stipulation and consent to discipline, the parties agreed that Respondent's conduct violated several provisions of the Code of Judicial Conduct and constituted willful misconduct in office. Having heard oral argument, we accepted the findings and conclusions concerning Counts I and II of the stipulated petition; we rejected, with the consent of the parties, the conclusions regarding Count III; and we ordered, among other stipulated sanctions, this formal public reprimand.

BACKGROUND

{2} The petition addresses three separate matters that form the basis of the Commission's recommendation for discipline. The first matter involves Respondent's acceptance of per diem expenses for a training session that never took place. In November 2008, Respondent contacted Judge Barbara Aldaz-Mills, the municipal judge for the City of Aztec, New Mexico, about setting up a class for him on code enforcement training. Judge Aldaz-Mills offered to try to set up a meeting on code enforcement issues with several municipal judges. Judge Aldaz-Mills was unable to set up the meeting on the dates Respondent proposed, during the week of December 22 through

December 25, because of the holiday season, but she agreed to coordinate a meeting with the City of Aztec compliance officer during that period. At Respondent's request, on December 17, 2008, Judge Aldaz-Mills sent a fax to Respondent in Columbus regarding this proposed meeting. Respondent then certified and submitted a travel voucher to the Village of Columbus claiming reimbursement for per diem expenses in the amount of \$260.00 for code enforcement training in Aztec from December 22 through December 25, 2008. Neither the training nor the meeting ultimately occurred. At some point, Judge Aldaz-Mills informed Respondent that this meeting would not be possible, given the court's schedule during the holiday week. Respondent told Judge Aldaz-Mills he would be traveling to Aztec anyway, and Judge Aldaz-Mills left a small packet of code enforcement materials for Respondent to pick up.

{3} Respondent left Columbus in the morning of December 23, 2008, and arrived in Aztec late that same day. After picking up the packet in Aztec, Respondent drove to Durango, where he spent two days before returning to Columbus on December 26, 2008. On December 26, 2008, Respondent told the treasurer for the Village of Columbus that the training had been cancelled because of the unforeseen circumstance of bad weather. Respondent was reimbursed by the Village of Columbus for \$260.00 in per diem expenses.

{4} The second matter arose in the context of a hearing presided over by Respondent in a case regarding a building permit. At the hearing, held on February 18, 2009, were a code enforcement officer and the defendant, both of whom were women. The code enforcement officer had previously filed a claim against Respondent with the Equal Opportunity Employment Commission (EEOC) based on improper touching, and as part of the resulting settlement agreement, the EEOC had advised the Mayor of Columbus to enforce the village's sexual harassment policy. Consequently, the Mayor had met with Respondent in January of 2009 to discuss the EEOC claim and Respondent's conduct. Despite this earlier discussion, during the hearing on the building permit, Respondent kept moving his chair closer to the two women, kept moving his hands around, and touched the defendant. Both women felt uncomfortable and moved away from Respondent.

{5} The stipulated facts in the third matter state that Respondent failed to conduct the trial in the case involving the building permit within the 182-day period required under Rule 8-506 NMRA. Although the period within which to try the defendant had expired, Respondent explained to the defendant that the citation had never been logged into the court's computer. The defendant pleaded guilty to a charge of not having a building permit and was fined by the court.

{6} The parties agreed that Respondent's conduct in these three matters violated the New Mexico Code of Judicial Conduct and constituted willful misconduct in office. They also agreed that Respondent should be suspended without pay for ninety days, receive a formal reprimand, participate in a twelve-month formal mentorship and supervised probation, reimburse the Village of Columbus for improperly received per diem

expenses, and undergo training in financial practices and procedures and in the matter of sexual harassment.

DISCUSSION

{7} Under Article VI, Section 32 of the New Mexico Constitution, in order to discipline judges, "we must be satisfied by clear and convincing evidence that there is willful judicial misconduct." *In re Castellano*, 119 N.M. 140, 149, 889 P.2d 175, 184 (1995) (per curiam). "[W]ilful misconduct in office is improper and wrong conduct of a judge acting in his official capacity done intentionally, knowingly, and, generally, in bad faith. It is more than a mere error of judgment or an act of negligence." *In re Locatelli*, 2007-NMSC-029, ¶ 8, 141 N.M. 755, 161 P.3d 252 (per curiam) (internal quotation marks and citation omitted). Clear and convincing evidence is evidence that "instantly tilt[s] the scales in the affirmative when weighed against the evidence in opposition and the fact finder's mind is left with an abiding conviction that the evidence is true." *State ex rel. Children, Youth & Families Dep't v. Joseph M.*, 2006-NMCA-029, ¶ 15, 139 N.M. 137, 130 P.3d 198 (internal quotation marks and citation omitted).

{8} This case comes before us on stipulated facts and unchallenged findings that are binding on the parties on appeal. See *Stueber v. Pickard*, 112 N.M. 489, 491, 816 P.2d 1111, 1113 (1991). However, we review conclusions of law and recommendations for discipline de novo. See *In re Bristol*, 2006-NMSC-041, ¶¶ 16-18, 140 N.M. 317, 142 P.3d 905 (per curiam). In reviewing the conclusions of law, we determine whether the law was correctly applied to the facts. See *Golden Cone Concepts, Inc. v. Villa Linda Mall, Ltd.*, 113 N.M. 9, 12, 820 P.2d 1323, 1326 (1991) (citation omitted). We first address the conclusions of law about each matter in turn and then address the recommendations for discipline.

Conclusions of Law

{9} ***Per diem expenses.*** Respondent admits that he received per diem expenses for a training session that never took place. The Commission concludes that this conduct violated the following provisions of the Code of Judicial Conduct: Rule 21-100 NMRA (requiring a judge to establish, maintain, and enforce high standards of conduct to uphold the integrity and independence of the judiciary); Rules 21-200(A) and (B) (requiring a judge to avoid impropriety and the appearance of impropriety and to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary, and requiring a judge to respect and comply with the law and prohibiting the judge from lending the prestige of judicial office to advance the judge's private interests); Rule 21-300(C)(1) NMRA (requiring a judge to discharge his or her administrative responsibilities without bias or prejudice); and Rule 21-500(A)(1), (2), and (4) NMRA (requiring a judge to discharge his or her extra-judicial activities so that they do not cast doubt on the judge's ability to act as a judge, do not demean the judicial office, and do not violate the judge's oath to uphold the laws and constitutions of the United States and New Mexico).

{10} Even assuming Respondent believed at the time he submitted the voucher for reimbursement that he would be traveling to Aztec for training, once that training failed to materialize, he should not have accepted the money even if he still made the trip and picked up a package of materials in Aztec. The stipulated facts thus support a conclusion that Respondent knowingly accepted reimbursement for expenses to which he was not entitled. By accepting per diem expenses for a trip to a training session that never occurred, Respondent breached the public trust, and his conduct could reasonably be perceived as an abuse of the power of judicial office.

{11} As we have previously written, "[t]he conduct prescribed for judges and justices is more stringent than conduct generally imposed on other public officials." *In re Romero*, 100 N.M. 180, 183, 668 P.2d 296, 299 (1983). The reason for this elevated standard is that "[t]he United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society." *Model Code of Judicial Conduct*, pmb. (2007). Accordingly, judges "should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence." *Id.* We agree, therefore, with the Commission's conclusions that Respondent's conduct violated provisions of Rules 21-100, 21-200(A) and (B), 21-300(C)(1), and 21-500(A)(1), (2), and (4) of the Code of Judicial Conduct and constituted willful misconduct in office.

{12} ***Improper courtroom demeanor.*** Respondent admits that during a hearing on a matter involving a building permit, he kept moving his chair closer to the code enforcement officer and the defendant, both of whom were women, and that he moved his hands around and touched the defendant. What makes this conduct more troubling, however, is that the code enforcement officer had previously been awarded damages in a claim she had filed with the EEOC concerning Respondent, based on improper touching by Respondent. The Commission concludes that Respondent's conduct violated the following rules: Rule 21-100 NMRA (requiring a judge to establish, maintain, and enforce high standards of conduct to uphold the integrity and independence of the judiciary); Rule 21-200(A) and (B) NMRA (requiring a judge to avoid impropriety and the appearance of impropriety and to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary, and prohibiting the judge from acting in a way that conveys the impression that personal relationships influence the judge's rulings); and Rule 21-300(B)(2), (3), and (4) NMRA (requiring a judge to be faithful to the law, maintain order and decorum in the courtroom, and be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in the judge's official capacity).

{13} A judge exercises great power over those who appear in the courtroom and, consequently, must be proportionately sensitive to the effects of the judge's conduct in the courtroom. See *In re Vincent*, 2007-NMSC-056, ¶ 21, 143 N.M. 56, 172 P.3d 605 (per curiam) (stating that "[j]udges hold a unique position in society, and with that position comes the unique power and responsibility of administering justice" (alteration

in original) (internal quotation marks and citation omitted)). An abuse of that power undermines the public trust and thus our legal system. *See id.*

{14} In light of the fact that the mayor had informed Respondent of the code enforcement officer's earlier EEOC complaint and settlement, Respondent should have been aware that his conduct, which included sitting too close to the parties and touching them when he spoke to them, was not appropriate judicial conduct. Not only may such conduct be unwanted, but it may also convey the impression that a judge is not impartial. We note that the Commission has not specifically alleged that Respondent's conduct constituted sexual harassment or a violation of Rule 21-300(B)(5) NMRA, which prohibits a judge from manifesting bias or prejudice based on sex, by either words or conduct. However, we point out that the commentary to that rule states that "[a] judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment." Rule 21-300(B)(5) cmt. This commentary repeats the requirement articulated in Rule 21-200 that judges must avoid not only impropriety but the appearance of impropriety. We agree with the Commission that the stipulated facts support a conclusion that Respondent's demeanor in the courtroom was inappropriate, that the conduct violated provisions of Rules 21-100, 21-200(A) and (B), and 21-300(B)(2), (3), and (4), and that it constituted willful misconduct in office.

{15} ***Exceeding jurisdiction.*** The Commission and Respondent stipulated that Respondent commenced a trial outside the 182-day time period specified in Rule 8-506(B) NMRA. The Commission concluded that Respondent had, consequently, exceeded his jurisdiction and violated the following provisions of the Code of Judicial Conduct: Rule 21-100 NMRA (requiring a judge to establish, maintain, and enforce high standards of conduct to uphold the integrity and independence of the judiciary); Rule 21-200(A) NMRA (requiring a judge to avoid impropriety and the appearance of impropriety and to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary); and Rule 21-300(C)(1) and (2) NMRA (requiring a judge to discharge his or her administrative responsibilities without bias or prejudice, maintain professional competence, and require his or her staff to act in the same way).

{16} We do not agree that the stipulated facts support this conclusion. Rule 8-506(C) NMRA permits municipal court judges to extend the time for the commencement of trial for up to sixty days after the 182-day time period has expired. And we have made clear that time limits in our rules are not jurisdictional requirements. *See State v. Savedra*, 2010-NMSC-025, ¶ 2, 148 N.M. 301, 236 P.3d 20 (pointing out that commencing a trial within 182 days is not a jurisdictional requirement); *Govich v. North American Sys., Inc.*, 112 N.M. 226, 230, 814 P.2d 94, 98 (1991) (stating that the time limit for filing a notice of appeal is not jurisdictional, and an appellate court has discretion to hear an appeal even if mandatory time limits are not complied with). While Respondent acknowledges that he had not extended the time to commence trial, his ability to do so precludes any conclusion that he lacked jurisdiction to begin a trial outside the 182-day time limit. The Commission neither alleged nor demonstrated that Respondent's failure to comply with the 182-day time limit for commencing trial was willful or the result of an improper purpose. Accordingly, we decline to accept the Commission's conclusion that conduct

described in the stipulated facts violated Rules 21-100, 21-200(A), or 21-300(C)(1) and (2) or constituted willful misconduct in office.

Recommendations for Discipline

{17} The Commission has recommended a ninety-day unpaid suspension, followed by twelve months of supervised probation and formal mentorship, a formal reprimand, reimbursement of per diem expenses, and training in both public financial practices and procedures and training concerning sexual harassment. In imposing discipline on judges, this Court looks "at such factors as the nature of the misconduct and patterns of behavior." *In re Garza*, 2007-NMSC-028, ¶ 26, 141 N.M. 831, 161 P.3d 876 (per curiam). We also note that the *Model Code of Judicial Conduct* states that when imposing discipline on judges, courts should consider "factors such as the seriousness of the transgression, the facts and circumstances that existed at the time of the transgression, the extent of any pattern of improper activity, whether there have been previous violations, and the effect of the improper activity upon the judicial system or others." *Model Code of Judicial Conduct*, Scope, ¶ 6 (2007).

{18} At oral argument on this matter, we agreed with the Commission that the violations were serious because of the effect of such violations on the judicial system and the public's trust in its honesty, fairness, and impartiality. In addition, we recognized that this was the second time Respondent has appeared before this Court in a disciplinary matter. On the earlier occasion, the judge was reprimanded and fined for having business interests that conflicted with his judicial duties. As the Commission pointed out, however, Respondent has accepted responsibility for his actions in the current matter and has expressed a willingness to undergo the necessary training to ensure that such conduct will not occur again. In this case, we agree with the Commission that Respondent's conduct, particularly in light of previous misconduct, is serious and warrants serious consequences, but we recognize, as did the Commission, that Respondent is willing to learn from his mistakes. While we consider this a close case, we agree that the combination of a three-month suspension without pay, a published reprimand, remedial training, and formal supervision will constitute a serious form of discipline and provide Respondent an opportunity to learn from his mistakes and change his behavior. Balancing the seriousness of the misconduct in this case with Respondent's acceptance of responsibility for his actions and willingness to correct his conduct, we accept the Commission's recommendations for discipline.

CONCLUSION

{19} For the foregoing reasons, we have imposed the following discipline in this matter:

- (1) Respondent shall receive a formal reprimand, to be published in the Bar Bulletin.
- (2) Respondent shall be suspended from judicial office for ninety days without pay.

(3) Following the period of suspension, Respondent shall receive twelve months of supervised probation and formal mentorship, covering all substantive and procedural issues addressed in the stipulation agreement, including but not limited to Respondent's obligations and responsibilities under the Code of Judicial Conduct and remedial training concerning proper judicial demeanor, court administration, jurisdiction, and proper performance of judicial duties. The probation supervisor/mentor who will be recommended by the Judicial Standards Commission must report the progress and outcome of the mentorship to this Court and to the Commission.

(4) Respondent shall reimburse the Village of Columbus \$260.00 for per diem expenses that Respondent improperly received, to be paid on or before May 26, 2010, by certified check made payable and hand-delivered to the Village of Columbus Treasurer, with proof of the payment to be provided to this Court and to the Judicial Standards Commission.

(5) Respondent shall complete training by the Judicial Education Center, or other entity recommended by the Judicial Standards Commission and approved by this Court, in public financial practices and procedures, including the submission of public vouchers. All costs and expenses required or incurred to attend and complete this training, including travel, accommodations, and meals shall be borne by Respondent, and Respondent shall promptly provide the Commission with proof of successful completion of this requirement.

(6) Respondent shall complete training by the Judicial Education Center, or another entity recommended by the Judicial Standards Commission and approved by this Court, in sexual harassment. Respondent shall bear at his own expense all costs required to attend and complete this training, including travel, accommodations, meals, and all other expenses incurred in relation to completing this requirement. Respondent shall promptly provide the Commission with proof of successful completion of this requirement.

(7) Respondent shall abide by all the terms of the Stipulation Agreement and Consent to Discipline.

(8) Respondent and the Commission shall bear their own costs and expenses in this matter.

{20} IT IS SO ORDERED.

CHARLES W. DANIELS, Chief Justice

PATRICIO M. SERNA, Justice

PETRA JIMENEZ MAES, Justice

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Justice