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**Via Hand Delivery**

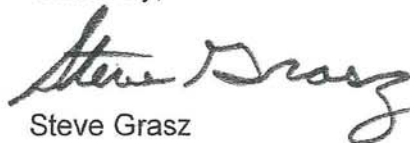
Hon. Michael G. Heavican  
Chief Justice  
Nebraska Supreme Court  
State Capitol #2214  
PO Box 98910  
Lincoln, NE 68509

Re: Judicial Nominating Commission-  
of the Nebraska Supreme Court--Time Sensitive Communication

Dear Chief Justice Heavican:

Pursuant to Neb. Ct. R. § 1-602(C) please find enclosed a Complaint seeking the disqualification of a member of the Judicial Nominating Commission for the of the Nebraska Supreme Court and seeking further proceedings by the Commission. A supporting Affidavit is also enclosed.

Sincerely,

  
Steve Grasz

Enclosure

In the Matter of the Vacancy  
Created by the Retirement of

[illegible]

(1) TO DISQUALIFY A  
AS A MEMBER OF  
THE COMMISSION; AND

(2) TO FURTHER CONSIDER THE  
QUALIFICATIONS OF

B

1. Challenges to the impartiality of a member of a judicial nominating commission may be brought by "any person." Neb. Ct. R. § 1-602(C). The undersigned is a person who is a practicing Nebraska attorney who formerly served as the Chief Deputy Attorney General of the State of Nebraska for more than a decade and who has authored a published article on preserving the merit system of judicial selection. The undersigned brings this complaint on his own behalf.

3. Many communications to, by or between members of the Supreme Court First District Judicial Nominating Commission ("Commission") are to be confidential. However, confidentiality does not apply in the case of a charge of misconduct in office.

Neb. Rev. Stat. § 24-812. This Complaint charges misconduct in office by A

(" A ").

**Subject of the Complaint**

4. A is a member of the Supreme Court Judicial Nominating Commission (the "Commission"). A was an attorney alternate member who was seated to replace another member of the Commission who recused herself. A's conduct warrants his removal from the Commission.

5. A planned and participated in a calculated effort to destroy the reputation of B (" B ") in a manner which made it difficult or impossible for B to fairly respond. A did so because he considers B to be a political conservative. A cloaked his opposition in gender-based comments which were more palatable than the raw political differences which formed the fundamental basis of his opposition to B.

6. A who in his partisan political capacity and personally, is an outspoken public critic of individuals holding conservative political and religious views, engaged in improper and partisan questioning of B during the public and private portions of the Commission proceedings, in a manner intended to reveal political or personal religious views of applicant B.

7. A, who is Chairman of the Nebraska Party and an outspoken public critic of capital punishment, engaged in improper and partisan questioning of B during the public hearing on the subject of the death penalty of applicant B. A's questioning of B was openly biased and antagonistic.

8. A asked B if as a matter of his own personal conscience, he could "kill someone" facing the death penalty.

9. Secondly, A then asked B if he would, as a matter of his personal political views or religious conscience, apply the law of judicial bypass with regard to a young woman that sought an abortion without consent of her parents.

A gave the example of a judge in Nebraska that expressed that he could not follow the law due to his religious beliefs and questioned B regarding whether his conscience would permit him to apply the law.

10. These questions were intended to reveal the political or religious views of applicant B, in violation of the Commission's oath and constitutional duty to not evaluate a candidate on the basis of their political views or religion. These questions also discredited the judicial selection process and disclosed partisanship and partiality on political and religious grounds in the consideration of applicant B.

11. A also made biased remarks during the public hearing indicating his preference for nominees of a particular gender. A commented favorably on the gender of the other candidates, excluding only B. After the presentation of a female judge, A stated how proud he was of the women applicants for the Court.

12. After publicly stating his gender bias with regard to applicants for the open seat on the Court, A engaged in an orchestrated effort to paint applicant B as a sexist and "anti-woman" during the private portion of the Commission's proceedings. A engaged in a reprehensible and premediated scheme to accomplish this goal by confronting B, in the presence of other Commission members, with false and malicious accusations of having mistreated a female law



partner of A and of demonstrating discriminatory behavior towards female attorneys. The accusations of A directed against B are materially false and were made for political purposes.

13. Following the hearing, A publicly posted biased comments on social media which further reflected discredit upon the judicial selection process and disclosed partiality in the consideration of the applicants. In a Facebook posting immediately following the hearing, A wrote that the Commission had "made history" by nominating three candidates who were all women. This statement reflects an improper bias and basis for evaluating candidates for the position under consideration by the Commission, and also reflects an improper bias and basis for supporting a decision to not advance B's name to the Governor.

14. A knew at the time he took his oath of office and swore to abide by the rules and ethics of the Commission that he and/or his law partner may provide evidence or testify against B to the Commission. Moreover, A was a false witness, as he affirmatively mischaracterized material facts to the Commission to the prejudice of B.

15. Two letters were apparently submitted to the Commission at the last moment, thus ensuring that their scurrilous accusations could not be adequately answered by B. The letters were written by lawyers who had not spoken or worked with B in approximately eighteen years. A is a plaintiff's personal injury trial lawyer. Both of the authors of the letters also are plaintiff's personal injury trial lawyers who are colleagues with A both professionally and politically. The letters, about which A may well have communicated with the authors, contained complaints

about B's political views and asserted that terrible things would flow from B's political views regarding women, gay rights advocates or members of same sex relationships and other issues.

16. A lent support to these claims by raising an allegation that he attributed to his law partner, C ("C"). A confronted B with an allegation that B had treated C discriminatorily in a Lancaster County Personnel Board matter because C is a woman. Those damaging allegations, asserted by A, were flatly false in key material respects. (See Exhibit A, attached hereto and incorporated herein by reference)(Affidavit of attorney E )

17. By buttressing the damaging letters regarding 18 year old characterizations of B from A's colleagues with more recent, though false, allegations, A sought to confirm suspicions about B's political or religious views. This conduct by A effectuated his purpose at the Commission, which was to submarine the application of a qualified applicant whose politics he disliked.

18. B was provided a brief opportunity to comment on the letters that he was shown only moments before he was asked to address them. B did not have a full opportunity to rebut the comments in the letters.

19. B was provided with even less of an opportunity to respond to A's claim that he had mistreated C based on C's gender. B did not recall the details of the conversation between C and B as described by A at that moment because it so grossly varied from the facts. It is essential for the Commission members to understand what actually occurred during the incident A raised. During the private meeting with the Commission, A reported to the

Commission that his law partner, C, had told him that B had "yelled at her" at a hearing of the Lancaster County Personnel Board. A stated that C told him that she could not understand why B was "yelling at her" but concluded that it was because she was a woman, as B was not yelling at D, another lawyer member of the Personnel Board. A emphasized that B yelled at her because she was a woman, and then refused to apologize to C for doing so.

20. These allegations were false and designed to advance A claim that B was a sexist. Contrary to what A stated to the Commission, a witness to the conversation between C and B that A was referring to has confirmed that B never yelled at C, that there was a mutually engaged discussion between two lawyers that was at all times appropriate, and no harsh, demeaning, improper or sexist behavior of any kind was directed at C by B. (See Exhibit A). Furthermore, this witness confirms that D was not even present at the hearing in question.

#### **Legal and Ethical Bases for the Complaint**

As a member of the Commission, A is duty-bound to the following obligations of Commission members:

21. **Commission members take an oath to faithfully discharge the duties of their office.** Neb. Rev. Stat. § 24-801.01.

22. **Commission members subscribe to ethical standards under which they promise the following:** "In the performance of their duties, the judicial nominating commission members shall be ever mindful that they hold positions of public



trust. No commission member shall conduct himself or herself in a manner which reflects discredit upon the judicial selection process or discloses partisanship or partiality in the consideration of applicants. Consideration of applicants shall be made impartially, discreetly, and objectively." (Statement of Understanding of Ethical Considerations)

23. **Commission members agree in writing that they will:** "avoid preselection of nominees, 'hidden agenda,' or consideration of factors other than the merit of the applicants." They further agree they will not "discriminate against any applicant because of the applicant's race, religion, gender, political affiliation, age, or national origin. (Statement of Understanding of Ethical Considerations)

24. **Commission members must disqualify themselves if there is:** "Any instance in which the member of the commission would cast his or her vote on a basis other than an applicant's qualification for the office." (Neb. Ct. R. § 1-602)

25. **Nebraska law prohibits attempting to influence the Commission for political reasons or on the basis of personal agendas:** "It shall be unlawful and a breach of ethics for any . . . lawyer or any other person . . . to attempt to influence any judicial nominating commission in any manner and on any basis except by presenting facts and opinions relevant to the judicial qualifications of the proposed nominees . . . at or prior to the time of the public hearing." Neb. Rev. Stat. § 24-811.

26. **Commission members are to evaluate candidates according to objective criteria:** "In determining whether a candidate is sufficiently qualified to be nominated for a judicial vacancy, a judicial nominating commission shall consider the candidate's knowledge of the law, experience in the legal system, intellect, capacity for



fairness, probity, temperament, industry, and such other factors relating to judicial quality as the Supreme Court may by rule promulgate." Neb. Rev. Stat. § 24-811.01.

**Allegations of Commission Member Misconduct**

A violated his oath of office and the statutes and rules governing the merit selection process as follows:

**Allegation #1:**

**A Violated the Oath and Duty of Impartiality**

27. By sitting on the Commission, A subscribed to ethical standards under which he promised the following:

In the performance of their duties, the judicial nominating commission members shall be ever mindful that they hold positions of public trust. No commission member shall conduct himself or herself in a manner which reflects discredit upon the judicial selection process or discloses partisanship or partiality in the consideration of applicants. Consideration of applicants shall be made impartially, discreetly, and objectively.

(Statement of Understanding of Ethical Considerations).

28. Furthermore, A gave an Oath that he would execute his duties on the Commission with impartiality. Nevertheless, A testified of personal knowledge that he believed was relevant to the Commission, and at the same time sat as a member of the Commission for which he was a witness. A had a duty to recuse himself from the Commission and testify to the Commission as a witness, if he wished to make such allegations. It is a matter of elementary legal and ethical standards that

that one cannot be both a witness to a matter and be an impartial evaluator of the matter, as the Commission Oath requires.

29. A conducted himself in a manner which reflected discredit upon the judicial selection process and disclosed partisanship and partiality in the consideration of applicant B. He should be removed from the Commission and the Commission should engage in further consideration of B without A as a member.

#### Allegation #2

A discriminated against applicant B on impermissible grounds  
not related to merit.

30. A discriminated against applicant B on impermissible grounds not related to merit, but instead considered candidates based on gender and their political or religious viewpoints, and encouraged the Commission to do so as well. This violates Nebraska law and requires removal of A from the Commission.

Commission members give an oath that they will:

“avoid preselection of nominees, ‘hidden agenda,’ or consideration of factors other than the merit of the applicants.” They further agree they will not “discriminate against any applicant because of the applicant's race, religion, gender, political affiliation, age, or national origin.”

(Statement of Understanding of Ethical Considerations)

31. Nebraska law prohibits attempting to influence the Commission for political reasons or on the basis of personal agendas:

"It shall be unlawful and a breach of ethics for any . . . lawyer or any other person . . . to attempt to influence any judicial nominating commission in any manner and on any basis except by presenting facts and opinions relevant to the judicial qualifications of the proposed nominees . . . at or prior to the time of the public hearing."

Neb. Rev. Stat. § 24-811.

32. Recusal is required when a Commission member considers improper subject matter, such as the gender, political viewpoint or religious beliefs of a candidate:

"Any instance in which the member of the commission would cast his or her vote on a basis other than an applicant's qualification for the office."

(Neb. Ct. R. § 1-602)

33. A failed to disqualify or recuse himself despite the fact he intended to and did cast his vote on a basis other than an applicant's qualification for the office. During the hearing, A expressed his pride in the women who applied for the position to be considered by the Commission. After the Commission made a determination to advance the three other applicants and not advance B's application to the Governor, A announced in public that the Commission had made history by the fact that all candidates advanced to the Governor were women. This announcement reflects A's bias against B, for the reason that A believed and advocated that it was significant that no male candidate for the position was advanced to the Governor.

34. Because A valued an outcome in which all candidates advanced by the Commission were women, A did not evaluate B's application with sole reference to his qualifications for the Commission, and A has therefore violated his oath.

35. A conducted himself in a manner which reflected discredit upon the judicial selection process and disclosed partisanship and partiality in the consideration of applicant B. He should be removed from the Commission and the Commission should engage in further consideration of B without A as a member.

### Allegation #3

A violated the law and his Oath as a Commissioner to not consider B's Application based on his Political viewpoints or his Religion.

36. A discriminated against applicant B on impermissible grounds not related to merit, but instead considered his candidacy based on B's political or religious viewpoints, and encouraged the Commission to do so as well. This violates Nebraska law and requires removal of A from the Commission. Commission members give an oath that they will:

"avoid preselection of nominees, 'hidden agenda,' or consideration of factors other than the merit of the applicants." They further agree they will not "discriminate against any applicant because of the applicant's race, religion, gender, political affiliation, age, or national origin."

(Statement of Understanding of Ethical Considerations)



37. A asked questions of B during the Commission public hearing that were intended to reveal B's personal political or religious viewpoints on the issues of capital punishment and abortion.

38. In the first instance, A asked B if as a matter of his own personal conscience, he could "kill someone" facing the death penalty.

39. Secondly, A then asked B if he would, as a matter of his personal political views or religious conscience, apply the law of judicial bypass with regard to a young woman that sought an abortion without consent of her parents.

A gave the example of a judge in Nebraska that expressed that he could not follow the law due to his religious beliefs and questioned B regarding whether his conscience would permit him to apply the law.

40. These questions were wholly improper for a Commission member to ask, or to consider, because they were intended to reveal the political or religious views of applicant B, in violation of the Commission's oath and constitutional duty to not evaluate a candidate on the basis of their political views or religion. These questions also discredited the judicial selection process and disclosed partisanship and partiality on political and religious grounds in the consideration of applicant B.

41. A conducted himself in a manner which reflected discredit upon the judicial selection process and disclosed partisanship and partiality in the consideration of applicant B. He should be removed from the Commission and the Commission should engage in further consideration of B without A as a member.

42. Failure of the Commission to grant the relief requested herein would result in serious and irreparable damage to the merit selection system, public confidence in the fair and objective selection of judicial nominees and to the continued viability of judicial nominating commissions.

**Authority of the Commission to Resolve Complaints Regarding Member  
Misconduct and to Conduct Further Proceedings**

43. The terms of the members of the Commission have not expired and their duties under the Nebraska Constitution and laws remain ongoing. Neb. Rev. Stat. § 24-803.

44. Nominating Commission proceedings may be reopened to consider member misconduct and to consider challenges to the impartiality of members except as provided in Rule 1-602(D). Neb. Rev. Stat. § 24-810. There is no restriction on reopening the Commission process except in a specific situation that is not applicable here. The Commission has the duty to consider the matters unless the challenge is based on a blood, marital or residential relationship. This challenge is not based on any such relationship.<sup>1</sup>

45. It is the duty of the Commission to send the Governor a list of nominees selected according to the merit selection system in accordance with the Nebraska Constitution and laws. Any list which is created in violation of the applicable laws and rules is invalid. It is fundamental to the merit selection process

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<sup>1</sup> Supreme Court Rule 1-602(D) provides that "A violation of § 1-602(A)(1) by a commission member will not constitute cause for rescission of a judicial nomination or reopening of the commission process." Section 1-602(A)(1) deals with certain specified relationships between commission members and applicants (relationship by blood, marriage or shared residence). Thus, under the language of this Supreme Court rule, as well as pursuant to the constitutional and statutory requirements of the merit selection system, other instances of member misconduct and other grounds for disqualification, including those under §1-602(A)(4) upon which this complaint is based, are grounds for reopening Commission proceedings.

that Commission member misconduct which violates the very purpose of that process is clear grounds for disqualification of the offending member and for further proceedings by the Commission. Moreover, here it is necessary and proper for the Commission to meet for the purpose of permitting B to submit a response to the two late-filed letters which he was shown and to the assertions of A in support of those letters.

WHEREFORE, the undersigned respectfully requests that the Commission:

A. Remove A from the Commission; and

B. Conduct further proceedings in accordance with Neb. Rev. Stat. § 24-810

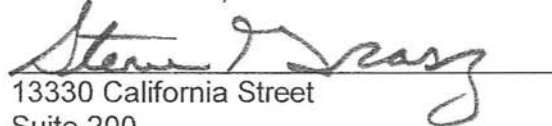
to give unbiased consideration to the application of B including the following:

1. Permit B to submit a response to A's statements and allegations;
2. Permit B to submit a response to letters submitted to the Commission which contain scurrilous accusations; and considering the above; and
3. Determine whether B's name should be submitted to the Governor along with the other candidates.

Dated this            day of            20   .

Respectfully submitted,

STEVE GRASZ, No. 19050



13330 California Street  
Suite 200

Omaha, NE 68154

(402) 964-5015

steve.grasz@huschblackwell.com



BEFORE THE JUDICIAL NOMINATING COMMISSION  
OF THE NEBRASKA SUPREME COURT

In the Matter of the Vacancy Created  
by the Retirement of

)  
)  
)  
) AFFIDAVIT OF  
) E  
)  
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)  
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)  
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STATE OF NEBRASKA )  
) ss.  
COUNTY OF LANCASTER )

I, E , being first duly sworn upon oath, depose and state as follows:

1. I am over the age of 18 and have personal knowledge of the statements contained herein.

2. I have been an associate attorney at F since and I frequently work with B in representing labor unions and public employees.

3. On , I represented a Lancaster County employee in a disciplinary appeal before the Lancaster County Personnel Policy Board.

4. Those Lancaster County Personnel Policy Board members present at the hearing were Kathleen Neary (Vice-Chair, and acting Chair), John Dumonceaux, Steve Eicher, and Jerry Sellentin. Lancaster County Deputy Attorney Richard Grabow represented the County. A true and correct copy of the Board's minutes for that meeting are attached hereto as Exhibit "A." Exhibit "A" accurately reflects who was present at the hearing.

5. Chairwoman Kathleen Neary was the only attorney sitting on the Board that day. Board members Randy Goyette (attorney) and Georgia Glass (non-attorney) were absent from the meeting. See Exhibit "A." Any insinuation or assertion that attorney D



was at this hearing is completely false. B was present in the audience, but he did not enter an appearance or make any statements on the record during the hearing.

6. My argument to the Board was essentially that my client received excessive discipline and that the Board had the authority to reduce that discipline. The County argued that the Board did not have the authority under its rules to reduce discipline.

7. At the conclusion of the hearing, Board member Eicher stated that he thought the discipline was excessive but the rules governing the Board did not permit the Board to reduce an employee's discipline. Acting Chairwoman Neary echoed Eicher's comments and stated that the discipline was excessive but that the Board either had to totally affirm or totally reverse the discipline because the Board had no authority to reduce discipline.

8. Ultimately, Board members Eicher, Sellentin, and Dumonceaux voted to affirm the employee's discipline, but Chairwoman Neary voted to reverse. See Exhibit "A."

9. Following the hearing, I recall B and C having a conversation about the rules governing the Board's authority. I was not a party to the conversation. I recall hearing C expressing frustration to B about the rules governing the Board and telling B that he should try to get the rules changed by the County Board of Commissioners to give the Personnel Board the authority to reduce discipline. B responded to C that the rules and the applicable union contract already gave the Board the authority to reduce discipline and that all the Board needed to do was apply the rules as written. I recall both B and C pointing to a copy of the Board's rules during this conversation to explain their respective understandings of the Board's authority.

10. The conversation I observed between B and C was spirited, but I do not believe either B or C engaged in any conduct unbecoming of attorneys. I simply witnessed two lawyers—both of whom represent employees for a living—having a spirited and genuine off-the-record conversation about the extent of the Board's authority, and both lawyers were coming from the perspective that the Board's authority should include the ability to reduce excessive discipline. I did not witness

B belittle C call her names, or otherwise speak to her in a demeaning way. I likewise did not witness C belittle B call him names, or otherwise speak to him in a demeaning way. I do not believe the conversation between B and

C was any different than the sort of spirited debates I have observed taking place between lawyers, regardless of gender, on a routine basis on a variety of topics.

11. After we left the hearing, B and I debriefed and discussed our view that the Board's rules already gave the Board the authority to reduce excessive discipline.

B never made any demeaning comments to me about C, and he never made any comments to me about C's gender. In fact, B spoke very



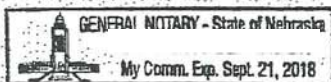
positively about C on subsequent occasions and even recommended that I contact C about an employment discrimination case I was working on, and I did so.

12. I have worked with B extensively over a three-year period on a near-daily basis. Our work has required me to drive long distances with B;—e.g., round trips from Lincoln to North Platte and Norfolk—and we have had many professional and personal conversations. I have never heard B make any comments that demean or degrade women. I have also not observed B treat female clients, staff, or attorneys any differently than he treats male clients, staff or attorneys. Based upon my extensive experience with B, I believe any insinuation or allegation that he harbors a gender bias is totally and utterly false.

FURTHER AFFIANT SAYETH NOT.

\_\_\_\_\_  
(NAME)

SUBSCRIBED AND SWORN to before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_



\_\_\_\_\_  
Notary Public/



# PERSONNEL POLICY BOARD

## May 2, 2013

### MEETING

Meeting was held Thursday, May 2, 2013, Room 113, County-City Building, Lincoln, Nebraska.

Members present: Jerry Sellentin, John Dumonceaux, Kathleen Neary, Steve Eicher. Members absent: Randy Goyette, Georgia Glass. Personnel Department resource staff attending: Karen Eurich.

The meeting was opened at 2:25 p.m. by Vice-Chair Kathleen Neary.

It was moved by John Dumonceaux and seconded by Jerry Sellentin to approve the minutes of the March 13, 2013 meeting. Motion unanimously carried.

Vice-Chair Kathleen Neary announced the board would hear Agenda Item 4 first, and Items 1, 2, and 3 at the end of the meeting.

Agenda Item 4 was the request for appeal hearing from Chad Anderson-Corrections. Richard Grabow of the County Attorney's office represented Corrections. Tom McCarty of Keating, O'Gara, Nedved and Peter represented Chad Anderson. The proceedings were recorded by Sondra Petersen of JS Wurm & Associates and are on file in that office. Exhibits #1 through #13 were offered by Richard Grabow. Exhibits #14 through #33 were offered by Tom McCarty. Richard Grabow objected to exhibits #17, #18, and #19. All exhibits were received by Kathleen Neary. Witnesses called: Micheaela Melton, Megan Hokett, Jordan Malcolm, Mike Thurber, Doug McDaniel, Chad Anderson. Following discussion, it was moved by John Dumonceaux and seconded by Jerry Sellentin to affirm the suspension. Voting yes: Jerry Sellentin, Steve Eicher, John Dumonceaux. Voting no: Kathleen Neary.

Jerry Sellentin requested Items 1, 2, and 3 be tabled until the next meeting. The Board members concurred.

There being no further business, the meeting adjourned at 5:38 p.m.

The next regularly scheduled meeting is tentatively set for Thursday, June 6, 2013.

Karen Eurich  
Personnel Operations Specialist

pc: Department Heads  
Tom McCarty  
Richard Grabow  
Chad Anderson

