State of New York
Commission on Judicial Conduct

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to

CULVER K. BARR,

a Judge of the County Court, Monroe County.

Determination

BEFORE: Mrs. Gene Robb, Chairwoman
Honorable Fritz W. Alexander, II
Honorable Richard J. Cardamone
Dolores DelBello
Michael M. Kirsch, Esq.
Victor A. Kovner, Esq.
William V. Maggipinto, Esq.
Honorable Isaac Rubin
Honorable Felice K. Shea
Carroll L. Wainwright, Jr., Esq.

APPEARANCES:

Gerald Stern (Robert Straus, of Counsel)
for the Commission
Alfred P. Kremer for Respondent

The respondent, Culver K. Barr, a judge of the County Court, Monroe County, was served with a Formal Written Complaint dated February 19, 1980, alleging various acts of misconduct arising from his arrest on two occasions for, inter alia, driving while intoxicated. Respondent filed an answer dated March 7, 1980.

The administrator of the Commission, respondent and respondent's attorney entered into an agreed statement of facts on May 16, 1980, pursuant to Section 44, subdivision 5, of the

Judiciary Law, waiving the hearing provided by Section 44, subdivision 4, of the Judiciary Law, and stipulating that the Commission render its determination on the pleadings and the agreed upon facts. The Commission approved the agreed statement and heard oral argument on July 23, 1980, to determine whether the agreed upon facts establish misconduct and, if so, an appropriate sanction. Thereafter in executive session the Commission considered the record of this proceeding and upon that record makes the following findings of fact.

1. On December 10, 1978, while being arrested by the New York State Police in the Town of Palmyra, New York (Wayne County), on charges of Driving While Intoxicated, a misdemeanor, and Failure to Keep Right, a violation of the Vehicle and Traffic Law, respondent:

(a) stated repeatedly to the arresting officers that he was a Monroe County Court Judge and wanted "consideration";

(b) asked Trooper Nelson Baker, one of the arresting officers: "Do you realize who I am?", and stated that respondent's reputation as a judge would be adversely affected by the arrest and if the trooper did not arrest him, respondent would give the trooper "anything";

(c) refused to take a field sobriety test;

(d) repeatedly refused to take a breathalyzer test at the New York State Police substation in Newark, New York;

(e) stated to the troopers at the substation that he does not "get mad," he "just get(s) even"; and

(f) stated to Trooper Slingerland at the substation that a County Court Judge should not be subject to arrest.

2.(a) On March 19, 1979, respondent was (i) convicted after a jury trial in the Town Court of Palmyra of Driving While Ability Impaired, and (ii) convicted of Failure To Keep Right by Palmyra Town Court Justice Harry White.

(b) On May 7, 1979, respondent was given a conditional discharge on his conviction of Driving While Ability Impaired and fined $25 on his conviction of Failure To Keep Right.

(c) The conditions of respondent's sentence of conditional discharge were: (i) that he attend an alcohol rehabilitation course approved by the Department of Motor Vehicles and (ii) that he lead a law-abiding life.

(d) From May 29, 1979, to July 29, 1979, respondent's license to operate a motor vehicle was suspended by the Department of Motor Vehicles as a result of his conviction.

3. On August 12, 1979, while being arrested by the Monroe County Sheriff's Department in the Town of Chili, New York (Monroe County), on charges of Driving While Intoxicated, a misdemeanor, and Refusal To Take A Breath Test and Moving From Lane Unsafely, violations of the Vehicle and Traffic Law, respondent:

(a) stated repeatedly to the arresting officers that he was a Monroe County Court Judge and wanted "consideration";

(b) refused to enter the Monroe County Sheriff's mobile processing van to be fingerprinted and otherwise processed in the course of arrest;

(c) repeatedly refused to take a breathalyzer test;

(d) stated: "F--- you" to the arresting deputies after being told that he was going to be handcuffed for failing to co-operate; and

(e) stated to the arresting officers that he hoped he would "have the opportunity to repay this back someday."

4. Respondent's arrest on August 12, 1979, for Driving While Intoxicated occurred while he was still serving the sentence of conditional discharge imposed for his prior conviction on March 19, 1979, of Driving While Ability Impaired; accordingly by his conduct on August 12, 1979, respondent violated the conditions of his sentence of May 7, 1979.

5. On August 20, 1979, respondent was convicted on his plea of guilty to the charges of Driving While Intoxicated and Moving From Lane Unsafely. Thereafter, on October 29, 1979, respondent was sentenced to serve three years probation, was ordered to attend an alcohol rehabilitation program, was fined $250 and had his license revoked.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent engaged in conduct prejudicial to the administration of justice, attempted to use the prestige of his office to obtain special consideration for himself, conducted himself in a manner which would tend to bring the judiciary into disrepute, failed to observe high standards of conduct, failed to conduct himself in a manner which would promote public confidence in the integrity and impartiality of the judiciary, and detracted from the dignity of his office, in violation of Article VI, Section

22, subdivision a, of the Constitution of the State of New York, Sections 33.1, 33.2(a) and 33.5(a) of the Rules Governing Judicial Conduct and Canons 1, 2A and 5A of the Code of Judicial Conduct. Charges I through V of the Formal Written Complaint are sustained, and respondent's misconduct is established.

In determining the appropriate sanction to be imposed upon a judge found guilty of misconduct, the Commission must balance its responsibility to insure to the public a judiciary beyond reproach and its responsibility to deal humanely and fairly with the individual judge. In some cases, the misconduct is so serious and so clearly reflects a lack of fitness that public confidence in the integrity of the individual judge is irretrievably lost. The public interest can be adequately protected in such cases only by removal of the judge from office.

In other cases, the misconduct, though serious and not in any sense to be condoned, is such that a lesser sanction permits both a vindication of the public interest and an opportunity for the judge to reform his conduct while continuing to serve effectively in judicial office. Under the New York Constitution, the only such lesser sanctions available to the Commission are censure and admonition.

The considerations that justify distinguishing one such type of case from the other are not always capable of precise formulation; rather, each case of misconduct must be carefully examined in all of its components so that a proper balance can be struck between the competing interests.

Here, the misconduct in which respondent engaged is undisputed. He was arrested twice for driving while intoxicated, the second time while under condition of the discharge from the first arrest. He identified himself as a judge and sought to use that to his advantage with the arresting officers. He refused to take the sobriety tests or submit to the processing routinely administered by the police in such cases. He became verbally abusive. Such conduct is reprehensible and brings the judiciary into disrepute. A judge may not flout the laws he is sworn to uphold when they are applied to him personally and expect to sustain the confidence and trust of the people in whose name he administers justice.

The psychological evaluation respondent submitted to the Commission concludes that respondent is an alcoholic. The record of this proceeding reveals a number of poignant circumstances, unnecessary to recite here, which contributed to the development of his condition. It is important to note, however, that respondent's alcoholism, whatever its source, does not excuse his conduct. However sympathetic we may be to the cause, the effect of respondent's illness has been to cast doubt as to his efficacy as a judicial officer and to cast a shadow over an otherwise unblemished record of nearly 13 years on the bench. Respondent appears to have made a sincere effort to rehabilitate himself since his second arrest, and while it is too soon to measure the success of these efforts, he appears to be making progress.

Our determination of an appropriate sanction in this case should consider whether the prospect of respondent's rehabilitation is worth the risk of leaving him on the bench.

One of the risks to be weighed in this consideration is the degree to which the administration of justice would be compromised, if at all, by allowing respondent to retain his office. There is no indication that respondent's alcoholism has ever manifested itself while respondent was on the bench or otherwise executing his office during regular court hours. The evidence before the Commission indicates that respondent is a dedicated judge whose demeanor on the bench is marked by sobriety and diligence.

Nevertheless, in at least one respect, his alcoholism and the consequent misconduct have affected the performance of his duties. By agreement between respondent and the district attorney of Monroe County, concurred in by individual defendants to date, respondent does not and will not preside over contested felony charges of driving while intoxicated (DWI). He continues to perform all his other judicial duties, including those which involve uncontested felony DWI matters, such as presiding over arraignments, accepting pleas and passing sentences.

This limitation upon respondent's availability to hear all cases in his court raises hard questions as to the administration of justice in respondent's court. For example, is the public well served by a judge who cannot hear a particular type of case? Is the burden on the other judges of the county court likely to be increased significantly as a result? Will public confidence be undermined in respondent's ability to pass sentence impartially in undisputed DWI matters, given his own personal experience with the same charge? Will respondent feel obliged or otherwise beholden to the district attorney, in DWI or other cases, as a result of this disqualification agreement? Will his disagreeable experience with the officers

who arrested him color his perspective of police officers whose testimony or affidavits he may later evaluate in uncontested DWI or contested non-DWI matters?

In the limited time since respondent's second arrest, the answers to these questions are not yet conclusive. Whether they will be resolved in respondent's favor, and indeed whether respondent will be successful in his effort to rehabilitate himself from alcoholism, remain to be seen. To resolve them against respondent at this stage would be premature.

Were suspension from office an alternative sanction available to us under the Constitution, we would impose it in this case, to allow a longer period of time within which to measure the success of respondent's rehabilitative efforts. Absent that alternative, and having given full consideration to the risks involved in permitting respondent to retain his judicial office, we conclude that the interests of both the public and this judge as an individual may be adequately served by allowing respondent the opportunity to reclaim public confidence in his performance.

By reason of the foregoing, the Commission determines that the appropriate sanction is a severe censure.

All concur, except for Mr. Kovner, who dissents in a separate opinion only with respect to sanction and votes that the appropriate sanction is removal from office.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct, containing the findings

of fact and conclusions of law required by Section 44, subdivision 7, of the Judiciary Law.

Dated: October 3, 1980
Albany, New York

Lillemor T. Robb, Chairwoman
New York State Commission on
Judicial Conduct

Mr. Kovner dissents in the following opinion.

The facts set forth in the Commission's determination present a clear case for removal from office. Respondent's criminal conduct in Driving While Ability Impaired and Driving While Intoxicated, standing alone, would warrant censure. When viewed in the context of the two instances of abuse of office, however, the vulgar threats of reprisal to the police officers require removal. Respondent's alcoholism should not relieve him of the consequences of this intolerable behavior. Furthermore, I do not accept the notion that a judge who refuses to take either a field sobriety test or a breathalyzer test could be unaware of the import of his statements.

It should be noted that the Commission has determined, and the Court of Appeals has affirmed, that judges whose conduct off the bench involves serious abuse of office should be removed. In Steinberg v. State Commission on Judicial Conduct, ___NY2d ___(1980), a New York City Civil Court Judge was removed, inter alia, for engaging in numerous prohibited business transactions. In Kuehnel v. State Commission on Judicial Conduct, 49 NY2d 465 (1980), a town court justice was removed, inter alia, for threats to misuse his judicial office in connection with four youths with whom he had had an altercation.

Moreover, in my view, the questions raised by respondent's current practices regarding DWI matters constitute an unacceptable burden on the administration of justice in respondent's court.

For the foregoing reasons, I respectfully vote that the appropriate sanction should be removal from office.

Dated: October 3, 1980
New York, New York

Victor A. Kovner