

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

PATRICK J. CUNNINGHAM,

Determination

a Judge of the County Court,
Onondaga County.

BEFORE: Mrs. Gene Robb, Chairwoman
Honorable Fritz W. Alexander, II
David Bromberg, Esq.
E. Garrett Cleary, Esq.
Dolores DelBello
Michael M. Kirsch, Esq.
Victor A. Kovner, Esq.
Honorable William J. Ostrowski
Honorable Isaac Rubin
Honorable Felice K. Shea
Carroll L. Wainwright, Jr., Esq.

APPEARANCES:

Gerald Stern (Stephen F. Downs,
Of Counsel) for the Commission

Bruce O. Jacobs for Respondent

The respondent, Patrick J. Cunningham, a judge of the County Court, Onondaga County, was served with a Formal Written Complaint dated July 8, 1981, alleging that he engaged in ex parte communications with a lower court judge concerning four of the lower court judge's decisions which were on appeal before respondent. Respondent filed an answer dated July 28, 1981.

On November 20, 1981, respondent, his attorney and the

administrator of the Commission entered into an agreed statement of facts pursuant to Section 44, subdivision 5, of the Judiciary Law, waiving the hearing provided for 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 on December 16, 1981, determined that no outstanding issue of fact remained and set a schedule for memoranda and oral argument to determine (i) whether the facts establish misconduct and (ii) an appropriate sanction, if any.

On January 22, 1982, the Commission determined that respondent's misconduct was established. On February 24, 1982, the Commission heard oral argument as to appropriate sanction and now renders this determination.

With respect to Charge I of the Formal Written Complaint, the Commission makes the following findings of fact.

1. On March 19, 1976, respondent signed three orders to show cause in connection with three appeals being taken to his court from decisions by Syracuse City Court Judge J. Richard Sardino in People v. Jerry Thousand, People v. Bonnie Chichester (Maraia) and People v. John Turner.

2. On March 20, 1976, respondent read an article in the Syracuse Post Standard in which he was quoted as making critical statements concerning Judge Sardino with respect to the three cases.

3. On March 20, 1976, respondent was told that Judge Sardino was very angry at him for having signed the three orders to show cause.

4. On March 20, 1976, in order to calm Judge Sardino and avoid criticism from him, respondent wrote the following letter to Judge Sardino on his official court stationery:

Don't believe that crap they put in the Post Standard. I was misquoted & really had nothing to say about these 3 sentences. Other than they all came in together. There is no way I would ever change a sentence that you had imposed. You can do whatever you want to whenever you want to & I'll agree with you. I signed one of those as an accomodation & the other 2 will be argued Monday. I take the position that you know the case and as sentencing judge can do whatever you damn well please to a defendant so don't get nervous at what you read in the paper. I tried to call you but couldn't locate you.

5. Thereafter respondent heard the appeals and affirmed Judge Sardino's decisions in the Thousand and Turner cases. The appeal in the Chichester case was never perfected.

With respect to Charge II of the Formal Written Complaint, the Commission makes the following findings of fact:

6. On July 9, 1979, respondent signed an order to show cause in connection with an appeal being taken to his court from a decision by Syracuse City Court Judge J. Richard Sardino in People v. Jill Ann Bucktooth.

7. On July 11, 1979, respondent was told that Judge Sardino was extremely upset that respondent had signed the order to show cause in the Bucktooth case.

8. On July 11, 1979, in order to calm Judge Sardino and avoid criticism from him, respondent wrote the following letter to Judge Sardino on his official court stationery.

I signed a show cause order on the [Bucktooth] matter.

Her retained lawyer claims she has an appeal and has some dough to perfect it. If I catch the appeal, I will affirm, as always, on a judge's discretion. The appeals are rotated when they are received, so I don't know who will get to hear it.

The appeal is moot if she has served her time. In these cases, I will sign a show cause almost automatically.

Word has it that you got a little nervous when she didn't appear at Jamesville.

9. Thereafter respondent heard the appeal in the Bucktooth case and reversed Judge Sardino's decision.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 33.1, 33.2, 33.3(a) (1) and 33.3(a) (4) of the Rules Governing Judicial Conduct and Canons 1, 2, 3A(1) and 3A(4) of the Code of Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained and respondent's misconduct is established.

It is the essence of our system of justice that a judge strive not only to be impartial but also to appear impartial in the discharge of judicial duty. Whether at a trial or on an appellate bench, a judge must preside with equanimity, view the issues with dispassion and render decisions free from undue influence. A judge who does not meet these standards undermines his

own usefulness on the bench.

Respondent's ex parte letters to Judge Sardino were in violation of the Rules Governing Judicial Conduct (Section 33.3[a] [4]). The sentiments expressed in those letters were plainly improper. By telling Judge Sardino (i) that "you can do whatever you want whenever you want to and I'll agree with you," (ii) that "[you] can do whatever you damn well please to a defendant," and (iii) "if I catch the appeal [in a particular case], I will affirm, as always," respondent abdicated his responsibility as an appellate judge to review such matters on the merits. Respondent's communications to Judge Sardino clearly indicated that appellate review in the cases at issue would be a sham, and that the lower court's decisions would be upheld automatically. Respondent's words, whether intentional or not, conveyed this unmistakable impression. Respondent appeared to be giving Judge Sardino license to do as he "damn well please[d]", as though Judge Sardino were unaccountable to a higher court.

Respondent's explanation that he wrote the letters "to calm," to "avoid criticism from" and "to make peace and keep peace" with an "angry" and "upset" Judge Sardino, does not mitigate his conduct. The personal reaction of a trial court judge to an appellate court's review of his decisions is irrelevant to the merits of the cases at bar. Indeed, it is unseemly for a higher court judge to coddle and even pander to a lower court judge in his jurisdiction. Respondent's overriding responsibility is to deal appropriately with the judicial matters before him, irrespective

of public or professional disapproval. See, Section 100.3(a)(1) of the Rules Governing Judicial Conduct (formerly Section 33.3[a][1] of the Rules).

The fact that respondent reversed Judge Sardino's decision in the Bucktooth case is of little moment. The integrity of the judicial system was compromised when respondent, before considering the merits, wrote to Judge Sardino that he would "affirm, as always." Such a declaration deprives the parties of a meaningful appeal. It also deprives a trial judge of an important constraint on his exercise of discretion: the knowledge that he is accountable for his actions to a higher court.

Respondent's conduct has completely impaired his effectiveness as a judge. He has demonstrated a profound disregard of the duties of an appellate judge, resulting in an irredeemable loss of public confidence in his performance. No one could ever be reasonably certain that respondent was acting properly, on the merits, in matters that henceforth would be before him.

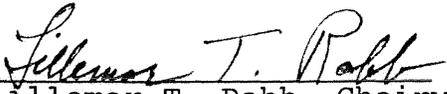
By reason of the foregoing, the Commission determines that respondent should be removed from office.

All concur, except for Judge Alexander, Mr. Bromberg, Mr. Cleary and Judge Ostrowski, who dissent in a separate opinion as to sanction only and vote that respondent be censured.

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: April 20, 1982


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

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PATRICK J. CUNNINGHAM,

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DISSENTING OPINION
BY JUDGE ALEXANDER,
MR. BROMBERG, MR.
CLEARY AND JUDGE
OSTROWSKI

In his answer, his testimony before the Commission, the agreed statement of facts and his appearance before the Commission, respondent readily acknowledged the serious impropriety of his conduct. He expressed sincere regret for his communications to Judge Sardino, and for the effect of such communications on public perception of the administration of justice. Respondent was open and frank and has given his assurance that he will not repeat such conduct.

Respondent's disposition of the appeal in the Bucktooth case (Charge II) indicates that, in fact, he decided the appeals before him fairly and on the merits. In Bucktooth, respondent reversed Judge Sardino's decision and wrote a lengthy, well-reasoned opinion which was severely critical of Judge Sardino. Thus, respondent's judicial decision-making function was properly performed.

We cannot, on this record, agree that the sanction of removal is appropriate. Such ultimate sanction is not normally to be imposed for poor judgment, even extremely poor judgment. See, Matter of Steinberg v. State Commission on Judicial Conduct, 51 NY2d 74, 81, and Matter of Shilling v. State Commission on

Judicial Conduct, 51 NY2d 397, 403.

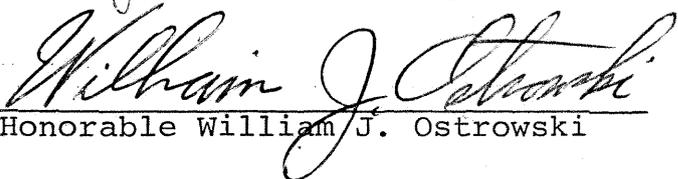
In view of the foregoing, we believe that censure is appropriate.

Dated: April 20, 1982


Honorable Fritz W. Alexander, II


David Bromberg, Esq.


E. Garrett Cleary, Esq.


Honorable William J. Ostrowski