STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

DETERMINATION

LUTHER V. DYE,

a Justice of the Supreme Court, 11th Judicial
District, Queens County.

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THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Raoul Lionel Felder, Esq.[1]
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Mary Holt Moore
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Gerald Stern (Alan W. Friedberg, Of Counsel) for the Commission

David Louis Cohen for Respondent

[1] Mr. Felder was appointed to the Commission on August 25, 2003. The vote in this matter was taken on May 21, 2003.

The respondent, Luther V. Dye, a Justice of the Supreme Court, Queens County, was served with a Formal Written Complaint dated March 18, 2003, containing two charges. Respondent filed an answer dated April 7, 2003.

On May 15, 2003, the Administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts, agreeing that the Commission make its determination based upon the agreed facts, jointly recommending that respondent be censured and waiving further submissions and oral argument.

On May 21, 2003, the Commission approved the Agreed Statement of Facts and made the following determination.

1. Respondent served as a judge of the Civil Court of the City of New York from 1989 to 1993. Respondent has served as a Supreme Court Justice from 1994 to the present.

2. Respondent will be 70 years old in 2003, and his term as a Supreme Court Justice will expire at the end of 2003. He is eligible to apply this year for a two-year term as a certificated Supreme Court Justice, and if certificated, would be eligible to seek re-certification for additional two-year terms and to serve as a certificated Supreme Court Justice through 2009. The decision to grant certification is within the discretion of the Administrative Board of the unified court system.

As to Charge I of the Formal Written Complaint:

3. On August 6, 2002, respondent presided over *Catherine Capanelli; natural guardian, Esther I. Benitez* v. *Wycoff Park Associates*, in which the infant plaintiff and her mother and guardian appeared before respondent concerning an application that $6,000.00 be withdrawn from funds previously awarded to Ms. Capanelli in connection with a negligence matter and used to pay educational expenses for Ms. Capanelli, including tuition, at Christ the King Regional High School, a Catholic parochial secondary school. Respondent denied the request.

4. During the *Capanelli* proceeding, respondent made inappropriate comments about education at Catholic parochial schools and inappropriately referred to publicized allegations concerning the Catholic Church. Respondent stated that he would not send his children to a Catholic parochial school, although, in fact, he had done so, and he asked Ms. Benitez if she has read the newspapers about what was occurring in Catholic schools and stated that he would not permit any funds to be used for such a purpose.

5. Respondent asserts that at the time of the *Benitez* proceeding, he was not biased against the Catholic Church or a Catholic education and that he rendered a decision in the *Benitez* case on the merits and on what he believed was in the best interests of the child.

6. In addition to the comments included in the charge, respondent stated that it was in the child's best interests to attend a public school. Respondent took

into account the fact that the sole remaining funds being held for the child was $12,614.03, of which educational expenses would have been $6,000.00. Respondent asserts that he believed it was best for the child to have those funds used for other purposes, subject to the discretion of the Court. Respondent asserts further that he regrets making the comments that are the subject of this charge and he apologizes for any impression he conveyed that he was critical of the Catholic Church, of a Catholic school education, or of Ms. Benitez or Ms. Capanelli for making the application.

7. Commission Counsel asserts that respondent's words in court conveyed the appearance of bias, and it is not relevant whether respondent's decision was on the merits or whether another judge would have made the same decision. If respondent had denied the application without making the statements that are the basis of the charge, he would not have been charged with misconduct. Based on the beliefs he expressed, however, he should have disqualified himself, which would have resulted in another judge hearing the matter.

As to Charge II of the Formal Written Complaint:

8. From August 21, 2002, to August 30, 2002, respondent presided over a jury trial in *Philip Ougourlian and Arpena Ougourlian* v. *NYC Health & Hospitals Corp.*, a medical malpractice matter.

9. During the proceeding and outside the presence of the jury, respondent acted in an undignified and discourteous manner toward Steven B. Samuel, Esq., who represented the plaintiffs, by:

(a) stating repeatedly that Mr. Samuel should "shut up";

(b) threatening to mark the matter off the trial calendar after Mr. Samuel requested a one-day adjournment on the grounds that the daughter of the plaintiff, Philip Ougourlian, had been involved in an automobile accident; and

(c) stating, without adequate basis, that Mr. Samuel should return to court with an attorney after the trial for a sanctions hearing to determine if Mr. Samuel had manipulated the court because he had submitted an affidavit of the plaintiff, Philip Ougourlian, in support of a request for a one-day adjournment of the trial after Mr. Ougourlian's daughter was involved in an automobile accident.

10. During the proceeding, on August 22, 2002, Mr. Samuel stated to respondent that Mr. Samuel was offended because respondent had accused him of having manipulated the court and Mr. Samuel added that he intended to file a complaint concerning respondent's conduct. Respondent was annoyed with Mr. Samuel and believed him to be an aggressive lawyer.

11. On August 26, 2002, at the end of the court day, respondent and Mr. Samuel engaged in a contentious dialogue. Respondent accused Mr. Samuel of attacking him and told Mr. Samuel that any complaint Mr. Samuel would make to the Commission was "as worthless as a bucket of spit." As Mr. Samuel was leaving the courtroom, after the matter was adjourned until August 28, 2002, respondent asked Mr. Samuel whether he was Jewish.

12. On August 28, 2002, Mr. Samuel complained on the record about

being asked by respondent if he was Jewish. Mr. Samuel asked, "Why did the Court ask me that question?" Respondent stated that he would answer the question, but then turned to Steve Rubin, Esq. of the New York City Law Department, who was representing the defendant, and said, "Mr. Rubin, why don't you answer that, you know the answer, you answer it." Mr. Rubin then stated:

> I don't think there was anything meant by it. I don't think it was a reflection of any type of bias. It was more just a friendly remark. I know that because the Judge asked me if I was Jewish and said there weren't – he knew I was from Virginia, that there weren't too many Jewish people that are from Virginia, and it stemmed out of that. The Judge is from North Carolina. That was my understanding.

Respondent then made the following statement on the record:

> I was born and bred in North Carolina. I saw no Jewish people, none. I saw no West Indians. I didn't know what a West Indian was until I came to New York. The only Chinese people I saw were in the laundry. I never saw a Jewish person. I never saw a temple. I never saw a synagogue. Didn't know what it was. I thought everybody went to church. I thought everybody was Christian. That's why I asked. Does that answer your question?

Mr. Samuel replied that it did not answer his question, and a contentious discussion ensued.

13. Respondent had left North Carolina for New York City in approximately 1949.

14. Respondent recognizes that he cannot successfully defend the charges, and for the purposes of discipline to be imposed, if the Commission accepts this Agreed Statement, the Commission is authorized to consider the prior determination of

censure, dated February 6, 1998, against respondent.

15. In consideration of the disposition of this proceeding, respondent has agreed that, if the Agreed Statement of Facts is accepted by the Commission, he will not seek or accept certification as a Supreme Court Justice, will retire from the judiciary on December 31, 2003, and will not seek or accept any judicial position in the unified court system in the State of New York, including as a Judicial Hearing Officer, at any time in the future.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.3(B)(1), 100.3(B)(3), 100.3(B)(4) and 100.3(E)(1) of the Rules Governing Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established.

"A judge must be and appear to be unbiased at all times so that 'the public can perceive and continue to rely upon the impartiality of those who have been chosen to pass judgment on legal matters involving their lives, liberty and property.'" *See Matter of Ain*, 1993 Ann Rep 51 (Commn on Jud Conduct, Sept 21, 1992), quoting *Matter of Sardino*, 58 NY2d 286, 290-91 (1983). Any statements by a judge that reflect religious or ethnic bias will not be tolerated. *See, e.g., Matter of Schiff*, 83 NY2d 689 (1994); *Matter of Ain, supra*. Respondent's inappropriate comments on two separate occasions conveyed the appearance of bias and warrant a severe sanction.

Respondent has acknowledged that during a proceeding to determine whether a child's funds could be used to pay for her educational expenses at a Catholic parochial secondary school, he made inappropriate comments about education at Catholic parochial schools, referred to publicized allegations concerning the Catholic Church, and stated that he would not send his own children to a Catholic parochial school. The fact that respondent has sent his own children to a Catholic parochial school does not mitigate the appearance of bias conveyed by his statements. At the very least, his comments created the appearance that he could not be impartial in the case and that his decision would be influenced by his personal bias, and he should not have handled the matter.

Respondent's inappropriate comments about the Catholic Church were not an isolated instance of misconduct. Three weeks later, after a series of hostile, discourteous comments to an attorney, respondent asked the attorney whether he was Jewish. The record establishes that earlier in the case, respondent had repeatedly told the attorney to "shut up," accused the attorney of manipulating the court and directed him to appear for a sanctions hearing after the trial. Shortly before asking that question, respondent and the attorney had engaged in a contentious dialogue and respondent accused the attorney of attacking him. In that context, respondent's question was so inappropriate that the conclusion is unavoidable that it was hostile and biased. As such, it constitutes misconduct. Two days later, when the attorney asked respondent on the record to explain why he had asked the question, respondent's explanation was not only

evasive, but bizarre. Explaining that he "saw no Jewish people" while growing up in North Carolina, respondent also commented that he "saw no West Indians" and "[t]he only Chinese people I saw were in the laundry." That "explanation" is unacceptable.

We are mindful that in 1998, respondent was censured for making "offensive and undignified remarks....of a personal and sexual nature" to his secretary. *Matter of Dye*, 1999 Ann Rep 93 (Commn on Jud Conduct, Feb 6, 1998). The Commission's determination stated in part:

> A Judge must conduct his everyday affairs in a manner beyond reproach. Any conduct, on or off the Bench, inconsistent with proper judicial demeanor subjects the judiciary as a whole to disrespect and impairs the usefulness of the individual Judge to carry out his or her constitutionally mandated function. (*Matter of Kuehnel*, 49 NY2d 465, at 469).

Viewed in its totality, the record suggests that respondent lacks sensitivity to the special ethical obligations of judges and indicates the need for a severe sanction.

In imposing a sanction short of removal, we have considered that respondent's term of office expires at the end of 2003 and that respondent has stipulated that he will retire at the end of the year and will not serve in any judicial capacity in the future. Effectively, this disposition ensures that respondent's fifteen-year judicial career will end this year. We believe this result is appropriate. This is particularly so since, absent a stipulated disposition, it is uncertain whether a disciplinary proceeding resulting in any public sanction could have been completed prior to respondent's departure from the bench.

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

Mr. Berger, Judge Ciardullo, Mr. Coffey, Mr. Goldman, Ms. Hernandez, Mr. Pope and Judge Ruderman concur.

Ms. Moore dissents and votes to reject the Agreed Statement of Facts on the basis that the disposition is too lenient.

Judge Luciano and Judge Peters were not present.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: September 19, 2003

Henry T. Berger, Esq., Chair
New York State
Commission on Judicial Conduct

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

LUTHER V. DYE,

DISSENTING OPINION
BY MS. MOORE

a Justice of the Supreme Court, 11th
Judicial District, Queens County.

The record establishes that in the *Capanelli* proceeding, respondent made inappropriate comments about education at Catholic parochial schools, referred to publicized allegations concerning the Catholic Church, and stated that he would not send his own children to a Catholic parochial school. It is shocking to me that a judge, who is supposed to be impartial and a model of neutrality and dignity, would make such comments. Even if no one objected to his words at the time, his statements were biased and insulting.

In another case, after a contentious exchange with an attorney, respondent asked the attorney whether he was Jewish. It was totally inappropriate for respondent to ask the attorney about his religion. Respondent's effort to justify the question by referring to his own upbringing was unbelievable and, if anything, even more offensive. Respondent is 70 years old and came to New York City more than 50 years ago, so it is frankly ridiculous to attribute his question to his upbringing in North Carolina.

In my view, respondent's admitted statements establish that he lacks the impartiality, temperament and judgment to serve as a judge. I feel strongly that, on these facts, any disposition other than removal is too lenient. Accordingly, I respectfully dissent and vote to reject the Agreed Statement of Facts.

Dated: September 19, 2003

Mary Holt Moore, Member
New York State
Commission on Judicial Conduct