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

JAMES L. KANE,

a Justice of the Supreme Court, Erie County.

Determination

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

The respondent, James L. Kane, a justice of the Supreme Court, Eighth Judicial District (Erie County), was served with a Formal Written Complaint dated September 27, 1978, setting forth ten charges of misconduct arising from certain activities during the period respondent was a judge of the County Court, Erie County. The charges alleged misconduct in that respondent (i) appointed his son Timothy J. Kane, Esq., as a referee in three cases, (ii) appointed two attorneys, associated in the practice of law with his son Timothy J. Kane, as a referee or receiver in four cases, (iii) appointed John J. Heffron, Esq., the brother of another judge of the Erie County Court, Judge William G. Heffron, as a referee or guardian ad litem in 19 cases, during a period that Judge Heffron

appointed respondent's son Timothy J. Kane as a referee in 16 cases and (iv) improperly participated in several cases in that he confirmed and ratified the reports as referee, receiver or guardian filed by his son Timothy J. Kane, the associates of Timothy J. Kane, and Mr. Heffron.

Respondent filed an answer dated November 16, 1978, admitting in part and denying in part the allegations set forth in the Formal Written Complaint.

By order dated February 28, 1979, the Commission appointed the Honorable Harold A. Felix as referee to hear and report with respect to the facts herein. Hearings were conducted on March 14, 1979, and May 8, 1979, and the report of the referee dated July 13, 1979, was filed with the Commission.

By notice dated August 23, 1979, the administrator of the Commission moved for a determination that the referee's report be confirmed and respondent be removed from office. Respondent filed papers dated October 11, 1979, which opposed the motion, and the administrator filed a reply dated October 18, 1979.

Oral argument was heard on October 25, 1979.

Preliminarily, the Commission finds that respondent is presently a justice of the Supreme Court, and that the actions herein occurred while respondent was a judge of the County Court, Erie County.

As to Charges I through IV of the Formal Written Complaint, the Commission makes the following findings of fact.

1. On June 5, 1974, respondent appointed his son Timothy J. Kane as referee to compute in Buffalo Savings Bank v. Foley, an action to foreclose a mortgage on real property.

2. On June 13, 1974, respondent ratified and confirmed the report of his son Timothy J. Kane as referee to compute in Buffalo Savings Bank v. Foley, and, on the same date, appointed Timothy J. Kane as referee to sell the foreclosed premises in the same case.

3. On March 24, 1977, respondent ratified and confirmed the report of his son Timothy J. Kane as referee to compute in Niagara Permanent Savings & Loan Association v. Greco, an action to foreclose a mortgage on real property, and, on the same date, appointed Timothy J. Kane as referee to sell the foreclosed premises in the same case.

4. On June 2, 1977, respondent ratified and confirmed the report of his son Timothy J. Kane as referee to compute in Buffalo Savings Bank v. McCrary, an action to foreclose a mortgage on real property, and, on the same date, appointed Timothy J. Kane as referee to sell the foreclosed premises in the same case.

5. On February 28, 1977, respondent ratified and confirmed the report of his son Timothy J. Kane as referee to compute in Izzo v. Manlil Management Corp., an action to foreclose a mortgage on real property.

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

As to Charges V and VI of the Formal Written Complaint, the Commission makes the following findings of fact.

6. On January 1, 1975, respondent's son Timothy J. Kane became a partner of Charles E. Weston, Jr., Esq., engaged in the practice of law under the firm name of Weber, Weston & Kane, and continued as a partner with Mr. Weston until the latter's death on March 12, 1978.

7. On June 16, 1975, respondent appointed Charles E. Weston, Jr., as receiver in Liechtung v. Colonie Apartments of Amherst, Inc., an action to foreclose a mortgage on real property, after having declined to appoint a person recommended by the plaintiff in that action.

8. For his services as receiver in the Liechtung case, Mr. Weston was allowed fees of $17,218.68 in 1976 and $33,638.27 in 1977, which were deposited in the account and general funds of the law firm of Weber, Weston & Kane. Pursuant to the partnership agreements of Weber, Weston & Kane, respondent's son Timothy J. Kane received 37.5% of the net profits of the law firm including the 1976 fee and 40% of the net profits of the firm including the 1977 fee.

9. On July 24, 1975, respondent appointed Charles E. Weston, Jr., as receiver in Stewart v. Swiss Estates, Inc., an action to foreclose a mortgage on real property.

10. On November 26, 1975, respondent settled, approved and confirmed the report of Charles E. Weston, Jr., as receiver in the Stewart case, allowed him a fee of $842.25 in the matter and discharged him as receiver.

11. Pursuant to the partnership agreement of Weber, Weston & Kane, respondent's son Timothy J. Kane received 35% of the net profits from the fee in the Stewart case.

12. At the time respondent made the appointments in the Liechtung and Stewart cases, he knew that his son Timothy J. Kane was associated in the practice of law with Charles E. Weston, Jr., and knew, or should have known, that his son and Weston were, in fact, partners practicing law under the firm name of Weber, Weston & Kane.

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

Charges VII and VIII of the Formal Written Complaint are not sustained and therefore are dismissed.

As to Charges IX and X, the Commission makes the following findings of fact.

13. From November 17, 1975, through June 23, 1977, while respondent was a judge of the County Court, Erie County, Judge William G. Heffron was also a judge of that court.

14. John J. Heffron, Esq., is the brother of Judge William G. Heffron. Judge Heffron is now retired.

15. From November 17, 1975, through June 23, 1977, in the 18 cases and on the dates listed below, respondent appointed John J. Heffron as referee to compute in actions to foreclose mortgages on real property.

(a) The Western New York Savings Bank v. Collins, November 17, 1975;

(b) Josephine DiMaria v. Thomas R. Answeeney, January 8, 1976;

(c) Joseph B. Gladysz v. Myron Rose, January 14, 1976;

(d) Liberty National Bank and Trust Corporation v. Moran, November 19, 1976;

(e) The Niagara Permanent Savings and Loan Association v. Kuhlmey, January 27, 1976;

(f) Buffalo Savings Bank v. Motif Construction Corporation, January 30, 1976;

(g) Buffalo Savings Bank v. Santarsiero, April 13, 1976;

(h) Liebeskind v. Abco Realty, Inc., June 29, 1976;

(i) Erie County Savings Bank v. Kearney, November 5, 1976;

(j) Buffalo Savings Bank v. Vinson, November 8, 1976;

(k) The Home Purchasing Corp. v. Burroughs, November 8, 1976;

(l) Hamburg Savings and Loan Association v. Lauricella, December 3, 1976;

(m) John Hancock Mutual Life Insurance Company v. Seventeenth Colonie Corp., January 6, 1977;

(n) Buffalo Savings Bank v. Johnson, March 2, 1977;

(o) Manufacturers and Traders Trust Company v. Swartwood, April 1, 1977;

(p) The Western New York Savings Bank v. Ludwig, June 6, 1977;

(q) The Western New York Savings Bank v. Misnik, June 14, 1977; and

(r) The Western New York Savings Bank v. Garmian Farms Ltd., June 23, 1977.

16. From January 20, 1976, through May 18, 1977, in the 14 cases and on the dates listed below, respondent (i) confirmed and ratified the reports of John J. Heffron as referee to compute in actions to foreclose mortgages on real property and (ii) appointed Mr. Heffron as referee to sell the foreclosed premises.

(a) Joseph B. Gladysz v. Myron Rose, January 20, 1976;

(b) Josephine DiMaria v. Thomas E. Answeeney, February 6, 1976;

(c) Liberty National Bank and Trust Company v. Paul T. Moran, February 9, 1976;

(d) The Niagara Permanent Savings and Loan Association v. Kuhlmey, February 24, 1976;

(e) Buffalo Savings Bank v. Santarsiero, April 26, 1976;

(f) Liebeskind v. Abco Realty, Inc., July 9, 1976;

(g) Erie County Savings Bank v. Kearney, November 22, 1976;

(h) Buffalo Savings Bank v. Vinson, December 1, 1976;

(i) John Hancock Mutual Life Insurance Company v. Seventeenth Colonie Corporation, January 7, 1977;

(j) The Home Purchasing Corporation v. Burroughs, March 2, 1977;

(k) Hamburg Savings and Loan Association v. Lauricella, March 4, 1977;

(l) Buffalo Savings Bank v. Johnson, March 16, 1977;

(m) The Western New York Savings Bank v. Misnik, June 10, 1977; and

(n) The Western New York Savings Bank v. Ludwig, June 23, 1977.

17. On April 6, 1976, respondent appointed John J. Heffron as guardian ad litem in Matter of Walz.

18. The total number of appointments by respondent of Mr. Heffron from November 17, 1975, through June 23, 1977, was 33.

19. From November 20, 1975, through May 18, 1977, in the 16 cases and on the dates listed below, Judge Heffron appointed respondent's son Timothy J. Kane as referee to compute in actions to foreclose mortgages on real property.

(a) Homestead Savings and Loan Association v. Kenneth D. Swan Demolition and Excavating, Inc., November 20, 1975;

(b) Erie County Savings Bank v. Hiller, February 11, 1976;

(c) Martin v. Martin, February 19, 1976;

(d) Niagara First Savings and Loan Association v. Tudor, February 23, 1976;

(e) Niagara Permanent Savings and Loan Association v. Country Estate Builders, Inc., February 24, 1976;

(f) Buffalo Savings Bank v. Lenahan, April 19, 1976;

(g) Beckley v. Anzalone, June 8, 1976;

(h) Western New York Savings Bank v. Land Girth Corp., June 23, 1976;

(i) Niagara Permanent Savings and Loan Association v. S.H.C. Construction Co., Inc., December 14, 1976;

(j) Izzo v. Manlil Management Corp., January 7, 1977;

(k) Niagara Permanent Savings and Loan Association v. Greco, February 10, 1977;

(l) Buffalo Savings Bank v. Dillon, February 18, 1977;

(m) Buffalo Savings Bank v. Hughes, February 22, 1977;

(n) Niagara First Savings and Loan Association v. Moore, April 19, 1977;

(o) Buffalo Savings Bank v. Davis, May 9, 1977; and

(p) Buffalo Savings Bank v. McCrary, May 18, 1977.

20. From December 8, 1975, through May 18, 1977, in the nine cases and on the dates listed below, Judge Heffron (i) confirmed and ratified the reports of respondent's son Timothy J. Kane as referee to compute in actions to foreclose mortgages on real property and (ii) appointed Mr. Kane as referee to sell the foreclosed premises.

(a) Homestead Savings Bank and Loan Association v. Kenneth D. Swan Demolition and Excavating, Inc., December 8, 1975;

(b) Niagara First Savings and Loan Association v. Tudor, February 27, 1976;

(c) Western New York Savings Bank v. Land Girth Corp., June 28, 1976;

(d) Niagara Permanent Savings and Loan Association v. S.H.C. Construction Co., Inc., December 16, 1976;

(e) Izzo v. Manlil Management Corp., January 19, 1977;

(f) Buffalo Savings Bank v. Dillon, March 14, 1977;

(g) Buffalo Savings Bank v. Hughes, March 15, 1977;

(h) Niagara First Savings and Loan Association v. Moore, April 20, 1977; and

(i) Buffalo Savings Bank v. Davis, May 18, 1977.

21. The total number of appointments awarded by Judge Heffron to respondent's son Timothy J. Kane from November 20, 1975, through May 18, 1977, was 25.

22. At the time respondent was making the 33 appointments of John J. Heffron listed above, he was aware that Judge Heffron was contemporaneously appointing his son Timothy J. Kane in similar proceedings.

Upon the foregoing facts, the Commission concludes as a matter of law that respondent violated Sections 33.1, 33.2, 33.3(a)(1), 33.3(b)(4) and 33.3(c)(1) of the Rules Governing Judicial Conduct and Canons 1, 2, 3A(1), 3B(4) and 3C(1) of the

Code of Judicial Conduct. Charges IX and X of the Formal Written Complaint are sustained and respondent's misconduct is established.

Respondent's judicial appointments in this matter fall into three categories: (i) the appointments of his son, (ii) the appointments of his son's law partner and (iii) the appointments of the brother of another County Court judge while respondent was aware that the same judge was contemporaneously appointing respondent's son.

By appointing his son as a referee on four occasions, respondent engaged in conduct which the Rules Governing Judicial Conduct specifically prohibit. Section 33.3(b)(4) of the Rules Governing Judicial Conduct states that a "judge shall not appoint or vote for the appointment of any person...as an appointee in a judicial proceeding, who is within the sixth degree of relationship of either the judge or the judge's spouse."

By ratifying and confirming the reports of his son as referee in four cases, respondent created the appearance of impropriety and failed to comply with that provision of the Rules which requires a judge to disqualify himself in a proceeding in which a person within the sixth degree of relationship to him is acting as a lawyer in the proceeding (Section 33.3[c][1][iv][b]).

By appointing his son's law partner, Mr. Weston, as a receiver in two cases, with knowledge that his son and Mr. Weston were partners in the same law firm, respondent violated that provision of the Rules which requires a judge to disqualify himself in a proceeding in which a person within the sixth degree

of relationship to him "is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding" (Section 33.3[c][1][iv][c]). The fees awarded to Mr. Weston, amounting to $50,000, were shared according to partnership percentages by respondent's son in these two cases. Clearly the fees involved are substantial interests within the meaning of the Rules. Yet had the fees in these cases been nominal, the fact that respondent appointed his son's law partner was improper, since it violated the applicable Rules Governing Judicial Conduct with respect to a judge's obligation to promote public confidence in the integrity and impartiality of the judiciary and not to permit family, social and other relationships to influence his judicial conduct or judgment (Section 33.2).

By making 33 judicial appointments to the brother of another judge of the same court during the same 19-month period that the other judge was making 25 judicial appointments of a similar nature to respondent's son, with knowledge that the appointments at issue were being made contemporaneously, respondent created the appearance of serious impropriety and evinced an intention to circumvent the outright prohibition against nepotism with a disguised alternative. Respondent's conduct in making these cross appointments was improper.

The issues in the instant matter were addressed by the Court of Appeals in Spector v. State Commission on Judicial Conduct, 47 NY2d 462 (1979):

> First, nepotism is to be condemned, and disguised nepotism imports an additional component of evil because, implicitly conceding that evident nepotism would be unacceptable, the actor seeks to conceal what he is really accomplishing. Second, and this is peculiar to the judiciary, even if it cannot be said that there is proof of the fact of disguised nepotism, an appearance of such impropriety is no less to be condemned than is the impropriety itself. [Id., at 466.]
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> The appointment of his son by any Judge would be both unthinkable and intolerable whatever might be the son's character and fitness or his father's peculiar qualification in the circumstances to assess such character and fitness. The enlarged evil in this instance is that an arrangement for cross appointments would not only offend the antinepotism principle; it would go a step further, seeking to accomplish the objectives of nepotism while obscuring the fact thereof. [Id., at 467-68.]

With respect to the cases involving the appointments of respondent's son, the Commission has considered respondent's argument that "[n]epotism, at the time of the events in question, was not considered in the same light as it is now regarded" (Resp. 9).* The Commission has also considered respondent's arguments that he was unaware of the promulgated rules prohibiting nepotism at the time of one of the appointments at issue (Resp. 3), that the signing of appointment orders was "ministerial in nature" (Resp. 4) and that some of his awards of appointments followed a "uniform practice" of the County Court "to uniformly appoint as Referee to sell the same individual as appointed to compute" (Resp. 3).

*"Resp." refers to the appropriate page in respondent's brief to the Commission.

The Commission rejects these arguments as in any way excusing or mitigating respondent's conduct.

Even in the absence of a specific rule prohibiting nepotism, a judge should know that nepotism is wrong. Indeed, as the Court noted in Spector, the practice of nepotism in the western world has been "repeatedly condemned" since the eighth century, and is "regarded as a form of misuse of authority, associated with corruption." Spector, supra, n.2 at 466-67. Respondent's alleged unfamiliarity with the specific rule is not persuasive. The first Canons of Judicial Ethics, adopted in 1909 by the New York Bar Association, more than 70 years ago, outrightly condemned nepotism. Respondent was obliged to know that nepotism is wrong.

In reaching its determination, the Commission has not overlooked the fact that respondent is currently an elected justice of the Supreme Court and that the conduct condemned herein occurred while he held a different judicial office. A judge may be removed from office, for cause, for misconduct prejudicial to the administration of justice (N.Y. State Const. Art. VI, Sec. 22, subd. a; Jud. Law, Sec. 44, subd. 1). Cause has been defined as an "inclusive, not a narrowly limited term" (Matter of Osterman, 13 NY2d [a], [p], cert. den. 376 U.S. 914), and the fact that respondent's misconduct in this matter occurred before he assumed his present judicial office is of no moment. "It matters not that the misconduct charge occurred prior to the Judge's ascension to the Bench. (See Matter of Sarisohn, 26 AD2d 388, 389, mot. for lv. to app. den. 19 NY2d 689, cert. den. 393 U.S. 1116, supra; see, also,

Friedman v. State of New York, 24 NY2d 528, 539, supra; State v. Redman, 183 Ind. 332, 339-340; Ann., 42 ALR3d 691, 712-719, supra.) 'A judicial officer is nonetheless unfit to hold office and the interests of the public are nonetheless injuriously affected,' the court wrote in the Sarisohn case (26 AD2d, at p. 389), 'even if the misdeeds which portray his unfitness occurred prior to assuming such office'" (Matter of Pfingst, 33 NY2d [a], [kk]).

Respondent's misconduct is so prejudicial to the administration of justice that the Commission concludes that respondent lacks the requisite fitness to serve and does not possess the moral qualities required of a judicial officer. His conduct and insensitivity to the egregiousness of his transgressions strike at the very heart of his fitness for high judicial office and require his removal.

By reason of the foregoing, the Commission determines that the appropriate sanction is removal from office.

All concur.

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.

Lillemor T. Robb

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

Dated: December 12, 1979
Albany, New York

APPEARANCES:
Harold J. Boreanaz for Respondent
Gerald Stern for the Commission (Christopher Ashton, John W. Dorn, Of Counsel)