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

Determination

NICHOLAS P. MOSSMAN,

a Justice of the Philmont Village Court, Columbia County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Myriam J. Altman
Helaine M. Barnett, Esq.
Herbert L. Bellamy, Sr.
Honorable Carmen Beauchamp Ciparick
E. Garrett Cleary, Esq.
Dolores Del Bello
Lawrence S. Goldman, Esq.
Honorable Eugene W. Salisbury
John J. Sheehy, Esq.
Honorable William C. Thompson

APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the Commission

John Connor, Jr., for Respondent

The respondent, Nicholas P. Mossman, a justice of the Philmont Village Court, Columbia County, was served with a Formal Written Complaint dated November 2, 1990, alleging that he failed to disqualify himself and improperly handled a Harassment case. Respondent filed an answer dated November 23, 1990.

By order dated November 30, 1990, the Commission designated Paul A. Feigenbaum, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on January 30 and 31, 1991, and the referee filed his report with the Commission on April 11, 1991.

By motion dated April 26, 1991, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be removed from office. Respondent opposed the motion on May 15, 1991. The administrator filed a reply dated May 20, 1991.

On May 23, 1991, the Commission heard oral argument. Because of recording problems, oral argument was heard de novo on June 27, 1991. Respondent appeared by counsel. Thereafter, the Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a justice of the Philmont Village Court since April 1, 1986.

2. Respondent's father, Philip P. Mossman, is the Mayor of Philmont and was in 1989. Henry Casivant has lived in the Philmont area for 23 years and owns rental properties there. He has had an adversarial relationship with respondent's father, of which respondent is aware. Mr. Casivant has been a party in several civil and criminal cases in respondent's court and has regularly appeared as scheduled for court dates.

3. Lewis Craver is a long-time acquaintance of respondent and his family. Mr. Craver was a regular patron in 1989 of Nick's Restaurant, which is owned by respondent's mother and where respondent's father tends bar. Respondent lives above the bar.

4. On May 20, 1989, at about 7:30 P.M., Mr. Craver and Mayor Mossman left Nick's Restaurant and met Mr. Casivant, who was on his own property in the vicinity of the restaurant.

5. Mayor Mossman drove Mr. Craver to his home. Mr. Craver then called the Philmont Village Police. Officers George Hazelton and Scott Taylor came to his home and took a complaint alleging that Mr. Casivant had said to Mr. Craver outside the restaurant, "You better not drive that car if you had to [sic] much to drink." The complaint charged Mr. Casivant with Harassment, a violation of Penal Law §240.25(5). The statute reads, "A person is guilty of harassment when, with intent to harass, annoy or alarm another person...[h]e engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose."

6. Officer Hazelton presented the complaint to respondent, who issued a warrant for Mr. Casivant's arrest. Respondent did not disqualify himself, even though the complaint stated that the incident occurred outside of Nick's Restaurant and that Mr. Craver had been in the company of "Mr. Mossman."

7. At about 11 P.M., Officers Hazelton and Taylor arrested Mr. Casivant and brought him before respondent for arraignment.

8. Respondent gave Mr. Casivant a copy of the complaint. Mr. Casivant argued that the complaint was not sufficient to constitute Harassment and asked respondent to disqualify himself.

9. Respondent refused to disqualify himself, arraigned Mr. Casivant, set bail at $250 and adjourned the case for two weeks. Mr. Casivant posted bail and was released.

10. After the arraignment, respondent asked Officer Hazelton to prepare a written statement of Mr. Casivant's remarks. Respondent also told Officer Hazelton that the complaint might not be sufficient and instructed him to obtain a more detailed complaint from Mr. Craver to better support the charge.

11. On June 3, 1989, Officer Hazelton met again with Mr. Craver. The officer wrote a longer, two-page complaint concerning the incident, and Mr. Craver signed it. Respondent was given a copy of the longer complaint.

12. On June 6, 1989, Mr. Casivant again appeared in court. Respondent furnished Mr. Casivant with a copy of the new complaint. Mr. Casivant objected that the second complaint was not sufficient to constitute Harassment. Respondent indicated that he intended to disqualify himself.

13. On June 13, 1989, Mr. Casivant again appeared before respondent in connection with the Harassment charge and earlier charges filed by Mr. Craver against him. Mr. Casivant's lawyer asked respondent to disqualify himself. Respondent indicated that he would disqualify himself from the Harassment case.

14. The case was transferred to the Chatham Town Court, where it was adjourned in contemplation of dismissal on January 22, 1990, and was dismissed in July 1990.

15. Respondent testified at the hearing that he had refused to issue a warrant on the basis of the first complaint, that Officer Hazelton obtained a second complaint on May 20, 1989, and that the warrant was issued and Mr. Casivant was arraigned on the basis of that complaint. Respondent testified that he asked Officer Hazelton to rewrite the second complaint because it was "chicken scratch." He claims that it was the rewritten complaint that was dated June 3, 1989; respondent destroyed the second May 20, 1989, complaint.

16. During the investigation of this matter, respondent answered in writing inquiries from Commission staff on November 22, 1989, and January 24, 1990, and he testified before a member of the Commission on May 23, 1990. At none of those times did he testify that there had been an intervening "chicken scratch" complaint.

17. On May 31, 1990, Mr. Craver gave testimony before Commission Chief Attorney Stephen F. Downs. Mr. Craver did not mention that he had signed two complaints on May 20, 1989.

18. On June 8, 1990, Mr. Downs wrote to respondent, questioning the discrepancy in the dates of the two complaints.

19. In response on July 11, 1990, respondent stated for the first time that there had been a "barely legible," intervening complaint. Respondent testified that he destroyed that complaint.

20. On July 19, 1990, Mr. Downs again interviewed Mr. Craver. He testified that he had spoken with respondent and now recalled that he had signed two complaints on May 20, 1989. Mr. Craver said that Officer Hazelton destroyed the second complaint on June 3. Mr. Craver's daughter, Karen, also testified that her father signed a second complaint on May 20, 1989, and that Officer Hazelton destroyed it.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2, 100.3 and 100.3(c)(1), and Canons 1, 2, 3 and 3C(1) of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained,* and respondent's misconduct is established.

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*The date of the court appearance in Paragraph 5 of the Formal Written Complaint was amended to read June 6, 1989.

Respondent should have had no part in the Casivant Harassment case. The complaining witness was a long-time acquaintance of respondent and a regular customer of a bar owned by respondent's mother. The complaint made it obvious that the incident occurred outside the bar, where respondent lived, and that respondent's father was a witness to the incident. Mr. Casivant was a political adversary of respondent's father. These factors brought into question respondent's ability to be impartial and mandated his immediate disqualification. (See, Rules Governing Judicial Conduct, 22 NYCRR 100.3(c)(1); Matter of Tyler v. State Commission on Judicial Conduct, 75 NY2d 525; Matter of Sims v. State Commission on Judicial Conduct, 61 NY2d 349).

Respondent not only failed to remove himself from the case immediately, but he issued an arrest warrant and arraigned Mr. Casivant on a complaint that was clearly deficient on its face, then attempted after the fact to have a valid complaint drawn. He knew that an allegation that Mr. Casivant told Mr. Craver, "You better not drive that car if you had to [sic] much to drink," could not constitute "a course of conduct or repeated[]... acts which alarm or seriously annoy [an]other person..." (Penal Law §240.25[5]). His knowledge of the deficiency of the complaint is evident from the fact that he told Officer Hazelton after the arraignment to obtain a more detailed complaint. In doing so, respondent abandoned his proper role as a neutral and detached magistrate (see, Matter of Wood, 1991 Ann

Report of NY Commn on Jud Conduct, at 82, 86) and gave the appearance that he was assisting in the prosecution of Mr. Casivant.

This conduct alone, while serious, would not ordinarily require removal. However, respondent's false testimony at the hearing and his attempts to obstruct the Commission's discharge of its lawful mandate demonstrate that he is unfit for judicial office.

During the investigation of this matter, respondent was asked twice to recount the events of Mr. Casivant's arrest and arraignment, and he testified on the subject before a member of the Commission. In two written responses and in his sworn testimony, he mentioned only two complints drawn against Mr. Casivant. Mr. Craver also gave a sworn statement in which he told of signing only two complaints.

Staff counsel then made a new inquiry of respondent, questioning the discrepancy in the dates of the complaints. Respondent and Mr. Craver acknowledge that they then discussed the matter, and respondent thereafter stated for the first time that there had been three complaints. He mentioned a "chicken scratch" complaint which was drawn on May 20, 1989, and had to be rewritten because it was "barely legible." Mr. Craver then altered his earlier testimony and claimed for the first time that he had signed three complaints. This was the version that both respondent and Mr. Craver gave at the hearing.

This chronology alone is ample basis for concluding that the "chicken scratch" defense is a belated attempt by respondent to conceal conduct that he knew was wrong. If there had been three complaints, why did respondent mention only two in earlier, detailed letters and in his investigative testimony?

The are other reasons for disbelieving this version. Officer Hazelton, who wrote the complaints, testified that only two complaints were drawn: one on May 20, 1989, and one on June 3, 1989. Respondent testified that he arraigned Mr. Casivant on the "chicken scratch" complaint, and, although he says it was "barely legible," he read it to Mr. Casivant. Mr. Casivant testified that he was read and was given the original, shorter complaint at arraignment. Although respondent said he ordered the "chicken scratch" complaint redrawn to make it more legible, the June 3, 1989, complaint was also in Officer Hazelton's handwriting.

The fact that the "chicken scratch" complaint cannot be produced further supports our conclusion that it never existed, as does the conflict between the Cravers and respondent as to how it was supposedly destroyed.

As did the referee, we reject the testimony of respondent and the Cravers and conclude that the "only possible inference is that [respondent] changed his story...and got the Cravers to go along by 'refreshing their memories.'" (Referee's report at p. 12).

"Such deception is antithetical to the role of a Judge who is sworn to uphold the law and seek the truth." (Matter of Myers v. State Commission on Judicial Conduct, 67 NY2d 550, 554; see also, Matter of Steinberg v. State Commission on Judicial Conduct, 51 NY2d 74, 78). Respondent did more than merely refuse to admit a culpable state of mind; he gave patently false testimony despite contrary objective proof (compare, Matter of Kiley v. State Commission on Judicial Conduct, 74 NY2d 364, 370).

A judge who lies under oath in defiance of the law cannot be entrusted to administer oaths and sit in judgment on others whose credibility he must assess. (See, Matter of Intemann v. State Commission on Judicial Conduct, 73 NY2d 580, 582; Matter of Gelfand v. State Commission on Judical Conduct, 70 NY2d 211, 216; Matter of Perry, 53 AD2d 882 [2d Dept]).

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

Mr. Berger, Judge Altman, Mr. Bellamy, Judge Ciparick, Mr. Cleary, Mr. Goldman, Judge Salisbury, Mr. Sheehy and Judge Thompson concur.

Ms. Barnett and Mrs. Del Bello were not present.

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: September 24, 1991

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