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

J. KEVIN MULROY,

a Judge of the County Court, Onondaga County.

Determination

THE COMMISSION:

Henry T. Berger, Esq., Chair
Jeremy Ann Brown
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel W. Joy
Honorable Daniel F. Luciano
Honorable Frederick M. Marshall
Honorable Juanita Bing Newton
Alan J. Pope, Esq.
Honorable Eugene W. Salisbury

APPEARANCES:

Gerald Stern (John J. Postel and Seema Ali, Of Counsel) for the Commission

John J. Sheehy and Gardner & Miles, L.L.P. (By Gary W. Miles) for Respondent

The respondent, J. Kevin Mulroy, a judge of the Onondaga County Court, was served with a Formal Written Complaint dated July 30, 1998, alleging seven charges of misconduct. Respondent filed an answer dated August 18, 1998.

By Order dated September 3, 1998, the Commission designated the Honorable Fritz W. Alexander, II, as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on November 4, 5 and 6, 1998, and the referee filed his report with the Commission on April 21, 1999.

The parties submitted briefs with respect to the referee's report. On June 3, 1999, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. Respondent has been a judge of the Onondaga County Court since January 1987.

2. Respondent was scheduled to preside on August 20, 1996, at a pre-trial conference in the cases of Darnell W. Dexter, Shawndell M. Everson, Allen L. Isaac and Clarence D. Paige, who were charged with the murder and robbery of a 67-year-old African-American woman in her home.

3. The night before the pre-trial, respondent attended a golf tournament and dinner at a country club. At the dinner, respondent approached the prosecutor in the murder case, Stephen J. Dougherty. Respondent told Mr. Dougherty that the District

Attorney's Office should be "reasonable" in its plea offers to two of the defendants because respondent did not want all four cases to go to trial.

4. Respondent asked Mr. Dougherty whether the prosecution was worried that, if it made reasonable offers to two of the defendants, it would appear to be "giving away" the cases.

5. Respondent told Mr. Dougherty that he should not worry because no one cared what happened, since the victim was just "some old nigger bitch."

6. At the pre-trial on August 20, 1996, the parties and respondent agreed to a plea reduction for two defendants to a charge carrying a five-to-ten-year sentence. Respondent said that the victim was "no great shakes" and that the District Attorney had "to take into account the victim and that this was an after-hours gin joint."

As to Charge II of the Formal Written Complaint:

7. In February 1996, respondent presided over People v Roberto Carvalho in the Oneida County Court in Utica.

8. While the jury was deliberating the rape charge, respondent became agitated, began zipping and unzipping his robe and put his feet on the bench. He then said to the prosecutor, Bernadette Romano, "You know, I don't know how long I'm going to let this go, Ms. Romano, you know....You better consider your options."

9. Ms. Romano indicated that she would strongly oppose respondent declaring a mistrial. Respondent replied, "Well, you can go ahead and do what you want, but I got to get back to Syracuse 'cause it's Thursday night, and it's men's night out."

10. Ms. Romano then left the courtroom briefly. When she returned, respondent was in an agitated state, spinning around on his chair and looking at his watch and the courtroom clock.

11. He said to Ms. Romano, "Why don't you give this guy a fucking misdemeanor so I can get out of this fucking black hole of Utica. I'm sick of Judge Burke sending me down here. I'm sick of Utica. You guys overcharge everything. This is a ridiculous case. This guy wouldn't have been indicted in Syracuse....You guys overcharge everything."

12. Ms. Romano refused to consider agreeing to offer a guilty plea to a misdemeanor. The jury shortly returned with a verdict of guilty.

As to Charge III of the Formal Written Complaint:

13. The charge is not sustained and is therefore dismissed.

As to Charge IV of the Formal Written Complaint:

14. In July 1996, respondent attended a charity dinner at a country club. He was seated at a table with eight other people.

15. During the course of the evening, Oneida County District Attorney Michael Arcuri came to the table to greet those seated there.

16. Mr. Arcuri asked respondent how his re-election campaign was going. Respondent complained that the Democratic party had nominated a candidate to oppose him.

17. Mr. Arcuri then said, "Some of us have to run for office, and others get it handed to them on a silver platter."

18. Respondent rejoined, "You know how you Italian types are with your Mafia connections."

19. Mr. Arcuri and respondent's campaign opponent, John La Paro, are of Italian descent. Assistant District Attorney Bernadette Romano, who is also of Italian descent, was among those seated at the table, and she overheard respondent's remark.

20. To respondent's remark, Mr. Arcuri replied, "You know, Judge, you're a real asshole," and he left.

21. During the course of the re-election campaign, respondent referred privately to Mr. La Paro as a "wop," "dago" and "guinea."

As to Charge V of the Formal Written Complaint:

22. The charge is not sustained and is therefore dismissed.

As to Charge VI of the Formal Written Complaint:

23. The charge is not sustained and is therefore dismissed.

As to Charge VII of the Formal Written Complaint:

24. On February 13, 1997, respondent testified under subpoena as a character witness for Andre R. Sobolevsky, a Syracuse attorney who was being tried before another judge in Supreme Court.

25. Respondent had adjourned proceedings in his own courtroom in order to testify in the Sobolevsky case. Attorneys Joseph V. O'Donnell, Edward J. McQuat and David B. Savlov had appeared before him that day.

26. In the Sobolevsky case, respondent testified that the defendant had a reputation in the legal community for truth and honesty that was "very good" or "excellent."

27. On cross examination, respondent was asked to identify lawyers with whom he had discussed Mr. Sobolevsky's reputation. He named Mr. O'Donnell, Mr. McQuat and Mr. Savlov.

28. Mr. O'Donnell had never discussed Mr. Sobolevsky's reputation with respondent and, in fact, knew little of Mr. Sobolevsky and had no opinion concerning his reputation. When he learned that respondent had used his name during the Sobolevsky case, Mr. O'Donnell confronted respondent. Respondent apologized and said that he had

been caught "off-guard" and that the names of Mr. O'Donnell and Mr. McQuat were the first ones that came to mind.

29. Mr. McQuat never had a conversation with respondent concerning Mr. Sobolevsky's reputation and, in fact, had an unfavorable impression of his reputation. When Mr. McQuat confronted respondent about using his name, respondent replied, "Well, if I didn't talk to you guys, I talked to somebody in your office about it."

30. Mr. Savlov had never talked to respondent about Mr. Sobolevsky's reputation and, in fact, believed that it was "not very good."

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(A), 100.2(C), 100.3(B)(3), 100.3(B)(4) and 100.3(B)(6). Charges I, II, IV and VII of the Formal Written Complaint are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established. Charges III, V and VI are dismissed.

The record establishes that respondent has attempted to subvert the proper administration of justice in order to suit his personal convenience and whims, has given false or misleading testimony and has repeatedly used language charged with racial and ethnic hatred.

Respondent's comments to the prosecutor that he need not be concerned that he would be "giving away" the murder cases because no one cared, since the victim was only "some old nigger bitch," devalued the life of the victim in a most unprofessional, disturbing and inappropriate way. The use of such a hateful racial epithet should have, as the referee aptly noted, no place in a judge's lexicon (see, Matter of Agresta, 64 NY2d 327; see similarly, Matter of Bloodgood, 1982 Ann Report of NY Commn on Jud Conduct, at 69), even off the bench and apart from judicial business (see, Matter of Kuehnel, 49 NY2d 465, 468).

Respondent's disparaging and ethnically charged remark to Mr. Arcuri at a public social event was obviously calculated to be hurtful and insulting. "[A] deliberate and calculated remark of this nature, even if isolated, 'casts doubt on [a jurist's] ability to fairly judge all cases before him....'" (Matter of Schiff, 83 NY2d 689, at 693, quoting the Commission's Determination, 1994 Ann Report of NY Commn on Jud Conduct, at 97, 99). A judge's use of such language indicates an unacceptable bias and insensitivity that has no place on the bench and warrants the severest possible sanction.

In the Sobolevsky case, respondent testified falsely or with reckless disregard of the truth. Asked to support his claim that Mr. Sobolevsky had a reputation for truth and honesty in the legal community, respondent apparently recited the names of the first three lawyers that came to mind -- three that had appeared before him earlier that day -- even though he had never spoken with them about Mr. Sobolevksy's reputation.

Such lack of candor under oath reflects poorly on a judge's ability to swear witnesses, uphold the law and seek the truth. (See, Matter of Bloom, 1996 Ann Report of NY Commn on Jud Conduct, at 65).

Respondent accosted a prosecutor at a social function and suggested that he offer plea reductions at a pre-trial hearing the following day so that four murder cases wouldn't have to go to trial. He attempted to affect the outcome of serious matters at the point of delicate plea negotiations. The comment was not merely idle chatter or overwrought invective; it was a calculated statement designed to produce a result: plea bargains that would lighten respondent's caseload.

Similarly, respondent's remarks during jury deliberations in Carvalho indicate an attempt to twist the ends of justice to accommodate his personal convenience. He improperly pressed a prosecutor to abort the trial and offer a plea, merely so that respondent could get home for "men's night out" and end an assignment that he disliked. In addition to attempting to force a plea for his own personal convenience, the language that he used was unbecoming a judge. (See, Matter of Chase, 1998 Ann Report of NY Commn on Jud Conduct, at 75, 76-77; Matter of Mahon, 1997 Ann Report of NY Commn on Jud Conduct, at 104).

The abuse of judicial authority in order to further a judge's personal interests, or even giving such an appearance, is improper. (See, Matter of McKevitt, 1997 Ann Report of NY Commn on Jud Conduct, at 106; Matter of Hanofee, 1990 Ann

Report of NY Commn on Jud Conduct, at 109; Matter of Reese, 1985 Ann Report of NY Commn on Jud Conduct, at 217; see also, Matter of Molnar, 1989 Ann Report of NY Commn on Jud Conduct, at 115).

Based on the totality of the misconduct in this record, it is clear that respondent lacks proper judicial temperament and is unfit to be a judge.

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

Mr. Berger, Ms. Brown, Mr. Coffey, Mr. Goldman, Ms. Hernandez, Judge Joy and Judge Newton concur as to sanction.

Ms. Brown dissents only as to Charge II and votes that the charge be dismissed.

Mr. Coffey and Mr. Goldman dissent only as to Charges II and VII and vote that the charges be dismissed.

Ms. Hernandez and Judge Newton dissent only as to Charge III and vote that the charge be sustained.

Judge Marshall dissents as to Charges III and VII and votes that Charge III be sustained and that Charge VII be dismissed, and he dissents as to sanction and votes that respondent be censured.

Mr. Pope dissents as to sanction only and votes that respondent be censured.

Judge Luciano and Judge Salisbury 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: August 12, 1999

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

J. KEVIN MULROY,

a Judge of the County Court, Onondaga County.

OPINION BY MR. GOLDMAN IN WHICH MR. COFFEY JOINS

I concur with the Commission's sanction of removal. I write separately, however, to explain my reasons and also my disagreements in some respects with the majority.

In my view, a single statement, particularly one made outside the courthouse, should not generally warrant termination of a judicial career. Judges, like others, sometimes say things that they did not intend, that upon reflection they would not say or that out of context sound very different from the way they were intended. However, respondent's use of the epithet "some old nigger bitch," made in a plea discussion with the prosecutor (even outside the courthouse), is so ugly, raw and insensitive and so beyond the limits of acceptable conversation, that that single statement alone requires that he no longer sit as a judge.[1]

African-American litigants, witnesses and attorneys who appear before respondent cannot be expected, in view of this statement, to have confidence that they will

[1] I also find improper, although much less troubling, the ex parte aspect of this discussion.

receive the fair and evenhanded treatment to which they are entitled. In my view, our justice system -- which many African-Americans distrust as biased against them[2] -- cannot tolerate a judge who has demonstrated such insensitivity, even one who it appears has served competently and independently for 15 years.

I do, however, disagree with the majority opinion to the extent that it appears to criticize respondent for attempting "to affect the outcome of serious matters at the point of delicate plea negotiations" and for a statement designated to produce a plea bargain that would "lighten [his] caseload." I find no misconduct in the attempt of a judge to involve himself or herself in plea negotiations in an effort to reach an agreement that would lighten the court calendar. As stated above, I do find offensive the manner in which he did so.

I also disagree with the majority in its finding that Charges II and VII should be sustained. With respect to Charge II, I do not find that respondent's banter -- which apparently did not affect the prosecutor -- rises to the level of judicial misconduct, although I do find it inappropriate.

With respect to Charge VII, I believe that a careful examination of the record does not justify the conclusion that respondent deliberately or recklessly testified falsely. Rather, I believe that this finding is based on a misconception of the rules of

---

[2] See, e.g., Cole, No Equal Justice: Race and Class in the American Criminal Justice System [The New Press 1999], pp. 10-11: "The racially polarized reactions to the [O.J.] Simpson case illustrate a deep and longstanding racial divide on issues of criminal justice: blacks are consistently more skeptical of the criminal justice system than whites. . . . Perceptions of race and class disparities in the criminal justice system are at the core of the race and class divisions in our society."

evidence with respect to the competency of character testimony. Under the rules of evidence, a witness may express the belief that a defendant has a character trait based either on having heard positive statements about the defendant or having heard nothing negative. (See, Richardson on Evidence, 11th ed., p, 165: "Although tactically less appealing than showing a widely held good opinion of the defendant's relevant character trait, the rule remains that good character may be shown by a witness who has heard nothing against the defendant.")

Respondent testified as a character witness for an attorney accused in a criminal case that the defendant's reputation in the legal community with respect "to truth and honesty" was "very good" or "excellent" and, as the basis for that belief, that he had never heard anything derogatory about him. During a vigorous cross-examination, respondent was asked to name lawyers with whom he had spoken about the defendant and mentioned two prosecutors and another attorney. When asked specifically what these attorneys said, he responded merely that these people had never said anything negative about the attorney. He did not say that the lawyers had said anything positive. Whatever these attorneys' actual views of the defendant, the record does not demonstrate that, at the time he testified, respondent did not believe that he had spoken with these lawyers about the attorney on trial and that they had never said anything negative about him. The

record, thus, does not justify the conclusion that respondent deliberately or recklessly testified falsely.

Dated: August 12, 1999

Lawrence S. Goldman, Esq., Member
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

J. KEVIN MULROY,

a Judge of the County Court, Onondaga County.

DISSENTING OPINION BY JUDGE MARSHALL IN WHICH MR. POPE JOINS

After consideration of the facts in this case, as well as the applicable case law, I respectfully dissent from the majority's splintered determination to remove this judge from the bench.

It is significant that respondent has acknowledged, with appropriate contrition, that his conduct under the sustained four charges was inappropriate, out of character and isolated. (Compare, Matter of Duckman, 92 NY2d 141, in which the evidence demonstrated a pattern of egregious conduct that continued even after the judge was made aware of his unacceptable behavior).

In this case, respondent has a long and unblemished record on the bench, which should be taken into account in rendering sanction. (See, Matter of Edwards, 67 NY2d 153, 155). Even witnesses against him testified that respondent handled their cases fairly from the bench. The majority of the sustained charges involved matters outside of the courtroom in private settings.

Removal is an extreme sanction that should be imposed only in truly egregious circumstances; it should not be ordered "for conduct that amounts simply to poor judgment, or even extremely poor judgment." (Matter of Cunningham, 57 NY2d 270, at 275). Respondent exercised poor judgment in making a number of ill-advised and careless comments off the bench. While respondent's actions clearly constitute misconduct, no case supports the majority's conclusion that such comments warrant the extreme sanction of removal. (Contra, Matter of Agresta, 64 NY2d 327 [judge censured for remarking from the bench, "I know there is another nigger in the woodpile," in proceeding involving two black defendants and in reference to a particular black person]; Matter of Cavotta, 1996 Ann Report of NY Commn on Jud Conduct, at 75 [judge admonished for pressuring defendants to plead guilty in order to avoid trial]; Matter of Ain, 1993 Ann Report of NY Commn on Jud Conduct, at 51 [judge censured for an intemperate diatribe during a court proceeding in which he made references to a lawyer's ethnic background]; Matter of Bloom, 1996 Ann Report of NY Commn on Jud Conduct, at 65, and Matter of Barlaam, 1995 Ann Report of NY Commn on Jud Conduct, at 105 [judges censured for misleading testimony in attorney disciplinary hearings]).

Accordingly, I find misconduct but deem censure to be the adequate and proper sanction.

Dated: August 12, 1999

Honorable Frederick M. Marshall, Member
New York State
Commission on Judicial Conduct