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

DAVID SCHIFF,

a Justice of the Liberty Village Court, Sullivan 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

Alfred H. Beck and Appelbaum, Eisenberg, Bauman & Appelbaum (By Bertram W. Eisenberg) for Respondent

The respondent, David Schiff, a justice of the Liberty Village Court, Sullivan County, was served with a Formal Written Complaint dated October 30, 1992, alleging that he made an improper remark with racial connotations, that he indicated that he would decide a case based on personal animosity and that he failed to remit court funds to the state comptroller because of poor recordkeeping practices. Respondent filed an answer dated December 10, 1992.

By order dated December 17, 1992, the Commission designated Ira M. Belfer, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on February 17 and 26, 1993, and the referee filed his report with the Commission on April 23, 1993.

By motion dated May 6, 1993, the administrator of the Commission moved to confirm in part and disaffirm in part the referee's report, to make additional findings and conclusions and for a determination that respondent be removed from office. Respondent opposed the motion on May 25, 1993. The administrator filed a reply dated July 8, 1993.

On July 22, 1993, 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 justice of the Liberty Village Court since August 1988.

2. On August 1, 1989, John Ferrara, a Sullivan County Legal Aid Society attorney, appeared in respondent's court. He was accompanied by Lisa Saltzman, a law student intern, and Stacy Zulkin, a college intern.

3. During a break in the proceedings, respondent remarked about changes in the community. He said that he recalled a time when it was safe for young women to walk the streets "before the blacks and Puerto Ricans moved here."

Ms. Saltzman was so offended by the statement that she walked out of the room.

4. At the time, respondent was aware of a controversy between Mr. Ferrara and another judge who was a "good friend" of respondent. Respondent believed that Mr. Ferrara was Hispanic because, he testified, Mr. Ferrara "looks or acts" like "a normal Hispanic person."

5. Assistant District Attorney Eric Adler was in the courtroom and overheard respondent's remark. He later told respondent privately that the comment was not the right thing to say to Mr. Ferrara and that the controversy with the other judge had taken a serious emotional and financial toll on Mr. Ferrara. Respondent replied, "I know. That's why I said it."

As to Charge II of the Formal Written Complaint:

6. On December 1, 1989, a motion for summary judgment was submitted to respondent in Mountain Pontiac-Cadillac-Buick v Sachs by the plaintiff's attorney, Carl P. Goldstein.

7. On March 30, 1990, respondent was involved in a car accident with Terrence S. Rogers, who was charged with Failure To Yield Right Of Way and Failure To Produce Valid Insurance. The case was tried in the Thompson Town Court before Judge Perry E. Meltzer. Judge Meltzer's law firm, Oppenheim & Meltzer, was representing the defendant in the Sachs case, which was pending before respondent.

8. On September 6, 1990, Judge Meltzer found Mr. Rogers not guilty of Failure To Yield Right Of Way and dismissed the other charge.

9. When told of the outcome by the arresting officer, respondent said, "It's a wheel. It goes around, and maybe someday I can do the same for him." He testified that, by this remark, he meant that "I can do him a favor of the same type, the way he handled my case."

10. Respondent's court clerk overheard him remark to an attorney that he was angry with another judge because of the decision in Rogers and that he intended to grant the summary judgment motion in Sachs because the defendant was represented by the other judge's law firm.

11. Respondent also commented to Mr. Adler that he was angry with Judge Meltzer because of the decision. "That goddamn fucking Meltzer. I'm hung heavier politically than Meltzer," respondent told the prosecutor.

12. On April 4, 1991, respondent granted summary judgment to the plaintiff in Sachs, ruling against the client of Judge Meltzer's law firm.

As to Charge III of the Formal Written Complaint:

13. From the time that he took the bench in August 1988 through August 1992, respondent failed to keep adequate records and dockets of the dispositions of more than 600 criminal cases, contrary to UJCA 107.

14. Because of his inconsistent records of the dispositions of criminal cases, respondent's court clerk was unable to report the dispositions and remit related court funds to the state comptroller in a timely manner, as required by UJCA 2020 and 2021(1), Village Law §4-410 and Vehicle and Traffic Law §1803. As a result, by April 1991, respondent's court account had accumulated a balance of $22,004, which he remitted on April 10, 1991.

15. Respondent did not take prompt action to remedy the inadequate records or remit the surplus money despite repeated requests to do so from his court clerk, Barbara Hamlin, and two letters from the police chief, Edward A. Eisley, requesting the disposition of cases handled in respondent's court.

16. Asked at the hearing to explain why he had marked an arraignment sheet in People v Stanley Miller to indicate that the case had been dismissed and that the defendant had paid a $200 fine, respondent testified:

> [H]e had a fight with a third person, I found him guilty as such, and I'm not going to send him to jail since he's a businessman. I fined him $200 and told him to 'Cool it, next time.' And that's it as far as I was concerned. It was dismissed. The case is over. Finished.

17. In connection with People v Warren McCummins, respondent testified that he considered the defendant "convicted" when he sent him to jail in lieu of bail and that the case was "dismissed" when it was concluded. This accounts for his notations that the case was dismissed and that the defendant was sentenced to time served, respondent said.

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), 100.3, 100.3(a)(3), 100.3(b)(1) and 100.3(b)(2), and Canons 1, 2A, 3, 3A(3), 3B(1) and 3B(2) of the Code of Judicial Conduct. Charges I, II and III of the Formal Written Complaint are sustained, and respondent's misconduct is established.

By his statements and actions, respondent has undermined public confidence in his ability to impartially adjudicate cases, to understand rudimentary principles of jurisprudence and to properly administer his court. He has demonstrated that he is unfit to continue as a judge and should be removed from office.

Respondent's suggestion that certain racial and ethnic groups are responsible for increasing crime rates casts doubt on his ability to fairly judge all cases before him. (See, Matter of Bloodgood, 1982 Ann Report of NY Commn on Jud Conduct, at 69, 71; see also, Matter of Ain, 1993 Ann Report of NY Commn on Jud Conduct, at 51). This was exacerbated by respondent's later admission to an attorney that he made the remark to hurt Mr. Ferrara because of his involvement in a controversy with another judge who was a friend of respondent.

Respondent created the impression that he used his judicial office to retaliate against Judge Meltzer by ruling against the position of the Oppenheim & Meltzer law firm.

Respondent's comment to an attorney in the presence of the court clerk clearly indicated that he was deciding the Sachs motion because of his displeasure with Judge Meltzer. Whether or not he actually decided the case on the merits, the harm was done by respondent's statement indicating that he would use his powers as a judge to satisfy a personal vendetta. (See, Matter of Cunningham v State Commission on Judicial Conduct, 57 NY2d 270). "[A]n appearance of such impropriety is no less to be condemned than is the impropriety itself." (Matter of Spector v State Commission on Judicial Conduct, 47 NY2d 462, 466).

Respondent's poor recordkeeping and his failure to remit court funds promptly to the comptroller is misconduct, even absent evidence of personal gain. (See, Matter of Goebel, 1990 Ann Report of NY Commn on Jud Conduct, at 101, 102). Perhaps more serious is the underlying cause of his mismanaged court accounts: that respondent, as exhibited by his testimony, is unable to understand the difference between a dismissal and a conviction or between holding a criminal defendant in jail in lieu of bail and sentencing a defendant to a jail term.

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

Mr. Berger, Judge Altman, Ms. Barnett, Mr. Bellamy, Judge Ciparick and Mrs. Del Bello concur.

Judge Salisbury dissents as to Charge III and votes that the charge be dismissed and dissents as to sanction and votes that respondent be censured.

Mr. Goldman and Mr. Sheehy dissent as to sanction only and vote that respondent be censured.

Mr. Cleary and Judge Thompson 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 15, 1993

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

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DAVID SCHIFF,

DISSENTING OPINION
BY MR. GOLDMAN

a Justice of the Liberty Village Court, Sullivan County.

Although I concur in the majority's finding of misconduct as to all three charges, I respectfully dissent from the extreme sanction of removal.

Respondent, during a break in court proceedings, made an extremely foolish and clearly inappropriate remark with racial connotations, apparently to get under the skin of an attorney involved in a dispute with a fellow judge. Such behavior is serious misconduct. However, it falls short of the misconduct in Matter of Ain (1993 Ann Report of NY Commn on Jud Conduct, at 51) which this Commission found merited only a censure, and not removal. There, the judge, during a pretrial conference, made a barrage of derisive remarks against the ethnic group of an attorney about to start a non-jury trial before him. I do not believe that a single, off-the-record remark of the type made by respondent merits removal.

Respondent also made inappropriate remarks to the effect that he would retaliate against the law firm of a town court judge who, in a traffic case, had acquitted the person with whom respondent was involved in an automobile accident.

Respondent said he would retaliate by granting summary judgment in favor of the party opposing the client of the judge's law firm. While respondent, some seven months after the acquittal, did rule against the client of the law firm in the summary judgment motion, there is no indication that the ruling, which was not appealed, was improper. Had there been evidence that respondent's determination was improper or even questionable, I would agree that removal is mandated. There is no proof, however, that the apparent bias expressed by respondent was a factor in his decision or constituted other than inappropriate and foolishly improper remarks. In this connection, I note that contrary to the statement made by the majority (determination, p. 7), in my view the appearance of impropriety, while serious, is not equivalent to actual impropriety and, therefore, is less to be condemned than is the impropriety itself.

While I agree that respondent's recordkeeping and failure to remit court funds also constitutes misconduct, absent personal gain by respondent, such misconduct generally results in an admonition or censure (see, e.g., Matter of Ranke, 1992 Ann Report of NY Commn on Jud Conduct, at 64; Matter of Goebel, 1990 Ann Report of NY Commn on Jud Conduct, at 101), or even in a dismissal and caution (see, 1993 Ann Report of NY Commn Jud Conduct, at 12). I believe that respondent's misconduct, even when considered cumulatively, does not justify removal.

I am, however, troubled by respondent's apparent lack of comprehension of rudimentary principles of the law he has been elected to administer, as evidenced by his apparent misunderstanding of such basic notions as that a defendant whose case is dismissed cannot be fined or otherwise punished (see determination, par. 16). Had respondent been served with a complaint alleging specifically as one of the charges that he failed to understand basic notions of law, been allowed to prepare for and defend himself against such a specific charge, and had such a charge sustained against him, I would have voted for removal. It may well be that respondent, an 81-year-old non-lawyer who did not become a judge until the age of 76, is not fit to be a judge. In the absence of charges specifically addressed to his lack of knowledge of basic concepts of law, however, I do not believe that, consistent with due process and fairness, this Commission can sanction respondent for his failings in this area.

For these reasons, I believe that censure is the appropriate sanction in this case.

Dated: September 15, 1993

Lawrence S. Goldman, Esq., Member
New York State
Commission on Judicial Conduct