

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

JOHN G. DIER,

a Justice of the Supreme Court, Fourth
Judicial District, Warren 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 (Stephen F. Downs, Of Counsel) for the
Commission

Sise & Sise (By Robert J. Sise) for Respondent

The respondent, John G. Dier, a justice of the Supreme Court, 4th Judicial District, was served with a Formal Written Complaint dated August 20, 1992, alleging that he allowed his personal animosity toward an attorney to influence his conduct and judgment in a case before him. Respondent did not answer the Formal Written Complaint.

On January 13, 1993, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided in Judiciary Law §44(4) and stipulating that the Commission make its determination based on the pleadings and the agreed upon facts. The Commission approved the agreed statement by letter dated January 22, 1993.

The administrator submitted a memorandum as to sanction. Respondent did not submit any papers.

On March 4, 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 determination.

1. Respondent has been a justice of the Supreme Court since January 1, 1980. He has been a judge since 1957, first in the Lake George Town Court and later in the Warren County Court.

2. On March 6, 1991, in the Queensbury Town Court, Justice Michael J. Muller held a pretrial conference in People v. Matthew Carpenter. District Attorney William E. Montgomery, III, appeared for the People; Kurt Mausert, Esq., appeared as assigned counsel for the defendant.

3. Mr. Mausert moved for an order directing Mr. Montgomery to remove an American flag pin that he was then wearing should he appear before a jury in the case. Judge Muller granted the motion.

4. On March 8, 1991, Mr. Mausert notified Judge Muller and the district attorney's office that Mr. Carpenter intended to waive his right to a jury trial. Judge Muller scheduled a bench trial for March 14, 1991.

5. On March 13, 1991, by Order to Show Cause, Mr. Montgomery brought an Article 78 proceeding against Judge Muller and Mr. Carpenter in Supreme Court, Warren County. The proceeding challenged Judge Muller's order that Mr. Montgomery remove the American flag pin if the case was tried before a jury. Respondent executed the Order to Show Cause, stayed the trial and ordered that the motion be heard on March 22, 1991. Mr. Mausert was not named as a party but received the papers and the Order to Show Cause as Mr. Carpenter's attorney.

6. After receiving the Order to Show Cause, Mr. Mausert went to Judge Muller's private law office to confirm that the trial would not be held the following day. Judge Muller was not in, but Mr. Mausert spoke to his brother and law partner, Robert Muller. Mr. Muller called Justice Thomas E. Mercure of the Appellate Division, Third Department, and explained that the trial had been stayed, apparently because respondent was unaware that a jury trial would be waived. Mr. Muller told Mr. Mausert that Judge Mercure had suggested calling respondent at home and explaining that it was to be a bench trial.

7. At about 6 P.M. on March 13, 1991, Mr. Mausert called respondent at home. Respondent told Mr. Mausert that he should see him at his office. Mr. Mausert said that he was calling at the suggestion of Judge Mercure. Respondent terminated the conversation.

8. At some point before March 22, 1991, respondent asked Judge Mercure about his conversation with Mr. Mausert and was told that Judge Mercure had spoken to Robert Muller, not Mr. Mausert.

9. Before oral argument on the Article 78 proceeding, respondent prepared a typewritten draft decision. He also instructed his court reporter to take notes of the proceeding for respondent's personal use.

10. Immediately after hearing argument, respondent read from the bench his previously prepared typewritten decision. There were numerous spectators in the courtroom, some of whom were wearing American flag pins.- There was applause as respondent left the bench.

11. In the decision, respondent:

a) ordered that Carpenter be transferred to a judge other than Judge Muller for trial, even though no such relief had been requested or argued;

b) criticized Judge Muller's judicial performance by stating, "I have no authority to discipline judges, but I feel the cost to the taxpayers of the Town of Queensbury for just the record in this case should indicate a need for review of the procedures and systems in Justice Muller's court...";

c) ordered that Mr. Mausert be disqualified from representing Mr. Carpenter, even though no such relief had been requested or argued, Mr. Mausert was not a party to the proceeding and had not been afforded notice or an opportunity to be heard on this issue;

d) ordered that the director of the assigned counsel program submit Mr. Mausert's payment voucher to respondent for review, even though respondent had no authority to review the voucher since he was not the trial judge, no such relief had been requested or argued, Mr. Mausert was not a party to the proceeding and had not been afforded notice or an opportunity to be heard on this issue; and,

e) ordered that Mr. Mausert be removed from the panel of assigned counsel, even though respondent had no jurisdiction to do so, no such relief had been requested or argued, Mr. Mausert was not a party to the proceeding and had not been afforded notice or an opportunity to be heard on this issue.

12. Respondent did not address the issue of whether the flag-pin dispute was moot inasmuch as a jury trial had been waived, even though that issue had been extensively argued by the parties in their papers and at oral argument.

13. In his decision, respondent said that Mr. Mausert had falsely stated that Judge Mercure had suggested that Mr. Mausert telephone respondent, whereas it was Robert Muller who had spoken to Judge Mercure. Based on comments made by Mr. Mausert at the pre-trial conference before Judge Muller,

respondent also accused Mr. Mausert of showing "verified animosity" toward Mr. Montgomery.

14. On March 22, 1991, respondent signed an order embodying the decision that he read from the bench.

15. In his decision, respondent criticized Judge Muller and Mr. Mausert because:

a) he was hostile toward Mr. Mausert because of certain information which he had learned outside of the court proceeding;

b) he believed that Mr. Mausert, who lived outside Warren County, was making too much money from the assigned counsel program and that only Warren County attorneys should share in the program's funds;

c) he believed from statements made to him outside of court that Mr. Mausert and Judge Muller were part of a group that was hostile to Mr. Montgomery and that they were trying to embarrass the district attorney;

d) he was of the opinion that Mr. Mausert had "disgraced" the American flag by his motion to have Mr. Montgomery remove the pin; and,

e) he believed that, by his decision, he could curtail Mr. Mausert's assigned counsel practice and his criticism of Mr. Montgomery.

16. Between April 2, 1991, and April 5, 1991, Mr. Mausert made three written requests of the county clerk, the court reporter and respondent, respectively, for a transcript of

Motivated by personal animosity that was based on information that he had obtained outside of the court proceedings, respondent rendered a decision that went beyond the relief requested and beyond his legal authority. In doing so, he failed to observe high standards of conduct and preserve the independence and impartiality of the judiciary. (See, Matter of Van Buskirk, 1990 Ann Report of NY Commn on Jud Conduct, at 174, 180; Matter of Mullen, 1987 Ann Report of NY Commn on Jud Conduct, at 129).

A judge has wide discretion in decision making, and a good-faith effort should not result in disciplinary action (Matter of Slavin, 1990 Ann Report of NY Commn on Jud Conduct, at 158, 163 [Altman, dissenting]), even though it might later be determined on appeal to be erroneous. In some instances, a judge is authorized to go beyond the relief requested by the parties to fashion an appropriate remedy. (See, e.g., CPLR 3212[b] regarding motions for summary judgment). This was not such an instance.

Respondent's decisions to remove Mr. Mausert from representing Mr. Carpenter and from receiving any further assignments as counsel to indigent defendants were not authorized by statute. They denied Mr. Mausert's rights without notice or hearing, and they were based on animus and vindictiveness.

Respondent's personal views concerning Mr. Mausert and his fees as assigned counsel should have played no part in his decision-making process. Nor should respondent's patriotism or his interest in protecting the district attorney from criticism

the oral argument in the Article 78 proceeding. On May 15, 1991, an attorney for Mr. Mausert requested the transcript from both the court reporter and respondent.

17. On May 19, 1991, the court reporter sent a letter to Mr. Mausert's attorney, David Goldstein, in which the reporter denied that a stenographic record existed. Respondent had discussed the matter with the court reporter and was aware of the general substance of his letter before it was sent.

18. On May 20, 1991, respondent wrote to Mr. Goldstein that no stenographic transcript had been made of the proceeding, even though he knew that the court reporter had taken stenographic notes.

19. On February 13, 1992, the Appellate Division, Third Department, reversed respondent's decision and order in the Article 78 proceeding against Judge Muller and Mr. Carpenter.

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(b), 100.3(a)(1), 100.3(a)(2) and 100.3(a)(3), and Canons 1, 2A, 2B, 3A(1), 3A(2) and 3A(3) of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained insofar as it is consistent with the findings herein, and respondent's misconduct is established.

have influenced the outcome of the proceeding. Respondent clearly abused his discretion for personal and partisan reasons.

It was also wrong for respondent to mislead Mr. Mausert and his attorney by telling them that there was no transcript of the argument in respondent's court when he knew that he had directed the court reporter to take notes of the proceeding. He gave misleading information concerning the availability of a transcript and condoned the actions of the court reporter in doing so, as well. (See, Matter of Reeves v. State Commission on Judicial Conduct, 63 NY2d 105, 108-09; Matter of Reyome, 1988 Ann Report of NY Commn on Jud Conduct, at 207, 209). The fact that the transcript may not have been part of the record for appeal but rather a record for respondent's personal use is no excuse for misrepresenting that it did not exist.

In mitigation, we note that respondent has been "forthright, cooperative and contrite" in the proceeding before us. (See, Matter of LaBelle v. State Commission on Judicial Conduct, 79 NY2d 350, 363).

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

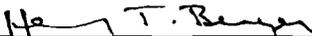
Mr. Bellamy, Judge Ciparick, Mr. Cleary, Judge Salisbury, Mr. Sheehy and Judge Thompson concur.

Mr. Berger, Judge Altman, Ms. Barnett, Mrs. Del Bello and Mr. Goldman dissent as to sanction only and vote that respondent be censured.

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: April 28, 1993


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

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DISSENTING
OPINION BY
MRS. DEL BELLO

I dissent and vote that respondent be censured.

Admonition, the least severe of the public sanctions available to the Commission, does not adequately redress respondent's conduct. A judge's primary responsibility is to put aside personal feelings and prejudices and decide cases impartially on the merits and within the law. This is precisely what respondent, a Supreme Court justice with 35 years experience on the bench, failed to do.

He further demonstrated his hostility and partisanship--as well as a lack of candor--by his attempt to prevent Mr. Mausert from obtaining a transcript of the argument in the Article 78 proceeding.

In addition, respondent's previous censure for seeking to influence the disposition of cases in other courts (Matter of Dier v. State Commission on Judicial Conduct, 48 NY2d 874) is an appropriate consideration in determining sanction in this matter (see, Matter of Maney v. State Commission on Judicial Conduct, 70 NY2d 27, 31).

Respondent's serious abuse of his power should be strongly condemned. I vote that he be censured.

Dated: April 28, 1993



Dolores Del Bello, Member
New York State
Commission on Judicial Conduct

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DISSENTING
OPINION BY
MR. GOLDMAN
IN WHICH
MS. BARNETT
JOINS

I dissent from the Commission's determination that respondent be issued an admonition. I believe that the appropriate sanction in this case is a censure.

I find respondent's removal of Mr. Mausert from his representation of Mr. Carpenter, and from the Warren County assigned counsel list, serious misconduct deserving of a severe sanction. Respondent had no legal authority for removing Mr. Mausert from the Carpenter case or the assigned counsel list. No such relief had even been requested. Mr. Mausert was not a party to the proceedings, had not been afforded notice of respondent's intended action, and had no opportunity to be heard on this issue.

Respondent apparently felt that Mr. Mausert, who lived outside the county, was making too much money from the Warren County assigned counsel program and that only Warren County attorneys should share in the program's funds. Respondent also apparently believed that Mr. Mausert's stated animosity toward District Attorney Montgomery in some manner affected his representation in the criminal case. Nonetheless, these beliefs provide no basis for respondent to remove Mr. Mausert from the case and from the assigned counsel panel.

Rather, it is apparent that respondent's action was based on his own personal hostility toward Mr. Mausert.

By his actions, respondent deprived Mr. Mausert of a substantial part of his livelihood, and deprived the indigent criminal defendants of Warren County, including Mr. Carpenter, of the services of a zealous defense attorney. His actions in mistreating the attorney constituted an abuse of judicial power (see generally, Matter of Slavin, 1990 Ann Report of NY Comm on Jud Conduct, at 158; Matter of Sharpe, 1984 Ann Report of NY Comm on Jud Conduct, at 134; Matter of Taylor, 1983 Ann Report of NY Comm on Jud Conduct, at 197).

Especially in view of respondent's prior censure by this Commission, also involving an abuse of his power as a judge (Matter of Dier v. State Commission on Judicial Conduct, 48 NY2d 874), I believe that a mere admonition is inadequate. Accordingly, I vote that respondent be censured.

Dated: April 28, 1993


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