

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

JAMES J. LEFF,

a Justice of the Supreme Court,
First Judicial District.

BEFORE: Mrs. Gene Robb, Chairwoman
Honorable Fritz W. Alexander, II
John J. Bower, Esq.
David Bromberg, Esq.
E. Garrett Cleary, Esq.
Dolores DelBello
Victor A. Kovner, Esq.
Honorable William J. Ostrowski
Honorable Felice K. Shea (Not Participating)
Carroll L. Wainwright, Jr., Esq.

APPEARANCES:

Gerald Stern (Raymond S. Hack and Jean M.
Savanyu, Of Counsel) for the Commission

Kasanof Schwartz Iason (By Robert Kasanof,
Lawrence Iason and Howard E. Heiss)
for Respondent

The respondent, James J. Leff, a justice of the Supreme Court, First Judicial District (New York County), was served with a Formal Written Complaint dated January 5, 1981, alleging that, for a six-month period in 1980, respondent refused to perform his assigned duties in accordance with an administrative order. Respondent filed an answer dated February 18, 1981.

By order dated March 12, 1981, the Commission designated the Honorable Bertram Harnett referee to hear and report proposed findings of fact and conclusions of law. The hearing was held on September 21, 22, 24 and 25, 1981, and the referee filed his report with the Commission on January 20, 1982.

By motion dated February 24, 1982, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be censured. Respondent opposed the motion and cross-moved on March 29, 1982, to disaffirm the referee's report and for dismissal of the Formal Written Complaint or, in the alternative, for reference of the Formal Written Complaint to a different referee for a new hearing. The Commission heard oral argument on the matter on April 22, 1982, thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a justice of the Supreme Court, First Judicial District, since January 1969, having been elected in the fall of 1968 to a 14-year term.

2. Between 1969 and April 1972, respondent served almost exclusively in civil parts of the Supreme Court.

3. Between May 1972 and June 1980, respondent served almost exclusively in criminal parts of the Supreme Court.

4. On May 27, 1980, respondent was assigned to serve in Part 4 of the Civil Term, a jury part, of the Supreme Court, New York County, for the period from June 16, 1980, to December 26, 1980. Respondent actually learned of the pending assignment by

April 1980 and was notified officially on or about May 27, 1980.

5. The assignment of respondent was made in connection with the general assignment of all elected and acting Supreme Court justices to the civil and criminal parts of the Supreme Court in the counties comprising New York City, for the period from June 16, 1980, to December 26, 1980. There were at the time 167 criminal parts and 86 civil parts in the Supreme Court in New York City.

6. The assignment of respondent was recommended, approved, effected, concurred in or ratified by the following: Hon. E. Leo Milonas, Deputy Administrative Judge for New York City; Hon. Jawn A. Sandifer, Deputy Administrative Judge for the Criminal Term, Supreme Court, New York County; Hon. Edward Dudley, Assistant Administrative Judge for the Civil Term, Supreme Court, First Judicial District; Hon. Herbert Evans, Chief Administrative Judge of New York State; Hon. Francis Murphy, Presiding Justice of the Appellate Division, First Department; and the Chief Judge of the State of New York, Hon. Lawrence Cooke. In regular course during the periods at issue, assignments of elected New York Supreme Court justices in the First Judicial District to civil and criminal parts were done by the authority of both Justice Evans and Justice Murphy. In practice, as was done in respondent's case, the assignment schedules were drawn up by Justice Milonas after consultation with Justices Sandifer and Dudley. Justice Milonas then forwarded a draft assignment schedule to Justices Sandifer and Dudley for comment, and later submitted his final schedule to Justices Evans

and Murphy for consideration and signature.

7. Respondent refused to serve in Part 4 of the Civil Term as assigned and failed to perform any judicial duties in that part for the period from June 16, 1980, to December 26, 1980.

8. In the Supreme Court, in New York City, no general practice of circularizing justices for assignment preferences existed, and reasons for assignments were not given to individual justices as a matter of regular course. The only written standard for assignment of judges cited was Section 31.2 of the Rules of the Administrative Board of the Judicial Conference of the State of New York, which reads:

Assignment of justices to criminal terms.

The appropriate Appellate Division or such administrative judge or judges as it may designate, shall make the assignments of justices to criminal term parts. The aptitude, interest, and experience of justices in criminal work shall be considered in making such assignments.

Nothing was cited for assignment to civil terms.

9. Respondent discussed his assignment views and corresponded over them with judges in the administrative chain both before and after his actually learning, and official notification, of his new assignment.

10. Respondent enjoys a broad reputation for good judicial performance.

11. He has the intellect, ability and experience necessary to discharge well the functions of both civil and criminal parts of the New York State Supreme Court.

12. Respondent has for many years expressed public and private criticism of the courts and their administration.

13. Respondent, as an individual, was considered personally troublesome by Justice Sandifer.

14. In February 1980, respondent requested and was given a transfer from a criminal calendar part to a criminal trial part on respondent's own claim that he was tired and needed a rest from the calendar part.

15. No punitive or retaliatory basis, and no irregularity of any kind, was proven with respect to respondent's assignment on May 27, 1980, to Part 4 of the Civil Term of his court, the assignment here in question.

16. In December 1980, respondent was given another civil assignment, which he willingly accepted and later performed satisfactorily.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 33.1, 33.2(a), 33.3, 33.3(a)(1), 33.3(a)(5) and 33.3(b)(1) of the Rules Governing Judicial Conduct (now Sections 100.1, 100.2[a], 100.3, 100.3[a][1], 100.3[a][5] and 100.3[b][1]) and Canons 1, 2A, 3A(1), 3A(5) and 3B(1) of the Code of Judicial Conduct. The Charge in the Formal Written Complaint is sustained and respondent's misconduct is established.

Respondent's assignment on May 27, 1980, to a civil part

of the Supreme Court, was lawfully made by those justices charged with the administration of the Supreme Court. Their authority derives from Article VI, Section 28, of the State Constitution and Article 7-A of the Judiciary Law.

Respondent had a duty to serve in accordance with that assignment. In a large and complex court system, it is obvious that individual judges cannot be free to set their own assignments or reject those which they simply do not prefer. Respondent himself concedes that he does not have a right to veto his assignments. For individual judges to do so would result in chaos and negate any effective central administration.

Respondent was elected to serve as a justice of the Supreme Court, not as a justice of the criminal part of the Supreme Court. A person elected to the Supreme Court must expect to be assigned from time to time to duties in either the civil or criminal parts, in which all Supreme Court justices are constitutionally qualified to serve.

Respondent was never ordered to perform an assignment which was unconstitutional, or which even remotely shocked the conscience, or which other Supreme Court justices were not routinely required to perform, or which respondent had not already performed in the past.

Respondent's contention that the order of May 27, 1980, was punitive and in retaliation for his open criticism of court administration is without foundation. On its face, there is nothing unusual or punitive about an assignment of a Supreme Court justice to a regular civil part of the Supreme Court in his home county. On the record of this proceeding, there is no proof that

this otherwise valid assignment was inspired by retaliatory motive. As Justice Harnett, the referee, concluded, "the unequivocal testimony of [Justices] Murphy, Evans, Milonas, Dudley and Sandifer explicitly negated imputation of punitive retaliation or irregularity." Surely, evidence that a judge has some ground to believe an assignment was punitive is insufficient to warrant a finding of invalidity and plainly fails to justify a private work stoppage or strike against the litigants and attorneys scheduled to appear in his court.

We reject the contention that a work stoppage is an appropriate manner by which to assert such a claim. An Article 78 proceeding to test such an assignment was the obvious alternative, and one which respondent did not hesitate to adopt to challenge the Commission's own proceedings.* The dissent's argument that such a course of action imposes an expensive and unfair burden on the judge is unpersuasive.

In essence, this case involves not the validity of the assignment to civil term but the refusal by a judge to perform his duties for six months. Assuming, as we do, that respondent sincerely believed that the assignment of May 27 was improper, he had the obligation to seek redress in a lawful manner. One would expect that a judicial officer, when confronted by an order whose validity he challenged, would seek relief in those same courts

*Two independent proceedings were instituted by respondent in state and federal courts in the course of this proceeding. Leff v. Commission et al., N.Y. Sup Ct (1st Jud. Dist., Index No. 18586/80, Oct. 5, 1980); and Leff v. Commission et al., U.S. Dist. Ct. (SDNY, Index No. 80Civ.6074, Nov. 3, 1980).

over which he otherwise presides and before which the ordinary citizens of a civilized society are expected to bring their disputes.

There is a great irony, and a potentially dangerous message to society at large, for a judge to decline to rely upon the very legal system whose laws he applies to others, and instead take extra-judicial action. Had the order of May 27 been so onerous as to shock the conscience, had it directed respondent to commit an illegal act, for example, he still would have been obliged to challenge it in court. Respondent's implication that review of such a challenge would have been less than fair is an unwarranted slur upon the state's judiciary.

Respondent has advanced the argument, which the dissent has furthered, that the Commission, in disciplining a judge for his refusal to accept an assignment, has somehow impaired the independence of the judiciary. This contention is unsound.

Historically, the term "independent judiciary" has referred to those courts in which judges are free to decide the merits of cases without fear of public reproof for unpopular decisions and without private pressure from those who govern or others with influence. An "independent judiciary" has never encompassed authority for judges to refuse lawfully-assigned work. Indeed, in the very constitutional provision establishing this Commission, "persistent failure to perform his duties" is one of the specifically-enumerated causes for disciplining a judge (Article VI, Section 22a, of the Constitution). Thus, to

argue that discipline in this case would chill judicial independence is to misunderstand the nature of that independence and to ignore our constitutional obligation to discipline a judge who does not work.

The Commission holds that refusal to accept a lawful assignment for a period of six months constitutes judicial misconduct. In so holding, we have every confidence that this determination will not impair in the slightest the abilities of our judiciary to fulfill their obligations as independent officials under our state and federal constitutions.

As to the propriety of imposing discipline for such conduct, it first must be noted that the Commission's determinations are subject to full scrutiny by the judiciary itself, in the form of de novo review by the Court of Appeals. Thus the judiciary itself, not the other independent branches of government, remains the final arbiter of judicial disciplinary proceedings. Second, the judiciary is well-represented on the Commission itself, with four of our eleven members required by law to be judges. Third, the Commission frequently, as in the instant case, turns to distinguished former judges to serve as referees during the formal hearings on stated charges which precede the issuance of determinations.

As to appropriate sanction, we find, as did the referee, that respondent enjoyed an outstanding reputation as a member of the Supreme Court. Perhaps his years of outstanding service led him to believe that his reassignment was subject to

standards not applicable to his colleagues. His error is tragic. We agree with the referee's conclusion that respondent has disgraced himself and compromised the judiciary.

We note, however, that in December 1980, respondent accepted another civil part assignment and has since performed satisfactorily. We have every reason to believe that his lapse of judgment will not recur and that years of productive service lie ahead.

By reason of the foregoing, the Commission determines that respondent should be censured.

Mrs. Robb, Mr. Cleary, Mrs. DelBello, Mr. Kovner, Judge Ostrowski and Mr. Wainwright concur.

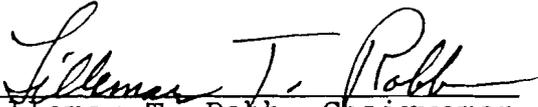
Judge Alexander and Mr. Bower concur in the findings of fact and conclusions of law but dissent as to sanction only and vote that respondent should be admonished.

Mr. Bromberg dissents from the findings and conclusions and votes that the Formal Written Complaint should be dismissed.

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 20, 1982
Albany, New York


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