57 N.Y.2d 270, 442 N.E.2d 434, 456 N.Y.S.2d 36

In the Matter of Patrick Cunningham, as Judge of the County Court of Onondaga County, Petitioner. State Commission on Judicial Conduct, Respondent.

Court of Appeals of New York
Argued October 13, 1982;
decided November 11, 1982

CITE TITLE AS: Matter of Cunningham

SUMMARY

Proceeding pursuant to article VI (§ 22, subd a) of the New York Constitution and subdivision 7 of section 44 of the Judiciary Law to review a determination of respondent State Commission on Judicial Conduct, dated April 20, 1982, which found petitioner guilty of misconduct and determined that he should be removed from the office of Judge of the Onondaga County Court.

On July 9, 1981, the Commission on Judicial Conduct served a complaint upon petitioner containing two charges of misconduct. The charges arose from letters sent by petitioner to Judge J. Richard Sardino of the Syracuse City Court concerning appeals to County Court from Judge Sardino's decisions. The first letter concerned three cases in Judge Sardino's court. Petitioner read a newspaper article in which he was quoted as making statements critical of Judge Sardino's handling of these cases, and later in the day he learned that Judge Sardino was angry at him for signing orders to show cause in these cases. Each of the appeals involved claims that the sentences were excessive. To calm Judge Sardino and to avoid criticism from him, he wrote a letter to Judge Sardino in which he stated "[t]here is no way I would change a sentence that you had imposed. You can do whatever you want to whenever you want to & I'll agree with you. * * * I take the position that you know the case and as sentencing judge you can do whatever you damn well please". Ultimately, petitioner heard the appeals in two of the cases and affirmed. The second letter concerned the appeal from Judge Sardino's court in another case. Petitioner learned that Judge Sardino was upset that he had signed an order to show cause in that case and wrote a second letter, in which he stated that "[i]f I catch the appeal, I will affirm, as always, on a judge's discretion." Later petitioner heard the appeal and reversed the determination of Judge Sardino ***271** in an opinion which was critical of Judge Sardino's sentencing determination.

The Court of Appeals rejected the determined sanction of removal and imposed the sanction of censure, holding, in a *Per Curiam* opinion, that although the letters constituted judicial misconduct because they gave the appearance of impropriety, the record indicated that the Judge did not actually abrogate his appellate duty to review matters before him on the basis of their merits alone, and that removal is an extreme sanction which should be imposed only in the event of truly egregious circumstances.

HEADNOTES

Judges
Disciplinary Proceedings

(1) Upon learning that a City Court Judge was angry at him for signing orders to show cause in certain cases, a County Court Judge sent letters to the City Court Judge stating that he would affirm, on appeal, the sentences and convictions imposed by the City Court Judge; since a Judge must view matters before him on their merits alone, without regard to public or professional disapproval, the letters constituted judicial misconduct because they gave the appearance of impropriety in that they created the impression that the County Court Judge had prejudged the cases and allowed himself to be improperly

influenced; however, inasmuch as the record indicates that the Judge did not actually abrogate his appellate duty to review matters before him on the basis of their merits alone, and since the letters were not meant to be and in fact were not disseminated publicly, the sanction of censure is imposed. The penalty of removal as determined by the Commission on Judicial Conduct was excessive, removal being an extreme sanction which should be imposed only in the event of truly egregious circumstances.

POINTS OF COUNSEL

Leonard Amdursky and *Bruce O. Jacobs* for petitioner.
I. The commission's rationale supporting removal of petitioner is not supported in the record. II. The commission erred in equating the "avoiding of criticism" with being swayed by "fear of criticism" as found in canon 3A (1) of the Code of Judicial Conduct. III. The ex parte communications between petitioner and Judge Sardino were not of the type prohibited under canon 3A (4) of the Code of Judicial Conduct. IV. Provision to impose a sanction of removal with its concurrent loss of the right to hold further judicial office requires a greater degree of proof and unanimity to be constitutional. (People v Light, 285 App Div 496; Apodaca v Oregon, 406 US 404; Burch v Louisiana, 441 US 130.) V. The sanction of removal from judicial office is unwarranted based on all of the facts and circumstances of the case. ***272**
Albert B. Lawrence, Gerald Stern and *Jean M. Savanyu* for respondent.
I. Petitioner's conduct was prejudicial to the administration of justice, compromised the integrity of the judicial system and rendered him unfit as a Judge. (Matter of Shilling, 51 NY2d 397.) II. Due process does not require a unanimous determination or a higher standard of proof.
William F. FitzPatrick, John J. Dee, John M. Freyer, John E. Shaffer and *Ronald C. Berger* for Onondaga County Bar Association, *amicus curiae.*
I. The commission's conclusions in support of the sanction of removal are unsubstantiated in the record. (Matter of Spector v State Comm. on Judicial Conduct, 47 NY2d 462; Matter of Lonschein, 50 NY2d 569.) II. The sanction of removal is excessive under the circumstances. (Matter of Pell v Board of Educ., 34 NY2d 222; Matter of Quinn v State Comm. on Judicial Conduct, 54 NY2d 386; Matter of Schilling, 51 NY2d 397; Matter of Sobel, 8 NY2d [a]; Matter of Steinberg, 51 NY2d 74; Matter of Rogers v State Comm. on Judicial Conduct, 51 NY2d 224; Matter of Cooley, 53 NY2d 64; Matter of Pfingst, 33 NY2d [a]; Matter of Kane, 50 NY2d 360; Matter of Kuehnel v State Comm. on Judicial Conduct, 49 NY2d 465.) III. Subdivision 6 of section 41 of the Judiciary Law, allowing a Judge to be removed upon a majority vote of the commission, is unconstitutional. (Lubin v Panish, 415 US 709; Edwards v Reynaud, 463 F Supp 1235; Bullock v Carter, 405 US 134; Crowe v Lucas, 595 F2d 985; Lanza v Wagner, 11 NY2d 317; Burch v Louisiana, 441 US 130; Linmark Assoc. v Willingboro, 431 US 85.)

OPINION OF THE COURT

Per Curiam.

In this proceeding we are called upon to review a determination of the State Commission on Judicial Conduct removing from office the petitioner, a Judge of the Onondaga County Court, for certain acts of judicial misconduct. After having reviewed all of the evidence before the commission, we conclude that the penalty of removal is excessive and that censure is the more appropriate sanction. ***273** On July 9, 1981, the commission served a complaint upon petitioner containing two charges of misconduct. The charges arose from two letters sent by petitioner to Judge J. Richard Sardino of the Syracuse City Court concerning appeals to County Court from Judge Sardino's decisions. On November 20, 1981, the petitioner, his attorney and the administrator of the commission signed an agreed statement of facts, as provided by subdivision 5 of section 44 of the Judiciary Law, waiving the right to a hearing and stipulating that the determination be made by the commission on the facts as agreed upon.

The first letter concerned three cases in Judge Sardino's court: People v Thousand, People v Chichester and People v Turner. On March 20, 1976, Judge Cunningham read an article in the *Syracuse Post Standard* in which he was quoted as making statements critical of Judge Sardino's handling of these cases; and later that day, he learned that Judge Sardino was angry at him for signing orders to show cause in these cases. Each of the appeals involved claims that the sentences were excessive. To calm Judge Sardino and to avoid criticism from him, he wrote a letter to Judge Sardino on March 20, 1976, in which he stated "[t]here is no way I would ever change a sentence that you had imposed. You can do whatever you want to whenever you want to & I'll agree with you * * * I take the position that you know the case and as sentencing judge you can do whatever you damn well please".

Ultimately, Judge Cunningham heard the appeals in People v Thousand and People v Turner and affirmed both cases. The

appeal in the third case, People v Chichester, was never perfected.

The second letter, which formed the basis for the second charge against Judge Cunningham, concerned the appeal from Judge Sardino's court in People v Bucktooth. On July 11, 1979, Cunningham learned that Judge Sardino was upset that he had signed an order to show cause in that case. Accordingly, in order to calm Judge Sardino, Cunningham wrote a second letter, in which he stated that "[i]f I catch the appeal, I will affirm, as always, on a judge's discretion." Later, Cunningham heard the appeal and reversed the determination of Judge Sardino in an opinion ***274** which was critical of Judge Sardino's sentencing determination.

In the agreed stipulation of facts, Judge Cunningham conceded that his conduct constituted a violation of the Rules Governing Judicial Conduct and the Code of Judicial Conduct, insofar as the letters he had sent created the impression that he had prejudged the cases and also created the impression that he had allowed himself to be improperly influenced by Judge Sardino. On the basis of these stipulated facts, the commission determined, by a vote of 7 to 4, that petitioner should be removed from the Bench.

In reaching this conclusion, the commission determined that petitioner had violated sections 33.1, 33.2, 33.3 (a) (1) and 33.3 (a) (4) of the Rules Governing Judicial Conduct (22 NYCRR 100.1, 100.2, 100.3 [a] [1], 100.3 [a] [4]) and canons 1, 2, 3A (1) and 3A (4) of the Code of Judicial Conduct. The commission felt that petitioner's conduct had impaired his effectiveness as a Judge.

Petitioner now seeks review pursuant to subdivision 7 of section 44 of the Judiciary Law of the determination of the commission ordering his removal. Subdivision 9 of section 44 of that law, which defines the scope of our review in these matters, provides the Court of Appeals with authority not only to "review the commission's findings of fact and conclusions of law," but also to accept or reject the sanction determined by the commission, impose a different sanction, or impose no sanction at all. Under this statutory framework, the court is not restricted to reviewing the proceedings below for errors of law alone but, on the contrary, we are required to review the findings of fact made by the commission. Thus, in essence, there is a determination *de novo* (see Spector v State Comm. on Judicial Conduct, 47 NY2d 462).

Upon examination of the record in this proceeding, we conclude that Judge Cunningham's actions were, indeed, improper. To be sure, a Judge must view matters before him on their merits alone, without regard to public or professional disapproval. Moreover, a Judge must also avoid creating the appearance that he would decide a ***275** matter before him in any other manner. Thus, regardless of whether Judge Cunningham was influenced by his concern about Judge Sardino's criticism, his letters, as he concedes, constituted judicial misconduct because they gave the appearance of impropriety.

Although it is evident that Judge Cunningham acted improperly in sending the two letters to Judge Sardino, we do not believe that the record supports the conclusion that Judge Cunningham actually abrogated his appellate duty to review matters before him on the basis of their merits alone. His reversal of Judge Sardino's decision in People v Bucktooth indicates that he continued to review cases dispassionately, and that his misconduct was rooted not in the actual prejudgment of cases but in the creation of the appearance that he might be prejudging certain matters.

Under the circumstances, we cannot agree with the conclusion of the commission that Judge Cunningham's misconduct warrants the imposition of the sanction of removal. Removal is an extreme sanction and should be imposed only in the event of truly egregious circumstances (Matter of Steinberg, 51 NY2d 74, 83). Indeed, we have indicated that removal should not be ordered for conduct that amounts simply to poor judgment, or even extremely poor judgment (Matter of Shilling, 51 NY2d 397, 403, citing Matter of Steinberg, supra, at p 81). Under the circumstances of this case, we believe that censure is the appropriate sanction.

We find support for our conclusions in the interplay of several factors. First, although petitioner may have given the appearance to Judge Sardino that he would affirm all sentencing determinations, his reversal in *Bucktooth* indicates that he did not abrogate his appellate responsibility to review matters on their merits alone. Second, these letters were meant only for Judge Sardino's eyes and were not to be nor were they disseminated publicly. This, of course, does not excuse the improper conduct, but to the extent that Judge Cunningham's misconduct consisted of creating the appearance of impropriety, it is of some moment that the possible perception of this improper conduct was limited to the eyes of one person only. That it later ***276** came to public attention resulted from certain bizarre circumstances which could not have been anticipated, the responsibility for which cannot be attributed to Judge Cunningham.

In conclusion, we stress our belief that Judge Cunningham's behavior amounted to misconduct. Nevertheless, after a careful review of the facts and circumstances in this case, we believe that petitioner should be censured for his conduct rather than removed from office.

Accordingly, the determined sanction should be rejected, without costs, and the sanction of censure imposed.

Chief Judge Cooke and Jasen and Meyer, JJ.

(Dissenting).

The perversion of the judicial process that is involved in an appellate Judge's advice to a Trial Judge whose decisions the appellate Judge reviews that he can do as he wishes without fear of reversal warrants removal. The amorphous concepts which are the everyday consideration of an appellate Judge -- of excessiveness, reasonableness, fairness, due process, arbitrariness, prudence, and the like -- make it especially important that appellate decisions be made after conscientious evaluation of the case presented below, not with a rubber stamp.

Nor should the fact that the understanding stated was not intended to be made public be regarded as an ameliorating factor. To the contrary, the clandestine nature of the communication, exposed only by happenstance, is an aggravating factor, not only because it encouraged the Trial Judge to continue his inappropriate and intimidating comments but also because there is no place in the decisional process for such secret understandings. Moreover, the continuing fairness of the judicial process being the reason for the procedures established by section 22 of article VI of the State Constitution, we should not, in a case so clearly involving detriment to that concept, overturn the commission's determined sanction without potent reason.

We therefore, dissent and vote to accept the commission's determination.

Judges Gabrielli, Jones, Wachtler and Fuchsberg concur in *Per Curiam* opinion; Chief Judge Cooke and ***277** Judges Jasen and Meyer dissent and vote to accept the determined sanction in a dissenting memorandum.

Determined sanction rejected, etc. ***278**