

To Be Argued By:
MICHAEL MANTELL

New York Supreme Court
Appellate Division—First Department

MICHAEL MANTELL,

Petitioner-Appellant,

—against—

NEW YORK STATE COMMISSION
ON JUDICIAL CONDUCT,

Respondent-Respondent.

APPELLANT'S BRIEF

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STATEMENT OF THE QUESTION INVOLVED

1. Does Judiciary Law §44.1 require the New York State Commission on Judicial Conduct to investigate facially-meritorious complaints?

The answer of the Court below was no.

2. Is the New York State Commission on Judicial Conduct's dismissal, without investigation, of a facially-meritorious complaint judicially reviewable by way of Article 78?

The answer of the court below was no.

NATURE AND FACTS OF THE CASE

This is an Article 78 Proceeding against the respondent (the New York State Commission on Judicial Conduct, referred to hereinafter as "the Commission") based upon the Commission's failure to conduct an investigation pursuant to a complaint made to it by Petitioner-Appellant (referred to hereinafter as "Petitioner") that is facially sufficient.

The details of the facts of the transgressions by the judge who is the subject of the complaint by Petitioner to the Commission are set forth at length in the complaint to the Commission (R20-R48). This is a detailed recitation (including a letters from Petitioner to the Commission, copies of written orders by the Judge, and a transcript of the proceedings) that the subject of the complaint, a judge of the Criminal Court in the City of New York, County of New York, viz., the Honorable Donna Recant, committed the following violations:

- I. Changing her ruling on a matter before her on the basis of her personal reaction to the attorney representing the defendant.

- II. Engaging in a display of intemperate conduct which intimidated lawful advocacy on behalf of a criminal defendant.
- III. Making remarks on the record which were a gross departure from required courtesy and civility.
- IV. Engaging in an ex parte communication with the attorney for the defendant about a case which was before her.
- V. Advising counsel, ex parte, what should be done by counsel to change the judge's attitude and her ruling on a criminal case.
- VI. Having a spectator forcibly removed from the court room in which she was presiding for reasons only of her personal animosity. (R16-17)

The Commission did not investigate, but, rather, dismissed the complaint by way of a pro forma letter (R49).

The petition (R-15-48) incorporates the complaint and alleges, inter alia, that this failure by the Commission was "a failure to perform a duty enjoined upon it by law, and was affected by an error of law, and was arbitrary and capricious, and was an abuse of discretion" and requests an order directing that the Commission conduct an investigation (R-17).

The only opposition on behalf of the respondent was by the Attorney General of the State of the State of New York, and consisted of a Memorandum of Law (52-70). There was no factual statement or other evidence offered in opposition, or any argument that the allegations of judicial misconduct were insufficient..

In dismissing the petition the lower court, by the Hon. Edward H. Lehner in a decision dated September 30th, 1999 (R4-R12), made no finding or holding, or even referred to the

sufficiency of the allegations. By reason of said omissions, Petitioner asserts to this Court that there is no issue that the accusations of judicial misconduct by Judge Recant are facially sufficient.

The basis of the lower court's dismissal of the petition was that the Court does not have authority to order an investigation by the Commission. The ratio decendi by the lower court is an analogy of lack of jurisdiction by the Court to order a District Attorney to prosecute, or to compel the Disciplinary Committee to investigate a complaint against an attorney.

ARGUMENT

Section 44 of the Judiciary Law, subsection 1, says, in part:

Upon receipt of a complaint (a) the commission shall conduct an investigation of the complaint; or (b) the commission may dismiss the complaint if it determines that the complain on its face lacks merit. (Emphasis added).

The Court of Appeals has stated, in Nicholson v. State Commission on Judicial Conduct, 50 NY2d 597, as part of a thorough discussion of the Commission's responsibility and its relations with the judiciary:

There can be no doubt that the State has an overriding interest in the integrity and impartiality of the judiciary. There is "hardly . . . a higher governmental interest than a State's interest in the quality of its judiciary." [Citations] p. 607

It is in light of these overriding interests that the investigatory activities of the body charged with policing the conduct of Judges must be examined. (emphasis added). p. 608

Based upon the aforesaid holding, and after continued discussion, the Court of Appeals concluded:

Specifically, the commission must investigate following receipt of a complaint,

unless that complaint is determined to be facially inadequate (Judiciary Law, §44, subd.1), (emphasis added). p. 610

References in the decision being appealed from to cases iterating the independence of the District Attorney, Petitioner respectfully submits to this Court, are obviously distinguishable.

The court below (by way of citation of the cases of Clouden v. Lieberman, 1992 WL 54370(E.D.N.Y. 1992, and Schachter v. Departmental Disciplinary Committee, 212 A.D.2d 378, 1st Dept. 1995, R-10) also referred to the office of the Chief Counsel the Department Disciplinary Committee. But the very wording of the grant of the authority to said office makes the distinction apparent.

Rules of the Supreme Court, Appellate Division, First Department:

§ 603.4 (d) When the departmental Disciplinary Committee, after investigation, determines that it is appropriate to file a petition against an attorney in this court, the committee shall institute disciplinary proceedings in this court and the court may discipline an attorney on the basis of the record of hearings before such committee, or may appoint a referee, justice or judge to hold hearings. (Emphasis added)

And

§ 605.6 (c) **Investigation.** The staff of the office of Chief Counsel shall make such investigation of each Complaint as may be appropriate. (Emphasis added)

Moreover, the Court in Clouden said;

The chief Counsel is in the same position as a public prosecutor required to exercise "independence of judgment"

The opinion of Judge Lehner cites the case of Doe v. Commission on Judicial Conduct 124 A.D.2d 1067, 4th Dept. 1986. (R-6) for the proposition that filing of a complaint does not require that an investigation take place. However, this is not what the Doe case holds. Doe deals with an "administrator's complaint", which is pursuant to subsection 2 of Judiciary Law, § 44, as

opposed subsection 1, which is the basis of this proceeding. It may well be that the Commission has discretion pursuant to subsection 2, an administrator's complaint. It does not have discretion with respect to the complaint in this case, which is pursuant to subsection 1 and is not an administrator's complaint. Indeed, the holding in the Doe case it is exactly the opposite of the holding by Judge Lehner:

We hold that Supreme Court has jurisdiction to hear and determine claims that the Commission has exceeded its authorized powers or is not proceeding in the manner provided by law. [Citations] p. 1067 (emphasis added).

The Court below said, "The discretion to decline to investigate applies regardless of the source of the complaint. See also, Harley v. Perkinson, 187 A.D.2d 765 (3rd Dept. 1992)" (R-7). But this is not so, and is not supported by the case cited for said authority. Harley v. Perkinson was a plenary action by the plaintiff against the Commission and the Office of Court Administration. The criteria for such a cause of action are certainly quite different from the criteria of judicial conduct. The court held that no cause of action was stated in the complaint in the plenary action; it certainly did not state that the discretion to decline to investigate applies regardless of the source of the complaint. What it did say is that:

To the extent that plaintiff requested that these defendants [Office of Court Administration and the Commission] perform certain duties, his claims were in the nature of mandamus to compel and where, as here, the actions involved the exercise of judgment or discretion, no such relief could be granted. p. 766

That is far different than this petition against the Commission for its failure to conduct a statutorily mandated investigation. The res gestae is a complaint to the Commission by a private

party against a judge, asking the Commission to investigate the transgressions. The distinction is apparent and needs no further elaboration.

Judge Lehner concluded (R-12) that, "This mandatory initial investigation is contrary to the explicitly discretion granted the Judicial Commission by Judiciary Law §44. [see Frooks v. Adams, 214 A.D.2d 615]." But said holding by the court below is contrary to the Court of Appeals specific holding in Nichols (*supra*), and is not supported by the cited decision of Frooks v. Adams. Frooks v. Adams was a proceeding against the Office of Professional Discipline of the New York State Education Dept. In Frooks the court found that there was an investigation, and held that:

[The office of Professional Discipline of the New York State's Education Department]'s determination that no violation has occurred is a discretionary one for which review in a proceeding in the nature of mandamus is unavailable. (Emphasis added). p. 615

The word "shall" (as used in statute) and the word "must" (as used by the Court of Appeals in Nicholson) quite clearly require the respondent to conduct an investigation if the accusations are facially sufficient.

Moreover, the jurisdiction of this Court over the respondent is not just a matter of statutory interpretation or attributions to the Court of Appeals. It is a matter of basic and fundamental public policy that goes without saying; the Court has the power, the duty, the authority, and the moral obligation to oversee any agency that is a part of the Judicial System.

CONCLUSION

The decision of the Court below should be reversed and the Commission should be directed to conduct an investigation of Judge Recant, pursuant to the statute.

Dated: New York, New York
July 31, 2000

Respectfully submitted,



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