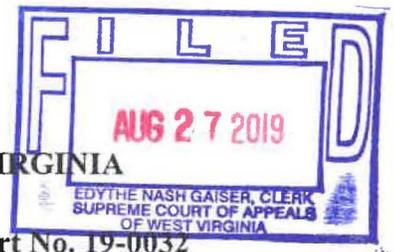


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



IN THE MATTER OF
THE HONORABLE DAVID E. FERGUSON,
MAGISTRATE OF WAYNE COUNTY

Supreme Court No. 19-0032
JIC Complaint No. 35-2018

**JUDICIAL DISCIPLINARY COUNSEL'S
RULE 4.11 OBJECTIONS TO RECOMMENDED
DECISION OF THE JUDICIAL HEARING BOARD**

Comes now, Teresa A. Tarr and Brian J. Lanham, Judicial Disciplinary Counsel ("JDC"), and raise the following objections to the August 1, 2019 Recommended Decision of the Judicial Hearing Board ("JHB") in the above-captioned matter. The objections include but are not limited to the following:

1. JDC objects to Findings of Fact Paragraph No. 4. JDC provided clear and convincing evidence to establish the conduct and Rule violations complained of; and therefore, the JHB erred when it found otherwise;
2. JDC objects to Findings of Fact Paragraph No. 8. JDC provided clear and convincing evidence to establish the conduct and Rule violations complained of; and therefore, the JHB erred when it found otherwise;
3. JDC objects to Conclusions of Law Paragraph No. 12. Rule 1.1 states that "[a] judge shall comply with the law including the West Virginia Code of Judicial Conduct." In paragraphs 6 and 9, the JHB found that Respondent violated the Code of Judicial Conduct by "misstating during his sworn statement" that "he had not acted disrespectfully to the DNR officer" and that "he had not behaved inappropriately during the DNR's investigation and issuance of citations." In paragraph No. 16, the JHB concluded that Respondent violated Rule 2.16(A) "when he improperly denied in his sworn statement that he had not acted in a disrespectful and coercive manner towards the DNR officer." Thus, in concluding that

Respondent violated Rule 2.16(A) of the Code of Judicial Conduct for his misstatements during the sworn statement, logic dictates that the Hearing Board should also have found a violation of Rule 1.1;

4. JDC objects to the Conclusions of Law in that they do not include Conclusions with respect to Findings of Fact Paragraph Nos. 4 and 8;
5. JDC objects to Recommended Discipline Paragraph No. 27 in part. While JDC agrees that the impetus for the ethics complaint involved a nolo plea to a fishing regulation this case is about so much more than a simple ticket. It involves egregious conduct displayed by the Respondent while receiving the ticket from the DNR officers, and the lies told by him during his sworn statement and his disciplinary hearing – the latter fact having been ignored completely by the JHB. The JDC also objects to the JHB’s conclusions with respect to the *Cruickshanks, infra*, factors that Respondent’s acts of misconduct “were not related to the administration of justice; are entirely personal in nature and do not involve . . . a callous disregard for our system of justice.”

The Court has consistently held that the purpose of judicial disciplinary proceedings is the preservation and enhancement of public confidence in the honor, integrity, dignity and efficiency of the members of the judiciary and the system of justice. *See* Syl. Pt. 1, *In re Cruickshanks*, 220 W. Va. 513, 648 S.E.2d 19 (2007). The Court has stated that “[m]atters of suspension due to accusations of judicial misconduct are reviewed and decided based on the unique facts and circumstances of each case.” *In re Fouty*, 229 W. Va. 256, 260, 728 S.E.2d 140, 144 (2012). The Court has set forth the following non-exhaustive list of factors to consider when determining whether it is appropriate to suspend a judicial officer: (1) whether the charges of misconduct are directly related to the administration of justice or the public’s perception of the administration of justice; (2) whether the circumstances underlying the

charges of misconduct are entirely personal in nature or whether they relate to the judicial officer's public persona; (3) whether the charges of misconduct involve violence or a callous disregard for our system of justice; (4) whether the judicial officer has been criminally indicted, and (5) any mitigating or compounding factors which might exist. Syl. Pt. 3, *In re Cruickshanks*, 220 W. Va. 513, 648 S.E.2d 19.

Counsel asserts that the ethics charges are directly related to the administration of justice given that Respondent attempted to use his position as magistrate to get out of the ticket. The circumstances are not entirely personal in nature and do relate to Respondent's public persona in that he attempted to use his position as a Magistrate to get out of the ticket. Moreover, his bad behavior and the use of his position in an effort to get out of the ticket clearly demonstrate a callous disregard for the Court system as a whole.

6. JDC objects to Recommended Discipline Paragraph No. 30 in part. JDC agrees that at the time Respondent received the fishing violation he had been a magistrate for four months. However, at the time he gave his sworn statement to JDC, Respondent had been a magistrate for almost a year and undoubtedly by that time understood the importance of telling the truth in a judicial setting. At the time Respondent testified before the JHB where he again lacked candor, he had been a magistrate for over one and a half years. There is no evidence to support the JHB assertion that the father's conduct may have influenced the Respondent's poor behavior in accepting the ticket. On the contrary, Respondent testified under oath in his sworn statement and at hearing that he recognized that his father was misbehaving and that he tried to get him to settle down.

The JHB also utilizes "prior cases prosecuted by certain DNR officers in which the Respondent and his father had made rulings with which those officers did not agree as mitigation." This is not mitigation. There is no evidence introduced at hearing to support

this statement. At the time of the incident, Respondent had been on the bench four months and had heard one DNR case. Neither of the officers who testified at hearing were involved in that matter and neither of the officers testified that any ruling by the Respondent or his father in that case influenced their conduct. Moreover, JDC fails to see how a negative ruling by the Respondent or his father against the DNR would serve as justification for their actions on the day in question. They could not have been upset by their own rulings. Lastly, whether Respondent had a lawyer at the time he gave his sworn statement is irrelevant. The question is whether he lied. You don't need a lawyer to tell you not to lie. As a judicial officer who places people under oath every day, Respondent understands the importance of telling the truth. Moreover, Respondent had a lawyer at hearing and it didn't help. He lacked candor at the hearing. The lack of lawyer as mitigation also sets a dangerous precedence in a civil judicial disciplinary proceeding where the decision is left solely up to the Respondent as to whether he wants a lawyer or not. Respondent should not get the benefit of his own poor judgment.

7. JDC objects to Recommended Discipline Paragraph No. 31. In *In the Matter of Riffle*, 210 W. Va. 591, 558 S.E.2d 590 (2001), a magistrate, who was convicted of two felony counts of fraudulently attempting to secure workers compensation benefits, three misdemeanor counts of providing false or misleading information to the State Police and two misdemeanor counts of falsely reporting an emergency incident. Prior to her conviction, the Court had suspended the magistrate without pay on April 15, 1999. The suspension was never lifted and she received no pay through the end of her term as magistrate which occurred on December 31, 2000, and she never ran for re-election. The disciplinary proceedings against her concluded on October 25, 2001, when the Court ordered a censure

and a one-year suspension without pay for violations of the Code of Judicial Conduct in connection with her conviction. In coming to this conclusion, the Court noted:

Our independent review of the record shows that Ms. Riffle clearly violated Canons 1, 2, 3A and 3(B)(2) when she made false statements and filed untrue reports with the Department of Public Safety, and when she fraudulently attempted to collect workers compensation benefits. The commentary to Canon 2 notes that “public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. Ms. Riffle did not avoid impropriety in her actions.

Because of the severity of the offenses for which Ms. Riffle was convicted and the likely effect that her misconduct, while serving as a judicial officer would have on the public’s confidence in our judiciary, we agree with the Board that public censure of Magistrate Riffle is appropriate. We further agree that suspension for 1 year is warranted. However, we disagree with the Board’s recommendation of imposing a \$5,000.00 fine. Ms. Riffle was, in fact, suspended for nearly 2 years without pay, and she was further punished for her acts in the criminal proceeding. We see no purpose for the additional penalty and decline to impose the recommended fine. Ms. Riffle was adequately disciplined by the loss of her income and by her criminal punishments, making the imposition of additional sanctions unnecessary in this case.

Id. at 593, 558 S.E.2d 593. Thus, the year-long suspension that the magistrate received is solely be attributable to her lack of candor and not to her criminal convictions.

This case is more akin to *In the Matter of Callaghan*, 238 W. Va. 495, 796 S.E.2d 604 (2017) where a circuit judge was suspended without pay for two years for making materially false statements while a judicial candidate about his opposition in a campaign flyer. Like the judge in *Callaghan*, Respondent made material and repeated false statements about his conduct during his interaction with the DNR officer and he never conveyed authentic regret –which is another aggravating factor not considered by the JHB. It appears from the recommended decision that the JHB wants to put great emphasis on the triggering event when it should be focused on the cover-up.

8. JDC objects to the Recommended Discipline in part. Specifically, JDC objects to the imposition of a public reprimand and a thirty (30) day suspension without pay as insufficient. This is a case about abuse of power and a repeated lack of candor. Consistent with *Riffle* and *Callaghan*, the Respondent should be censured and suspended without pay for fifteen (15) months.

Please also be advised that the undersigned will be on brief and Deputy Counsel Brian J. Lanham will argue the case before the Court should oral argument be required.

Respectfully submitted,

JUDICIAL DISCIPLINARY COUNSEL,

By



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