

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

RESPONDENT'S COUNSEL'S BRIEF

Respectfully submitted,

Judicial Disciplinary Counsel

By

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I.

STATEMENT OF THE CASE

Respondent's counsel acknowledges that Judicial Disciplinary Counsel (JDC) has correctly set forth in its Statement of the Case a concise account of the procedural history of the case. Further, JDC in its brief, and the Judicial Hearing Board (JHB) in its recommended decision, have set forth numerous references to the trial hearing transcript to which respondent's counsel acknowledges correctly cite the record with some exception.

JDC on page 18 of its brief so states that the respondent testified that "I didn't treat him with any more disrespect than he treated me" (HTr at 302), but omitted the remainder of respondent's answer stating "so no, I didn't treat him disrespectful." (HTr at 302).

That in regards to DNR Officer Harvey's testimony concerning conduct of the respondent and his father during the interaction involving the issuance of the citation to the respondent and his father stated the following: "Did you believe they were

going to cause serious harm to themselves or others?" A. "That's why – no, not – not at the end, when we were talking about signing the citation. You know, at that point, they had calmed things down." (HTr at 195).

That in regards to the discussion concerning respondent's inquiring who was DNR Officer Harvey's boss, wherein DNR Officers Amick and Ronkle names were mentioned, that the record in void of any testimony that respondent made any attempt to contain those officers to avoid the citation in question. In fact, the record is clear that the respondent plead no contest to the citation the same day of its issuance. (HTr 257).

II.

SUMMARY OF ARGUMENT

Respondents counsel's position is that the recommended decision of the JHB on August 1, 2019, correctly decided all issues concerning alleged disciplinary allegations, and that its recommended discipline set forth in paragraphs 32 and 33 of that recommended decision of the appropriate disciplinary action to be sanctioned against the respondent for Count I and Count II of the Formal Statement of Charges.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

By Order entered December 5, 2019, the Supreme Court has set this matter for oral argument on its January 14, 2020, Oral Argument Docket.

IV.

ARGUMENT

A. INTRODUCTION

Respondent's counsel so concurs with JDC that this Court is the final arbiter of judicial ethics in West Virginia, and that the Court will make an independent of the record and recommendations of the JHB. Judicial Inquiry Commission v Dostert, 165 WV. 233, 271 S.E. 2d 427 (1980).

B. JHB DID NOT ERR IN FINDING THAT THE JDC PRESENTED INSUFFICIENT EVIDENCE TO ESTABLISH THAT RESPONDENT AND HIS FATHER WERE FISHING WITH A THIRD MAN AND THAT HE LIED ABOUT THE IDENTITY OF THE MAN.

The JHB in detail set forth that the respondent did not violate the Code of Judicial Conduct by not disclosing the identity of the third man who had been fishing alongside respondent and respondent's father in paragraphs 4 and 8 of its recommended decision. Counsel submits that these findings of fact were not specifically rebutted by the JDC in its brief, particularly considering testimony of Mr. Napier at HTr 222 in response to the question "Did you go with the Ferguson's? A. Why I went by myself."

C. THAT THE JHB DID NOT ERR IN FINDING THAT ANY MISSTATEMENT DURING RESPONDENT'S SWORN STATEMENT WAS NOT A VIOLATION OF WVCJC RULE 1.1

Counsel submits that the JHB's conclusion of law set forth in paragraph 12 in that any misstatements were not violations of any law, therefore, a violation of Rule 1.1. Respondent readily admitted that he violated DNR laws by possessing the extra fish as well documented in this case. However, that admission unlike misstatements are clear violations of law, so as not to support the finding of a violation of Rule 1.1 as alleged by JDC to be clear and convincing evidence of that allegation.

D. THAT THE JHB DID NOT ERR IN FINDING THAT THEIR WAS MUCH MORE MITIGATION IN THIS CASE AS JUSTIFICATION OF ITS RECOMMENDED DECISION IN ADDITION TO THE RESPONDENT BEING A RELATIVELY NEW MAGISTRATE ON FEBRUARY 21, 2017, AND HAS NOT BEEN THE SUBJECT OF ANY PRIOR DISCIPLINE

This matter involves a nolo plea to a fishing regulation and that JHB's conclusion 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." See Syl. Pt. 1, In re Cruickshanks 220 W.Va. 513, 648 S.E. 2d 19 (2007). The evidence in this matter clearly shows that the respondent never made any attempt to contact DNR Officer Harvey's superiors, and further accepted his responsibility the same day that the ticket was issued.

That the JHB's consideration that the presence of respondent's father, a former Magistrate who was more confrontational and

disrespectful, may have influenced respondent's poor behavior; prior DNR cases in which respondent and his father had made rulings which with DNR Officers did not agree; and the fact that the respondent did not consult with an attorney with respect to preparation of the response to the complaint and his giving of a sworn statement, were all proper considerations in this matter, in that they contain "unique facts and circumstances" of this case. This is citation In re Flouty, 229 W.Va. 256, 260, 728 S.E. 2d 140, 144 (2012).

E. THAT THE JHB'S RECOMMENDED DECISION TO SUSPEND WITHOUT PAY THE RESPONDENT FOR THIRTY DAYS (30), TO ISSUE A PUBLIC REPRIMAND FOR HIS CONDUCT BE CONSISTENT WITH THE CODE OF JUDICIAL CONDUCT, A FINE OF \$1,000.00 AND PAYMENT OF COSTS AND PROCEEDINGS WAS PROPER IN LIGHT OF ALL AGGRAVATING AND MITIGATING FACTORS

That the JHB's findings and respondent's misconduct in this case falls well short of misconduct as compared to the conduct of a Magistrate in the case of In re Riffle, 210 W.Va. 591, 558 S.E. 2d 590 (2001). That the JHB's recommended decision in citing the aggravating and mitigating circumstances were proper support of its recommended decision.

V.

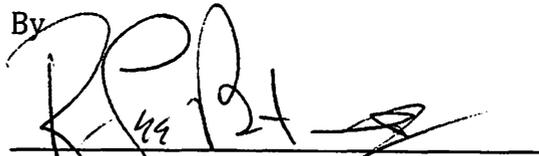
CONCLUSION

Wherefore your respondent's counsel respectfully requests that this Court adopt all findings and conclusions of the Judicial Hearing Board as proper disciplinary sanctions against your respondent.

Respectfully submitted,

David E. Ferguson

By

A handwritten signature in black ink, appearing to read "R. Lee Booten II", written over a horizontal line.

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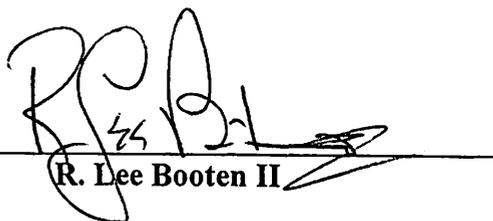
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CERTIFICATE OF SERVICE

I, R. Lee Booten II, counsel for Respondent, do hereby certify that on this 18th day of December 2019, I have served a true and accurate copy of Respondent's Counsel's Brief via email, and overnight mail, upon the following:

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