

BEFORE THE JUDICIAL HEARING BOARD OF WEST VIRGINIA

IN THE MATTER OF:

**THE HONORABLE DAVID E. FERGSON,
MAGISTRATE OF WAYNE COUNTY**

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



RECOMMENDED DECISION

On June 24 and 25, 2019, came the parties, by their respective counsel, for purposes of hearing in this matter. After considering the evidence, argument, and applicable law, the Board makes the following findings of fact, conclusions of law, and recommended discipline.

FINDINGS OF FACT

1. With respect to the allegation that the Respondent violated the Code of Judicial Conduct by interfering with a DNR undercover operation by allegedly telling an undercover DNR officer, “Hey, you need to watch out. There’s some game wardens around here somewhere,”¹ the Board finds that the allegation was not sustained by clear and convincing evidence because although undercover DNR Officer Miller testified that the Respondent approached him and said, “[Y]ou guys need to look out. There are some . . . new game wardens here,”² which the Respondent did not deny,³ Officer Miller testified that he contemporaneously told a fellow undercover DNR officer that the Respondent knew who they were,⁴ making unclear whether the Respondent’s statement to the DNR officer was intended to encourage compliance with or facilitate violation of the applicable fishing laws.

¹ Formal Statement of Charges at 2.

² Hearing Tr. at 66.

³ Hearing Tr. at 288 (“Someone had asked me, who the new game wardens were, when I was down next to my father and them. I just said, there’s some new ones around.”).

⁴ Hearing Tr. at 67.

2. With respect to the allegation that the Respondent violated the Code of Judicial Conduct by violating West Virginia's fishing laws,⁵ the Board finds that the allegation was sustained by clear and convincing evidence as the Respondent admitted at the hearing that he knew he was violating such laws,⁶ had entered a nolo plea,⁷ and does not dispute violating the Code of Judicial Conduct in this regard.⁸

3. With respect to the allegation that the Respondent violated the Code of Judicial Conduct by showing a DNR officer his Supreme Court identification card,⁹ the Board finds that the allegation was sustained by clear and convincing evidence as the Respondent's father testified that the Respondent placed several cards on a truck tailgate while being questioned by the DNR officer;¹⁰ DNR officers testified that the Respondent displayed his Supreme Court identification card;¹¹ and the Respondent's testimony that the DNR officer may have seen the card as the

⁵ Formal Statement of Charges at 2-3.

⁶ Hearing Tr. at 264 ("Q. So you admit that at the time you exceeded the creel limit, you knew you were violating state law? A. I'll admit that."). Moreover, the Respondent's father, a retired Magistrate, likewise testified that he knew at the time that the Respondent had violated fishing laws. Hearing Tr. at 348 ("Q. You knew it was a violation of state law; correct? A. Yes. Q. And you knew at the time that he exceeded the creel limit, that he violated state law. Correct? A. Yes, ma'am. Q. And as a matter fact, you encouraged him to get the extra fish. Correct? A. Yes, ma'am. Q. So you encouraged him to violate state law? A. Yes, ma'am.").

⁷ Hearing Tr. at 256-257, 259-260.

⁸ Hearing Tr. at 274 ("Q. So it's fair to say that you violated the Code of Judicial Conduct for being convicted of that charge. Correct? A. I have answered that, yes.").

⁹ Formal Statement of Charges at 3-4.

¹⁰ Hearing Tr. at 356 ("Q. All right. And the officer asked your son for his license and his -- his fishing license and his ID. And your son said he had to go through -- according to you, your son went through his wallet, and pulled stuff out. What did he do with the stuff that he pulled out until he got to his ID? A. It was just laying there on the tailgate of the truck.").

¹¹ Hearing Tr. at 73-75 ("Once we get to the vehicle, right before we made contact with -- the initial area the vehicle's in, I showed I showed my wallet and my badge and my ID, and I said, 'Just to show you, I'm not lying about who I am.' That way he knows, I am a police officer. At that time, like I said, with the fishing -- and fishing rod, he drops the tailgate of his truck and throws a card down, presents a card and he says, 'Well, I'm not lying about who I am, either.' Q. What was the -- the Respondent's demeanor when he -- he threw the card? A. Just kind of an arrogant manner. I wouldn't say aggressive, just more or less an

Respondent was leafing through several cards in his wallet to retrieve his driver's and fishing licenses¹² is not found to be credible.

4. With respect to the allegation that the Respondent violated the Code of Judicial Conduct by not disclosing the identity of a third man who had been fishing with the Respondent and the Respondent's father,¹³ the Board finds that the allegation was not sustained by clear and convincing evidence as the third man testified that he was not fishing with the Respondent and the Respondent's father;¹⁴ the Respondent credibly testified that he did not know the third man by name and that he was not fishing with the Respondent and the Respondent's father;¹⁵ and the

arrogant manner. Q. What was the card that he threw down on the tailgate? A. It -- it was a Supreme Court of Appeals. I do know that it said, Supreme Court on it, and it had a picture, a photo on the card. . . . Q. What did you do with the Supreme Court ID? A. It was left on the tailgate. Q. What was the impression you received, when he threw the Supreme Court ID down? A. That he was telling me he was somebody, some type of -- whether it be attorney, judge, magistrate, didn't know at the time. That he's somebody above the law. That it wouldn't apply to him. That I -- I could not enforce the law.""); Hearing Tr. at 133 ("Well, whenever I get to the parking lot, Officer Miller starts to tell me that, you know, first off, this guy gives me -- he give me a Supreme Court of Appeals ID. He said, 'I don't know what that's all about.' And as he said that, you know, I looked down and I could see a Supreme Court of Appeals ID on the back -- the tailgate of the truck. And right around when I said that -- he said that the Respondent said, 'Oh, I thought that was my driver's license.'").

¹² Hearing Tr. at 280-281 ("I've had this wallet, the same wallet, since that day. You can see I have a rubber band around it, because it's ready to kick the bucket. (Indicating.) I have to go through it. . . . I have to go through it, to get my things out. We were at the back of my truck. I never once -- right this -- I have a concealed weapons permit, I have my ID, I have the Supreme Court ID. I never once handed this right here to -- to Officer Miller. Now, if he seen that while I was getting it out, of my -- I keep my debit card on the front. I use my debit card all the time. I don't know where it was that day in there, because I have a -- I also have -- Q. Did you put on the bed of the truck? A. No, I never laid my ID down. Q. Did you lay anything on the bed of the truck? A. I do remember laying -- I don't know if I laid my -- my fishing license out first. I don't remember if I laid anything on the bed of the truck.").

¹³ Formal Statement of Charges at 4.

¹⁴ Hearing Tr. at 222 ("Q. And I asked you, did you go that day by yourself, or did you go with the Ferguson's? A. Why, I went by myself. And they were -- they come in later, and we sit beside each other. But now, yeah, I come there by myself. I didn't come with them, no.").

¹⁵ Hearing Tr. at 269 ("Q. On that day, did you know Mr. Napier by name? A. No, I didn't know who Mr. Napier was by name."); Hearing Tr. at 298 ("Q. But you knew that was a third man there. Correct? A. There was not a third man fishing with us. Q. So, if -- if -- if there was a third man fishing with you, and you knew that, then what you told -- you told us, was a lie. Correct? A. Ma'am, there was never a third guy fishing with us.").

Respondent's father credibly testified that the third man was not fishing with them¹⁶ and they had no ostensible reason to conceal his identity.¹⁷

5. With respect to the allegation that the Respondent violated the Code of Judicial Conduct by acting disrespectful to the DNR officer during his investigation and issuance of a citation,¹⁸ the Board finds that the allegation was sustained by clear and convincing evidence, including testimony by DNR Officer Miller that after he identified himself to the Respondent as a DNR officer, the Respondent "drops the tailgate of his truck and throws a card down, presents a card and says, 'Well, I'm not lying about who I am, either;'"¹⁹ that when the Respondent did this, he did so in "more or less an arrogant manner;"²⁰ that by presenting his Supreme Court identification card, the Respondent "was telling me that he was somebody . . . That he's somebody above the law. That it wouldn't apply to him. That I . . . could not enforce the law;"²¹ including testimony by DNR Officer Harvey, a nineteen-year veteran of DNR service,²² that the Respondent raised his voice to the officer and demanded that he "prove" to the Respondent that "I've exceeded the limit of trout"²³ which is inconsistent with the Respondent's testimony, previously

¹⁶ Hearing Tr. at 324-325 ("Q. There's been testimony that you were fishing next to -- next to Mr. Napier, in fact, maybe just even a foot away from him at times. A. Well, at times, that's very possible. Because I talked to him the whole time we were there. You know, he -- I knowed him. Q. Did you go fishing with him that day? A. No, sir. No. . . . I never went fishing with Mr. Napier in my life.").

¹⁷ Hearing Tr. at 361 ("Q. There's been testimony by Officer Miller and Officer Harvey that Mr. Napier was up there with you all when they were asking for the licenses, and at some point, Mr. Napier snuck off. A. Why would he -- Q. Was Mr. Napier ever up there? A. Why would he sneak off, if they had his license?").

¹⁸ Formal Statement of Charges at 5-6.

¹⁹ Hearing Tr. at 73.

²⁰ Hearing Tr. at 74.

²¹ Hearing Tr. at 75.

²² Hearing Tr. at 121.

²³ Hearing Tr. at 138.

referenced, that he knew that he had exceeded the limit; that after the officer informed the Respondent that both the officer and DNR Officer Miller had witnessed the violation, the Respondent stated, "Well, you do what you're going to do. You go ahead and do what you're going to do. This ain't going nowhere;"²⁴ that after DNR Officer Harvey tried to defuse the situation, including angry outbursts by the Respondent's father, by asking the Respondent to move their discussion to a picnic area, the Respondent replied, "I ain't going nowhere. I'm staying here behind my truck;"²⁵ that after DNR Officer Harvey had relocated to the picnic area, in part for his personal safety, the Respondent approached him with his hands in his pockets to which DNR Officer Harvey responded, "I really wish you would take your hands out of your pockets. . . . I don't want to get shot today," to which the Respondent angrily replied, "oh, so now I'm gonna shoot you;"²⁶ that when DNR Officer Harvey warned the Respondent that he could arrest him if he continued with his threatening conduct, the Respondent said, "you can't arrest us for this. This is not . . . jailable offense;"²⁷ that after being handed his citation, the Respondent said, "So I need to contact Sergeant Gary Amick about this?"²⁸ to which DNR Officer Harvey responded, "You can contact to my Lieutenant, Terry Ballard," who was the officer's supervisor, "if that's what you mean,"²⁹ which prompted the Respondent to reply, "Oh, so I need to -- I need to contact Sergeant Larry Rockel;"³⁰ the Respondent admitted asking DNR Officer Harvey about his

²⁴ Hearing Tr. at 139.

²⁵ Hearing Tr. at 141.

²⁶ Hearing Tr. at 146.

²⁷ Hearing Tr. at 148.

²⁸ Hearing Tr. at 152.

²⁹ Hearing Tr. at 153.

³⁰ Hearing Tr. at 153.

supervisor, Gary Amick³¹ and that “I . . . probably shouldn’t have ever asked him who his boss was;”³² the Respondent admitted that he mentioned Sergeant Rockel to DNR Officer Harvey and that “it looked bad” that he did;³³ the Respondent admitted that with respect to DNR Officer Harvey “I’m not going to say at the very end, that I didn’t . . . raise my voice a little bit” and that he was “frustrated;”³⁴ the Respondent admitted that he apologized to DNR Officer Harvey for his reaction to the request to remove his hands from his pockets;³⁵ and the Respondent’s denial of placing his Supreme Court identification card on the tailgate³⁶ is not credible, particularly when it is inconsistent with the testimony of his father.

6. With respect to the allegation that the Respondent violated the Code of Judicial Conduct by misstating during his sworn statement that he had not acted disrespectfully to the DNR officer,³⁷ the Board finds that the allegation was sustained by clear and convincing evidence as previously discussed.

7. With respect to the allegation that the Respondent violated the Code of Judicial Conduct by misstating during his sworn statement that he had not attempted to interfere with the DNR undercover operation, the Board finds that that the allegation was not sustained by clear and convincing evidence as previously discussed.

8. With respect to the allegation that the Respondent violated the Code of Judicial Conduct by misstating during his sworn statement that he had not improperly attempted to

³¹ Hearing Tr. at 277.

³² Hearing Tr. at 277.

³³ Hearing Tr. at 285.

³⁴ Hearing Tr. at 290.

³⁵ Hearing Tr. at 291 (“And at that time, I said, ‘I apologize. I would never think to do anything like that to an officer.’”).

³⁶ Hearing Tr. at 281.

³⁷ Sworn Statement at 119 (“I mean I would never disrespect those guys.”)

interfere with a DNR investigation by concealing the identity of the third man alleged to have been fishing with the Respondent and the Respondent's father, the Board finds that the allegation was not sustained by clear and convincing evidence as previously discussed.

9. With respect to the allegation that the Respondent violated the Code of Judicial Conduct by misstating during his sworn statement³⁸ that he had not behaved inappropriately during the DNR's investigation and issuance of citations, the Board finds that the allegation was sustained by clear and convincing evidence as previously discussed.

10. With respect to the allegation that the Respondent violated the Code of Judicial Conduct by misstating during his sworn statement that he had not engaged in any conversations with Wayne County Magistrate Dell Runyon about the Judicial Investigation Commission investigation, the Board finds that the allegation was not sustained by clear and convincing evidence as Magistrate Runyon testified that his only discussion with the Respondent relative to the disciplinary investigation was procedural, not substantive,³⁹ and the Respondent testified credibly that when he denied speaking with Magistrate Runyon during his sworn statement, he interpreted the question to be directed to any substantive discussion⁴⁰ which both Magistrate Runyon and the Respondent testified did not take place.

³⁸ Sworn Statement Tr. at 78 ("Q. Well, how would he know . . . if he didn't know who you were at the time, why would he say you took out a Supreme Court ID and showed it to him? A. I don't - I can't answer that. I never handed him a Supreme Court ID. . . Q. Did he ever pick it up off the truck? A. No."); Sworn Statement Tr. at 83 ("Q. You said you refused to sign the ticket because of the way he talked to you. Yes.").

³⁹ Hearing Tr. at 213.

⁴⁰ Hearing Tr. at 294-295.

CONCLUSIONS OF LAW

1. R. Jud. Disc. P. 4.5 provides, "In order to recommend the imposition of discipline on any judge, the allegations of the formal charge must be proved by clear and convincing evidence."

2. As noted, the Board has found that some of the factual allegations have been sustained by clear and convincing evidence, while others have not.

3. With respect to Charge I of the Formal Complaint, it is alleged that the Respondent violated Rule 1.1 of the Code of Judicial Conduct which provides, "A judge shall comply with the law, including the West Virginia Code of Judicial Conduct."

4. The Board concludes that the Respondent violated Rule 1.1 as he has conceded that he committed violations of West Virginia fishing laws and, as per such admission, the Respondent did not comply with the law.

5. With respect to Charge I of the Formal Complaint, it is also alleged that the Respondent violated Rule 1.2 of the Code of Judicial Conduct which provides, "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."

6. The Board concludes that the Respondent violated Rule 1.2 by engaging in inappropriate and disrespectful conduct relative to the DNR officer's investigation and issuance of citations.

7. With respect to Charge I of the Formal Complaint, it is also alleged that the Respondent violated Rule 1.3 of the Code of Judicial Conduct which provides, "A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so."

8. The Board concludes that the Respondent violated Rule 1.3 by displaying his Supreme Court identification card and otherwise intimating that he might receive different treatment relative to his citations due to his judicial office.

9. With respect to Charge I of the Formal Complaint, it is also alleged that the Respondent violated Rules 3.1(C) and (D) which provide, "A judge may engage in extrajudicial activities, except as prohibited by law or this Code. However, when engaging in extrajudicial activities, a judge shall not . . . (C) participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality . . . (D) engage in conduct that would appear to a reasonable person to be coercive."

10. The Board concludes that the Respondent violated Rules 3.1(C) and (D) by committing violations of fishing laws, by acting in an intemperate manner during the DNR officer's investigation and issuance of citations, and by acting coercively, including displaying his Supreme Court identification card and intimating that he might receive different treatment relative to his citations due to his judicial office.

11. With respect to Count II of the Formal Complaint, it is alleged that the Respondent violated Rule 1.1 which provides, "A judge shall comply with the law, including the West Virginia Code of Judicial Conduct."

12. The Board concludes that there is insufficient evidence, using a clear and convincing standard, that any misstatement during the Respondent's sworn statement constituted a violation of any law and, therefore, a violation of Rule 1.1.

13. With respect to Count II of the Formal Complaint, it is also alleged that Respondent violated Rule 1.2 which provides, "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."

14. The Board concludes that the Respondent violated Rule 1.2 when he improperly denied in his sworn statement acting in a disrespectful and coercive manner towards the DNR officer.

15. With respect to Count II of the Formal Complaint, it is also alleged that Respondent violated Rule 2.16(A) of the Code of Judicial Conduct which provides, "A judge shall cooperate and be candid and honest with judicial and lawyer disciplinary agencies."

16. The Board concludes that the 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.

17. The Comment to Rule 1.2 provides, "Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge. A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code. Actual improprieties include violations of law, court rules or provisions of this Code."

18. Although violating fishing laws may seem minor in the greater scheme of things, even minor violations of law by judges can erode public confidence in the judiciary and the Respondent should not have knowingly engaged in the violation of our fishing laws, particularly since he is an avid fisherman.

19. The Comment to Rule 1.3 provides, "It is improper for a judge to use or attempt to use his or her position to gain personal advantage or deferential treatment of any kind. For example,

it would be improper for a judge to allude to his or her judicial status to gain favorable treatment in encounters with traffic officials.”

20. Here, it was improper for the Respondent to allude to his judicial status and otherwise to use his position to imply that he should or would receive favorable treatment relative to his fishing violations.

21. The Comment to Rule 3.1 provides, “While engaged in permitted extrajudicial activities, judges must not coerce others or take action that would reasonably be perceived as coercive.”

22. Here, the Respondent’s behavior relative to the DNR officers could have reasonably appeared to them to have been coercive.

23. The Comment to Rule 2.16 provides, “Cooperation with investigations and proceedings of judicial and lawyer discipline agencies, as required in paragraph (A), instills confidence in judges’ commitment to the integrity of the judicial system and the protection of the public.”

24. Here, the Respondent was less than candid in his interactions during the judicial disciplinary investigatory process, which undermines public confidence in his commitment to the highest ethical standards expected of judges.

RECOMMENDED DISCIPLINE

25. R. Jud. Disc. P. 4.12 provides:

The Judicial Hearing Board may recommend or the Supreme Court of Appeals may impose any one or more of the following sanctions for a violation of the Code of Judicial Conduct: (1) admonishment; (2) reprimand; (3) censure; (4) suspension without pay for up to one year; (5) a fine of up to \$5,000; or (6) involuntary retirement for a judge because of advancing years and attendant physical or mental incapacity and who is eligible to receive retirement benefits under the judges’

retirement system or public employees retirement system. Any period of suspension without pay shall not interfere with the accumulation of a judge's retirement credit and the State shall continue to pay into the appropriate retirement fund the regular payments as if the judge were not under suspension without pay. An admonishment constitutes advice or caution to a judge to refrain from engaging in similar conduct which is deemed to constitute a violation of the Code of Judicial Conduct. A reprimand constitutes a severe reproof to a judge who has engaged in conduct which violated the Code of Judicial Conduct. A censure constitutes formal condemnation of a judge who has engaged in conduct which violated the Code of Judicial Conduct. The extent to which the judge knew or should have reasonably known that the conduct involved violated the Code of Judicial Conduct may be considered in determining the appropriate sanction.

26. "Always mindful of the primary consideration of protecting the honor, integrity, dignity, and efficiency of the judiciary and the justice system," our Court held in Syllabus Point 3 of *In re Cruickshanks*, 220 W. Va. 513, 648 S.E.2d 19 (2007), "this Court, in determining whether to suspend a judicial officer with or without pay, should consider various factors, including, but not limited to, (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."

27. Here, Respondent's acts of misconduct were not related to the administration of justice; are entirely personal in nature; do not involve violence or a callous disregard for our system of justice; and involve a nolo plea to a fishing regulation citation.

28. Finally, the Board has considered both aggravating and mitigating factors.

29. Regarding aggravating factors, the Board notes the discrepancy between the Respondent's admitted knowledge of his violation of fishing regulations and his denial of that violation on the day of the incident; the incident would not have escalated had the Respondent

simply accepted his citation with the grace expected of a judicial officer; and the Respondent exacerbated the hostilities by displaying his Supreme Court identification card and otherwise intimating that because of his status as a judicial officer he should or would receive more favorable treatment.

30. Regarding mitigating factors, the Board notes the Respondent had only been a Magistrate for a few months before the incident; the presence of his father, a former Magistrate, who was even more confrontational and disrespectful, may have influenced the Respondent's poor behavior; there had been prior cases prosecuted by certain DNR officers in which the Respondent and his father had made rulings with which those officers did not agree; and the Respondent did not consult with an attorney with respect to preparation of his response to the complaint and his giving of a sworn statement.

31. In *In re Riffle*, 210 W. Va. 591, 558 S.E.2d 590 (2001), our Court held that a magistrate's false statements to and filing of untrue reports with the Department of Public Safety and fraudulent attempt to collect workers' compensation benefits only warranted public censure and a one-year suspension, and the Respondent's misconduct in this case falls well short of the misconduct in that case, but still deserves discipline proportionate to his violations taking into account the aggravating and mitigating circumstances discussed.

32. With respect to Count I of the Formal Statement of Charges, the Board recommends that the Respondent be (a) reprimanded that his conduct was inconsistent with the Code of Judicial Conduct; (b) suspended for a period of thirty (30) days without pay; (c) fined in the amount of One Thousand Dollars (\$1,000); and (d) ordered to pay the cost of the proceedings.

33. With respect to Count II of the Formal Statement of Charges, the Board recommends that the Respondent be (a) reprimanded that his conduct was inconsistent with the Code of Judicial Conduct; (b) suspended for a period of thirty (30) days without pay to run

concurrently with Count I; (c) fined in the amount of One Thousand Dollars (\$1,000); and (d) ordered to pay the cost of the proceedings.

34. In other words, the Board recommends that the Respondent be reprimanded for violating the Code of Judicial Conduct relative to the charges in Counts I and II of the Formal Statement of Charges the Board finds were sustained by clear and convincing evidence; that he be suspended for a period of thirty (30) days without pay; that he be fined in the amount of Two Thousand Dollars (\$2,000); and that he pay the cost of the proceedings.

35. All members of the Board, other than the Honorable Darrell Pratt, who disqualified himself, participated in the consideration and decision of this matter, and join in this Recommended Decision.

Counsel to the Judicial Hearing Board is hereby directed to file a copy of this Recommended Decision with the Clerk of the Supreme Court of Appeals and to serve a copy on the members of the Judicial Hearing Board and counsel of record upon its entry.

Entered this 15th day of August, 2019.



Vice-Chairperson, Judicial Hearing Board