

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

SUPREME COURT NO. 19-0032
JIC COMPLAINT NO. 35-2018

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JUDICIAL DISCIPLINARY COUNSEL'S BRIEF

Respectfully submitted,

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I.

STATEMENT OF THE CASE

Article VIII, § 8 of the West Virginia Constitution states that under its inherent rule-making power, the Supreme Court “shall, from time to time, prescribe, adopt, promulgate, and amend rules prescribing a judicial code of ethics and a code of regulations and standards of conduct and performances” for justices, judges and magistrates. West Virginia Rule of Judicial Disciplinary Procedure (“WVRJD”) 1 states:

The ethical conduct of judges is of the highest importance to the people of the State of West Virginia and to the legal profession. Every judge shall observe the highest standards of judicial conduct. In furtherance of this goal, the Supreme Court of Appeals does hereby establish a Judicial Investigation Commission to determine whether probable cause exists to formally charge a judge with a violation of the Code of Judicial Conduct promulgated by the Supreme Court of Appeals to govern the ethical conduct of judges or that a judge because of advancing years and attendant physical and mental incapacity, should not continue to serve.

WVRJDP 1.11 gives the Judicial Investigation Commission (“JIC”) the authority to “determine whether probable cause exists to formally charge a judge with a violation of the Code of Judicial Conduct. . . .” WVRJDP 3.11 conveys to the Judicial Hearing Board (“JHB”) the authority to “conduct hearings on formal complaints filed by the Judicial Investigation Commission and make recommendations to the Supreme Court of Appeals regarding disposition

of those complaints.” WVRJDP Rule 3.12 allows the JHB to “recommend or the Supreme Court of Appeals may consider the discipline of a judge for conduct that constitutes a violation of the [West Virginia] Rules of Professional Conduct” (“WVRPC”).

Preamble [3] to the West Virginia Code of Judicial Conduct (“WVCJC”) states that the Code “establishes standards for the ethical conduct of judges and judicial candidates. It is not intended as an exhaustive guide for the conduct of judges and judicial candidates, who are governed in their judicial and personal conduct by general ethical standards as well as by the Code.”

Respondent is a resident of Wayne County, West Virginia, and has a high school education along with some college courses (6/24-25/2019 JHB Hearing Transcript “HTr.” at 243). Respondent’s father, a Wayne County Magistrate for approximately 25 years, decided not to run for re-election in the May 2016 judicial election (HTr. at 244, 321-22). Respondent ran for the seat being vacated by his father and won the election but was not supposed to take office until January 1, 2017. At some point thereafter, Respondent’s father retired (HTr. at 245, 321-22). Respondent was appointed to fill the vacancy and began serving as a magistrate on or about November 1, 2016 (HTr. at 244-45, 322). On January 1, 2017, Respondent again took office per the election (HTr. at 245). His term is set to expire on December 31, 2020 (HTr. At 245). At all times relevant to the matters giving rise to the instant proceeding, Respondent served as a Magistrate of Wayne County.

During the morning hours of February 21, 2017, Respondent’s father was at Vernick’s Country Corner, a small grocery store in East Lynn, when he learned that the trout stocking truck was going to the spillway (HTr. at 323). The father called Respondent, told him that the lake was being stocked with trout and asked him if he wanted to go fishing (HTr. at 323). Respondent

agreed (HTr. at 323). Approximately two to three hours later, Respondent picked his father up, and the two rode in Respondent's truck to the spillway (HTr. at 323).

On the day in question, Lendisy Napier, Respondent and his father "met down" at the spillway (HTr. at 228). Respondent's father and Mr. Napier have known each other for over thirty (30) years (HTr. at 235; 349). Mr. Napier has fished with Respondent's father on several occasions and has been to his home many times (HTr. at 349). Respondent's father even drove Mr. Napier to the hearing on the first day (HTr. at 325). Mr. Napier testified that he has known Respondent for about ten (10) years (HTr. at 235). Mr. Napier was already at the spillway fishing when the other two arrived (HTr. at 222, 323-24).

Respondent and his father settled down next to Mr. Napier and for the next "couple of hours or something like that" fished next to him (HTr. at 222, 224-225, 324). According to Respondent's father, Mr. Napier was the closest person fishing next to him outside of his son (HTr. at 352). Respondent's father testified that he "talked to [Mr. Napier] the whole time we were there" (HTr. at 324, 353). Respondent's father also testified that his son and Mr. Napier talked to each other (HTr. at 350). Mr. Napier stated that "there was the three of us there fishing, right there together" and "I was fishing beside both of them" (HTr. at 225, 234). He also stated that he "thought [Respondent] was fishing all the time there" beside of them (HTr. at 227).

Meanwhile, there were three undercover Department of Natural Resources ("DNR") officers in plain clothes at the spillway to make sure that no one was violating any West Virginia laws pertaining to fishing (HTr. at 60, 123). W. Va. Code § 20-1-17(b)(7) gives the DNR the authority to fix by regulation . . . the open seasons and the bag, creel, size, age, weight and sex limits with respect to wildlife in this State. On or about February 21, 2017, the daily creel limit

for brook, brown, rainbow and golden trout is “six (6) trout in aggregate and the possession limit is twelve (12) trout in aggregate. . . .” *See* 58 CSR 60-5.2. The term “aggregate” is defined as:

[T]he total creel or possession limit of similar kinds of game fish. For example, the daily creel limit for trout is six (6). This could be two (2) brown trout, two (2) brook trout, and two (2) rainbow trout, or any combination of six (6) trout, but not more than a total of six (6) per day nor more than a total of twelve (12) in possession.

See 58 CSR 60-2.1. Exceeding the creel limit on trout is a misdemeanor offense in West Virginia, and the penalty upon conviction is a fine of not less than fifty dollars (\$50.00) nor more than three hundred dollars (\$300.00) or imprisonment in the regional jail for not less than ten (10) nor more than one hundred (100) days or both a fine and imprisonment. *See* W. Va. Code § 20-2-5b.

The DNR officers did not know Respondent and he did not know them¹ (HTr. at 261). DNR Corporal Larry Harvey² was stationed out of Logan County and DNR Officer Jacob Miller was stationed out of Mingo County³ (HTr. at 55, 122). As of February 21, 2017, Respondent had only been on the bench for about three and a half months and neither Corporal Harvey nor Officer Miller had appeared before him prior to that time.

According to the two DNR Officers, they would go to different counties to perform undercover trout details because they wouldn’t be well known there (HTr. at 56, 123). During these details they “would look as least like a police officer as we can” (HTr. at 56). Officer

¹ Respondent testified at hearing that he didn’t know either officer before February 21, 2017, and he “didn’t even know who Officer Miller was today” (HTr. at 261).

² Corporal Harvey testified that he had been a DNR Officer for 19 years (HTr. at 121). When he first started working as a DNR Officer, he was stationed in Wayne County and served there for six years before being transferred to his home county of Logan (HTr. at 122). Corporal Harvey testified that he had appeared in front of the father when he served as a magistrate but the last time had been nine or ten years before the February 21, 2017 encounter (HTr. at 197). Corporal Harvey testified that although the father looked familiar to him, he did not recognize him as a former magistrate (183-84). In response to a question by Respondent’s attorney, Corporal Harvey stated that “what I was trying to explain to you before, is I thought it looked like someone that I knew, but I didn’t know who he was” (HTr. at 176). Respondent’s father testified that he did not recognize Corporal Harvey during the encounter (HTr. at 339).

³ The third officer was Corporal Dennis Painter, who was also from out of county. He has since retired from the DNR and did not testify at hearing.

Miller testified that “[w]e’re not allowed to grow facial hair in uniform, so we will use the term, “dirty up.” We’ll grow a scruff, just try to blend in with the – with the public, wear plain clothes” (HTr. at 56). They also took an unmarked cruiser to the spillway (HTr. at 61).

Corporal Harvey was standing on the western bank of the tail waters just below the dam observing Respondent, his father and Mr. Napier fishing together (HTr. at 123-126). Corporal Harvey fished “close or near to them for the next hour-and-a-half” (HTr. at 124). At hearing, Corporal Harvey testified that Respondent caught at least eight trout or two more than the law allows:

The Respondent took the blue stringer and set it down near his father. And he started catching fish, and what appeared to me to be, he was releasing them. So he’d catch a fish, and he’d throw down in the water. He’d catch a fish and throw it down in the water. Now of course, I can’t sit and stare at him the whole time. So you know, when I’m casting my rod and reel upstream, so I can look at them, because they’re located upstream from me. And as it comes down, of course, I go to take my eyes off them, and so on, and so forth. Cast again, so I can see what they’re doing. And intermittently, every minute or so, be able to see what’s going on. . . . Anyway, after awhile the gentleman directly beside me – I’d say he was about five foot away from me, I never found out who he actually is, so we’ll just refer to him as the unknown gentleman [Mr. Napier] – he had caught five trout, and amongst their conversation, I could hear him tell Respondent that “I only have five trout.”

The Respondent then reaches down into the water where I thought he’d been releasing fish at, and he pulls fish up out of there, and he says, do you want this?” And hands it to the older gentleman, and then he took it and put it on a stringer, which made six. A few minutes went on by, and the Respondent’s father said, “Well, I guess – I guess I’ve only got five too.” I’m assuming at this time, they’re about ready to leave. Well, the Respondent looks at him and says, “I can take care of that in a minute.”⁴ So he continues to fish. Well, he hooks a fish, reels it in, and gives it to his father. The Respondent gives it to his father. He puts it on the blue stringer that the Respondent had with him earlier as he moved up and down the bank.

They talk around for a little bit. I can’t remember, at that point, if the Respondent caught more fish, but I can see them getting up and moving around getting ready

⁴ Respondent and Respondent’s father both acknowledged at hearing that the father asked his son to “catch me” a fish (HTr. at 329). Respondent’s father testified that he knew at the time that he asked that it was a violation of state law to exceed the creel limit and therefore a violation of the Code of Judicial Conduct (HTr. at 347-349).

to leave. The Respondent goes up and he gets a stick, right about that long, about as big around as your pinky. And puts it through the gills of the fish, so he reaches down in the water, the fish that I think, at this point that he's releasing. He reaches down into the water and starts picking up fish.

And what he had done, he had – you take your fingers and you put your fingers underneath the gill plate of the fish, and you pull backwards, it breaks their neck and they die. So when you throw them down in the edge of the water – which is about this deep – they don't swim off. So he picks them up out of the water and starts putting them on that stick. And he gets six trout on that stick. . . .

And the Respondent's father and the other gentleman [Mr. Napier], all three get up, and they start up the bank at this point. And of course, at that point, then the Respondent had caught six trout for the blue stringer, and six trout for the stick and one trout for the other gentleman [Mr. Napier].

(HTr. at 127-129).

At about this time, Officer Miller went over to Corporal Harvey to tell him that he had some potential violators across the spillway and was going to apprehend them (HTr. at 69-70). Corporal Harvey suggested that Officer Miller wait because he was going to charge someone (HTr. at 70). Corporal Harvey then pointed to Respondent (HTr. at 70). Corporal Harvey asked Officer Miller to detain Respondent (HTr. at 71). Officer Miller told Respondent that he didn't want to embarrass him so he would follow him to his vehicle and talk to him:

When we got to the vehicle of the Respondent, on the way there, I go up to the Respondent, and in a friendly manner, you know, like I said, blending in, said, "how many fish did you catch, buddy?" or "Did you do any good buddy?" And he said, "Yeah, I've got six – I've got six." That's when I asked him, "Do you know who I am?" . . . And he said, "No." And I asked him again. "You – really don't know who I am?" And he says, "No, I don't know [who] you are." And I told him, "Well, I'm a game warden, and you had been fishing beside of another game warden, who's in plain clothes, and he's watched you violate the law. . . ." Once we get to the vehicle, right before we made contact with – the initial area the vehicle's in, 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. . . . [H]e 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."

(HTr. at 72-73). The card turned out to be Respondent's Supreme Court photo identification card (HTr. at 74). According to Officer Miller, Respondent acted in "kind of an arrogant manner" (HTr. at 74). Officer Miller looked at the card and once he saw it was not a driver's license he left it on the tailgate of the truck (HTr. at 74-75). Officer Miller then asked Respondent for a DMV issued driver's license or identification card, fishing license and trout stamp (HTr. at 74-76). The Respondent then gave him his driver's license and other documents (HTr. at 75-76).

Once Officer Miller had those in his possession "the other two gentlemen that were at the water with him, as we were walking up, they approached the vehicle as well"⁵ (HTr. at 76). Officer Miller then asked Respondent's father for his driver's license, fishing license and trout stamp (HTr. at 76). Respondent's father said, "Nope" (HTr. at 76). Eventually, he got a fishing license from Respondent's father (HTr. at 338). Officer Miller did not get to ask Mr. Napier for his identification (HTr. at 76). According to Officer Miller, Corporal Harvey "came up from the spillway where he was at and advised me that the individuals that I was watching earlier . . . were actually going to their vehicles, they were leaving. That I needed to hurry up and go up there and apprehend them and deal with them" (HTr. at 76-77).

Before leaving, Officer Miller gave Corporal Harvey the documents he had gathered but couldn't find Respondent's Supreme Court photo identification. Officer Miller asked Respondent what happened to it (HTr. at 77). Respondent informed Officer Miller that he had placed the Supreme Court photo identification back in his wallet (HTr. at 77). Officer Miller also told Corporal Harvey about Respondent showing a Supreme Court photo identification (HTr. at 133).

⁵ Mr. Napier testified at hearing that Respondent and his father left "just a few minutes before" he did (HTr. at 228). Mr. Napier also said as he "come up through there, they told me that they was – they was having a little affair with a game warden, and I just – I said, well, I'm just going home" (HTr. at 229).

Officer Miller told Corporal Harvey that the men were claiming that they each caught six fish (HTr. at 133). Corporal Harvey then looked at Respondent and said, “‘you caught too many trout, and you give him trout.’ I pointed at the elderly man [Mr. Napier]. And I said ‘and you give him trout,’ and I pointed to his father.”⁶ (HTr. at 133). At hearing, Officer Miller testified that when he left four people remained behind:

Q. When you left to go, to apprehend the other group, not counting Corporal Harvey, how many people were at the truck?

A. Three.

Q. Who would those three people be?

A. It was the Respondent, who was now identified as his father, and then another gentleman I do not know.

(HTr. at 78).

As Officer Miller was leaving, Respondent’s father yelled, “Where is he going. I want my fishing license”⁷ (HTr. at 135). Corporal Harvey told Respondent’s father that he had his license (HTr. at 136). He then asked the three men to stay where they were while he went to a nearby picnic table to retrieve his back pack containing citation forms (HTr. at 136). When he returned, Mr. Napier was gone (HTr. at 137). Corporal Harvey looked through the documentation that Officer Miller gave him and saw that he only had credentials for Respondent and his father (HTr. at 137). Corporal Harvey then asked them what happened to the third man:

I asked the Fergusons where their friend was and who he was. [Respondent’s father] said, “What friend.” [Respondent] said, “I don’t know who you are talking about.” I said, “The man you have been fishing right beside of and talking to. The one you walked up to the parking lot with and the one you were standing here

⁶ Officer Miller called it “party fishing” and defined it as “if I caught my six fish, and the gentleman with me fishing had caught four, I would catch the other two and give those to him, which makes it illegal” (HTr. at 57).

⁷ The testimony of Respondent’s father corroborated Corporal Harvey’s testimony (HTr. at 337-338).

with a minute ago.” Both Fergusons said, “I don’t know who you are talking about.”⁸

(JDC Exhibit No. 2 at 3; HTr. at 137-138).

Corporal Harvey said at that point things started “to get a little bit out of hand” (HTr. at 138). Corporal Harvey testified:

[Respondent] raises his voice and he says, “I want you to prove that you’ve got seven – you – I’ve exceeded the limit of trout. I want you to look in the back of this truck right here. There’s two stringers there, and there’s five fish on each stringer. Now you tell me – prove to me, how that I’ve exceeded the limit”

HTr. at 138). Corporal Harvey then looked in the back of Respondent’s truck and saw that one stick of six fish was missing and there were only five fish on each of the two remaining stringers (HTr. at 138). Corporal Harvey then answered Respondent’s question by stating that “myself and Officer Miller both saw each one of you with six fish. So it really doesn’t matter to me” (HTr. at 139). Respondent then retorted, “Well, you do what you’re gonna do. You go ahead and do what you’re gonna do. This ain’t going nowhere” (HTr. at 139). Respondent repeated the statement a second time (HTr. at 140-41). Corporal Harvey considered the statement a “threat” and that Respondent was going to get the ticket “taken care of” (HTr. at 141).

About the same time, Respondent’s father said he was “tired of fooling with you game wardens” (HTr. at 139). Officer Harvey reminded him that he wouldn’t have to fool with game wardens if he hadn’t violated the law (HTr. at 139). In an effort to try to diffuse the situation, Corporal Harvey suggested that they all go over and sit at a picnic table so he could have something “to write on” (HTr. at 141). Respondent replied, “I ain’t going nowhere. I’m staying here behind my truck” (HTr. at 141). Respondent’s father also refused to leave the truck (HTr. at

⁸ Respondent’s father admitted that he told Corporal Harvey that there was no third man there even though he had been fishing with his son and Mr. Napier (HTr. at 315-354). Respondent’s father also admitted telling JIC Investigator Dave Hudson that Corporal Harvey “got mad at him because there was an old man fishing there and he left and I wouldn’t tell him the man’s name because it was none of his business” (HTr. at 353).

141). Corporal Harvey left the two at the truck, sat down at the picnic table and began writing the citations (HTr. at 145-146).

Respondent then started walking toward the picnic table with his hands in his pockets (HTr. at 146). Corporal Harvey asked Respondent to take his hands out of his pockets for officer safety and because “I don’t want to get shot today” (HTr. at 146). Respondent became “enraged” which really “hyped up” the situation “for a long time” (HTr. at 146). With respect to the Respondent, Corporal Harvey testified:

So he’s like – he’s like, “oh, so now I’m gonna shoot you,” and he starts throwing his arms like this here (indicating), and pacing back and forth. And looks back at his dad and says, “He says he’s going to shoot me now. He’s” – “I guess I’m gonna shoot him.” And – and starts saying stuff like that. . . . Well, once he starts up that course, now the dad comes up and he just – the father starts, you know, trying to say, “Let us go. You can’t hold us here. . . .” I mean, it’s literally both of them are – they’re pacing back and forth, side to side, screaming at the top of the lungs. If they really wanted me to understand a point they had to say, they’d take a couple steps toward me, and they’d put their head over their chest right here, and then scream it real loud, like this, and, you know, giving me the – the gist of what they wanted me to really know that was the point they was trying to tell me – and most of the time, it was get my stuff let me go now.

(HTr. at 147).

They then had a discussion about whether Corporal Harvey could hold the two men there while he wrote the citations, whether the offenses charged were jailable and whether he had the authority to arrest them (HTr. at 147-148). Corporal Harvey testified that while this discussion was going on Respondent and his father for “most of the whole time, [are] screaming, it’s throwing their hands up in the air like this, and just unbelievable to me, to be truthful with you” (HTr. at 148-149). Respondent said things like “you can’t arrest us for this. This is not – this is not a jailable offense” and “oh, I guess you’re going to put me in jail for fishing without a license now. I got a license” (HTr. at 148-149). After a while they calmed down and returned to Respondent’s vehicle (HTr. at 150).

Corporal Harvey finished writing the citations and returned to the truck.⁹ Corporal Harvey charged Respondent with the misdemeanor offenses of exceeding the trout limit in violation of W. Va. Code § 20-1-7(7) and illegal possession of trout in violation of W. Va. Code § 20-2-32(c) (JDC Exhibit No. 2 at 6, and JDC Exhibit No. 3). Corporal Harvey attempted to get Respondent and his father to sign the citations. Corporal Harvey testified that “the first thing I get from both of them is, ‘Well, I’m not signing anything, and I – I’m not’ – they wouldn’t give me the phone numbers; they wouldn’t sign the citations” (HTr. at 151). In the end, Respondent and his father said, “I ain’t signing nothing” (HTr. at 152).

Corporal Harvey handed the citation to Respondent and told him how long he had to appear in Wayne County Magistrate Court (HTr. at 152). Respondent replied, “So I need to contact Sergeant Gary Amick about this?” (HTr. at 152). Corporal Harvey told him that he could “‘contact my Lieutenant, Terry Ballard,’ who was the acting captain at the time, or at the office, ‘if that’s what you mean’” (HTr. at 153). Respondent then said, “Oh, so I need to – contact Sergeant Larry Rockel” (HTr. at 153). Corporal Harvey replied, “‘Well, if – you know, Sergeant Larry Rockel is my sergeant’ and he kind of left at that point, after that was said” (HTr. at 153). After Respondent and his father left, Officer Miller returned from the other side of the spillway.¹⁰ He asked Corporal Harvey how it went (JDC Exhibit No. 1). According to Officer Miller, Corporal Harvey replied that “they were pretty belligerent and irate during the whole incident” (HTr. at 80; JDC Exhibit No. 1).

Corporal Harvey testified that the encounter with Respondent and his father was time consuming:

⁹ Respondent’s citation shows he received the ticket at about 1:50 p.m. (JDC Exhibit No. 3).

¹⁰ Officer Miller returned sometime after 2:10 p.m., which was the time listed on the two tickets he wrote that day (JDC Exhibit No. 6).

Q. In your 19 years of experience, how long does it usually take you to write two citations to – for the fishing – fishing violations that you wrote the Respondent and his father for?

A. Five minutes.

Q. And your recollection was about 30 minutes for that?

A. At least 30. Between 30 and 45, probably, when you start talking about from the start to the end of me trying to get the information, up to dealing with them, all the way to the end of it.

(HTr. at 150). Corporal Harvey also testified that it was the worst encounter of his career:

In my 19 years of experience, I have wrote many fish citations, exceeding the limit citations. I've never had anything close to this happen, not – I mean, this was terrible over a fishing violation. I guess most of the people will thank you and they'll say, yeah, I understand what I'm doing is wrong, you got me. That's usually what you get. I appreciate it, and I appreciate you going – you know, making me understand this is something that's important.

(HTr. at 154-155).

At some point shortly after the encounter, Corporal Harvey also told Officer Miller that the older gentleman was actually the retired magistrate¹¹ (H.Tr. at 80). However, Corporal Harvey and Officer Miller did not know that Respondent was the sitting magistrate until they contacted Sergeant Rockel after they left the spillway and were in cellphone range (HTr. at 80). Officer Miller testified:

I told Sergeant Rockel, I said, you know, we are on an undercover detail in Wayne County, and we probably just charged the retired magistrate of the county and his son. I'm still referring to him as his son; I don't know his position yet. And Larry kind of – I don't know if you would call it a laugh or just a chuckle – he said, "Who – what do you mean? Who did you charge? And I said the dad was charged as well as the son. And Larry says, in his terms, he says, "Guys, you know boys, the dad is a retired magistrate, the son is actually the acting magistrate

¹¹ According to Corporal Harvey, Respondent's father first disclosed that he had "just retired from working at the courthouse for twenty years" when he was handed the citation charging him with the misdemeanor offenses of illegal possession of trout in violation of W. Va. Code § 20-2-4 and failure to carry/present picture identification in violation of W. Va. Code § 20-2-32(c) (JDC Exhibit No. 2 at 6). Corporal Harvey "did not know David Ferguson Sr. was the retired magistrate until he mentioned working at the courthouse" (JDC Exhibit No. 2 at 6). The charges against Respondent's father were later dismissed by the prosecutor's office.

in Wayne County. He is the magistrate there.” I told him, I said, “Well, we’ve charged a retired magistrate and the magistrate, I guess.” And so he – actually – he had worked – he knew the Respondent, he worked with him on another side job, and he told me, he said, “You know, he’s a pretty good boy. I don’t know” – I can’t remember if he said, “What’s gotten into him” or – he did say that he was pretty – he knew him as being a pretty good guy, in my sergeant’s words.

(HTr. at 81).

The citation issued to Respondent was DNR No. 65107 (JDC Exhibit No. 3). The ticket listed both of Respondent’s misdemeanor charges (JDC Exhibit No. 3). Under the description of the incident, Corporal Harvey wrote “8 trout/6 limit.” At the bottom of the first page it says “I promise to appear in said court at said time and place and in the signature line underneath, Corporal Harvey wrote “failure to sign/refused” (JDC Exhibit No. 3). On page two of the citation, Respondent placed his initials “DF” next to “no contest” (JDC Exhibit No. 3; HTr. at 256-257). Respondent also placed his signature at the bottom of the no contest plea and dated it the same day as the incident or “2-21-17” (JDC Exhibit No. 3; HTr. at 257). Respondent admitted at hearing that he signed it the same day he received the citation (HTr. at 257). Respondent also testified;

Q. On page 2, the date of the ticket says February 21, 2017. When I asked about that, you said that was the day that you pled no contest to the ticket. Is that correct?

A. Yeah. I mean that had to have been when I went and that I did.

(HTr. at 313-314). At the top of the page, the Wayne County Prosecutor wrote the Wayne County Misdemeanor Case No. “17-M50M-00270” (JDC Exhibit No. 3). Interestingly, one of Respondent’s two misdemeanor charges was not dismissed until March 10, 2017, or some 17 days after Respondent had signed the citation indicating that he was pleading no contest (JDC Exhibit No. 4). The prosecutor prepared the Motion which said: “Dismiss illegal possession of

trout based on Defendant's plea to exceeding limit for trout. \$50.00 fine per W. Va. Code § 20-2-5b" (JDC Exhibit No. 4).

On February 23, 2017, both DNR officers wrote separate incident reports about the encounter which were admitted into evidence at hearing (Tr. 81-84; JDC Exhibit Nos. 1 and 2).

Officer Miller testified that incident reports were fairly routine:

Anytime something out of the ordinary happens, whether it be, you know an arrest with a use of force, [if] a CPS worker has to come, anything that's not in the norm for us, being the case here, we write an incident report, and that actually goes to our colonel, who's the head of the chain of command, and it lets him know what happened, and some of the brief details of what's going on. In case he's notified, he's not blindsided by someone asking him about that case. That just gives him a heads up of what's going on.

(HTr. at 81-82). Importantly, the narrative in both incident reports is consistent with each officer's testimony at hearing. Equally significant is the fact that each officer's incident report and testimony is corroborative of the other officer's incident report and testimony.

On April 9, 2018, a judicial ethics complaint was filed against Respondent by DNR Captain Terry A. Ballard and was given Complaint No. 35-2018. The complaint was predicated in part on the February 21, 2017 incident. By letter dated April 30, 2018, the Judicial Investigation Commission asked Respondent to reply to the allegations contained in the Complaint. By letter dated May 3, 2018, Respondent replied to the allegations:

When I received this violation the DNR Officer asked me for my identification. I presented to him my drivers license and also my fishing license. At no point during the incident did I ever tell the DNR Officer that I was a magistrate. **At no point during this incident did I ever present to any DNR Officer my judicial ID.** . . . As you can see I pleaded no contest to charge #1 (Exceeding Limit Trout) and I paid that fine. Charge #2 was dismissed by Magistrate Runyon and the Prosecuting Attorney based upon the plea to charge #1. . . **I have never nor will I ever treat any officer with disrespect.** . . .

(JDC Exhibit No. 4 at 3) (emphasis added).

The JIC conducted a thorough investigation into the allegations including taking a sworn statement from Respondent on October 12, 2018. A redacted version covering only the events surrounding February 21, 2017 was admitted into evidence at hearing. In that statement, Respondent lied about whether a third man was fishing with his father and him on February 21, 2017, and his knowledge concerning the identity of the third man. Respondent repeatedly falsely maintained that only he and his father were fishing together:

They said that there was fishing with three people. I was not fishing with three people. There was people there. There was another guy that had walked up after we left and he said, "who is that guy?" I don't know who the guy was. I wasn't fishing with him.

(10/12/2018 Sworn Statement "SSTr." at 45, 52). Respondent also denied knowing the name of the individual:

- Q. So when Officer Miller testifies there was a third-to this day—unknown party there that is wrong?
- A. Yeah. There was two of us. I can't tell you if somebody else was getting in their vehicle that day or not. There was two of us that day. We had went together, period.
- Q. So when Officer Harvey came and questioned you about where the third gentleman was, you had no idea who he was talking about?
- A. No. . . . There was some other people that Dad was talking to because I hadn't even been down there fishing with them. And when I come back down there, he did say "Catch one more. Let's get out of here, Get Papaw some Trout," and at that point, that's when I did that. But I don't know – I mean I don't know who was – who the other guy that they're referring to.

(SSTr. at 52-53). Respondent also said that the officers "were alleging that we had another guy with us and they said he was a gray-haired gentleman. And there was no other guy with us (SSTr. at 102).

Respondent also lied about his behavior when Officer Miller and Corporal Harvey interacted with him on that day. Respondent said his father was "heated" and that he tried to

“calm him down” (SSTr. at 38). Respondent denied yelling (SSTr at 60, 70). However, Respondent did say that he “might have spoke angrily [with Corporal Harvey] after he told me that he didn’t want fucking shot” (SSTr. at 70). He then said, “I won’t say that I was upset but I was not happy with him” (SSTr. at 70). Respondent also said that he “didn’t have a lot of interaction” with Corporal Harvey while the tickets were being written (SSTr. at 104). He also stated that “I would never disrespect those officers” (SSTr. at 119).

Respondent also lied about other things, Respondent consistently maintained that he only caught one extra fish (SSTr. at 34-35, 37-38, 45, 91). He also changed his story about not showing his Supreme Court identification at all to accidentally showing it when he was looking for his driver’s license (SSTr. at 35-37, 46-50).

The contents of the investigation were presented to the Judicial Investigation Commission at its December 7, 2018 meeting. By a unanimous vote, the Commission found that probable cause existed that Respondent violated the Code of Judicial Conduct and that formal discipline was appropriate. A two-count Formal Statement of Charges was filed with the State Supreme Court on January 10, 2019. A hearing was held on the charges on June 24 and 25, 2019.

At hearing, Respondent admitted that at the time he became a magistrate, he knew he couldn’t break the law (HTr. at 245). Respondent also acknowledged that his oath of office included a pledge to uphold the laws of the State of West Virginia (HTr. at 245-246). He also recalled reading the personnel manual which stated that he could not violate the Code of Judicial Conduct (HTr. at 246-248). However, Respondent testified that he did not read the Code until after February 21, 2017, even though he had been trained on the importance of following it prior to taking office (HTr. at 248-251). Respondent also testified that at the time he went fishing on

February 21, 2017, he knew the creel limit was six (HTr. at 252). He also acknowledged catching a seventh fish for his father in violation of state law (HTr. at 254-255).

Respondent continued his lack of candor when testifying about the incident at hearing. Respondent continued to maintain that he only caught one extra fish (HTr at 263; 267-268). Yet, Respondent also admitted that he never corrected the citation which stated that he had caught two extra fish (HTr. at 263). He also admitted never mentioning that he only caught one extra fish in his May 3, 2018 response to the ethics complaint.

Respondent again testified that he only accidentally showed Officer Miller his Supreme Court photo identification (HTr. at 280). As he did in his sworn statement, Respondent again admitted bringing up Sergeant Amick and Sergeant Rockel (SSTr. at 60-61; HTr. at 277-278, 285). On both occasions, Respondent acknowledged that he was wrong to ask who to contact about the ticket (SSTr. at 60-61; HTr. at 277-278). He also couldn't rationally explain why he asked the question (SSTr. at 60-61; HTr. at 277-279). He did acknowledge that "it doesn't look good" (HTr. at 279).

Respondent denied knowing Mr. Napier but said he "knew of Lendisy" (HTr. at 268). Respondent also testified:

Q. Lendisy said he calls you Dave. That's what Mr. Napier testified to, that he called you Dave.

A. He sure did, and I know his name is Lendisy, but I don't – I don't know Mr. Napier.

(HTr. at 269). Respondent also admitted that his father would have been lying if he told Corporal Harvey that he didn't know who the third man was (HTr. at 271-273).

Respondent largely denied any improper conduct with Officer Miller and Corporal Harvey (HTr. at 290-292). Respondent continued to maintain that he spent his time “trying to calm [his father] down for the most part” (HTr. at 292). Respondent also falsely testified:

Q. Mr. Harvey’s testimony was, you were belligerent, you were swinging your arms, you were disrespectful, you would not follow his commands, you were angry. You deny all that?

A. Absolutely.

(HTr. at 294). Respondent maintained that Corporal Harvey was “unprofessional” during the encounter (HTr. at 303). Revealingly, at one point in the hearing Respondent testified that “I didn’t treat him with any more disrespect then he treated me” (HTr. at 302).

II.

SUMMARY OF ARGUMENT

The JHB issued its recommended decision on August 1, 2019. On August 27, 2019 JDC filed its objections to the recommended decision. JDC raises multiple objections. Specifically, JDC objects to Findings of Fact Paragraph No. 4 and 8 of the Recommended Decision. 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. JDC also objects to Conclusions of Law Paragraph No. 12.

JDC objects to Recommended Discipline Paragraph No. 27 in part. JDC also objects to Recommended Discipline Paragraph No. 30 in part. JDC objects to Recommended Discipline Paragraph No. 31 as having mischaracterized *In re Riffle*, 210 W. Va. 591, 558 S.E.2d 590 (2001). The year-long suspension that the magistrate received in that case was attributable to her lack of candor and not to her criminal convictions. JDC is of the opinion that this case is more akin to *In the Matter of Callaghan*, 238 W. Va. 495, 796 S.E.2d 604 (2017).

Finally, 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.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

By Order entered September 5, 2019, the State Supreme Court stated that the “matter shall be set for oral argument under Rule 19 of the Rules of Appellate Procedure on a date during the January 2020 Term of Court.”

IV.

ARGUMENT

A. INTRODUCTION

This Court is the final arbiter of judicial ethics in West Virginia. *Id.* The longstanding rule is that the Court will make an independent evaluation of the record and recommendations of the JHB. *Id.* The review is *de novo*. *Id.* See also *Judicial Inquiry Commission v. Dostert*, 165 W. Va. 233, 271 S.E.2d 427 (1980). Included “within this independent evaluation is the right to accept or reject the disciplinary sanction recommended by the Board.” *In the Matter of Crislip*, 182 W.Va. 637, 638, 391 S.E.2d 84, 85 (1990),

The Court will generally defer to the factual findings of the JHB unless there is some apparent irregularity in the proceedings, or the charged misconduct is especially serious. *In the Matter of Baughman*, 182 W. Va. 55, 386 S.E.2d 910 (1989). In in the *Matter of Browning*, 192 W.Va. 231, 234, n. 4, 452 S.E.2d 34, 37, n. 4 (1996), the Court stated “that substantial consideration should be given to the Hearing Board’s findings of fact. This consideration does

not mean that this Court is foreclosed from making an independent assessment of the record, but it does mean that absent a showing of some mistake or arbitrary assessment, findings of fact are to be given substantial weight.” Thus, it only stands to reason that the Court often defers to the JHB on its conclusions of law, recommended mitigation and recommended discipline unless they are irregular, in error or contain arbitrary assessments.

JDC agrees with all JHB findings, conclusions and recommended decision where not specifically objected to by Disciplinary Counsel and asks the Court to defer to the JHB on those provisions in its final opinion since they are correct. Where JDC objects to the JHB findings, conclusions, mitigation and recommended discipline, we respectfully ask the Court to find that the JHB was in error and to instead adopt our provisions as set forth in this brief and incorporate them into its final opinion.

B. THE JHB ERRED 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 KNOWING THE IDENTITY OF THE MAN.¹²

WVRJDP Rule 4.5 states that “[i]n order to recommend the imposition of discipline on any judge, the allegations of the formal charge must be proved by clear and convincing evidence.” *See Callaghan, supra; In re Wilfong*, 234 W. Va. 394, 765 S.E.2d 283 (2014); *In re Watkins*, 233 W. Va. 170, 757 S.E.2d 594 (2013); and *In re Toler* 218 W. Va. 653, 625 S.E.2d 731 (2005). Clear and convincing evidence is the middle standard of proof. It means something more than preponderance of the evidence or probable cause and something less than proof of guilt beyond a reasonable doubt. *See generally Judicial Inquiry Commission of Virginia v. Wymack*, 745 S.E.2d 527 (VA 2012).

¹² This argument addresses Findings of Fact Paragraph Nos. 4 and 8 and the lack of any corresponding Conclusions of Law.

It is the burden of proof utilized in judicial and lawyer discipline cases. West Virginia has not specifically defined “clear and convincing” evidence as it relates to judicial discipline. Pennsylvania judicial disciplinary cases define “clear and convincing” as “evidence ‘that is so clear, direct, weighty, and convincing as to enable the trier of fact to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.’” *In re Eskin*, 150 A.3d 1042, 1046 (PA 2016) (citations omitted). North Dakota judicial disciplinary cases state that “the evidence must be such that the trier of fact is reasonably satisfied with the facts the evidence tends to prove as to be led to a firm belief or conviction.” *In re Disciplinary Action Against McGuire*, 685 N.W.2d 748, 759 (ND 2004). It means “evidence which leads to a firm belief or conviction that the allegations are true.” *Id.* It “does not require a showing by ‘100 per cent certainty’ or ‘absolute certainty.’” *Id.* The evidence presented also “need not be undisputed to be clear and convincing. A factfinder need not believe the greater number of witnesses” *Id.*

In Findings of Fact Paragraph Nos 4 and 8, the JHB relies heavily on the “credibility” of Respondent and his father. Yet, both men lied at hearing. Additionally, Respondent lied in his May 3, 2018 written response to the ethics complaint and in his October 12, 2018 sworn statement. Conversely, Officer Miller and Corporal Harvey’s testimony was consistent, credible, corroborative and cogent on this point. The evidence is overwhelming that Respondent and his father were fishing with Mr. Napier, that both men had a long standing relationship with him and that they purposefully declined to reveal his identity. The evidence is also clear and credible as to the misstatements made by Respondent about Mr. Napier during the sworn statement. Therefore, JDC asks the Court to find that Mr. Napier was fishing with Respondent and his father on February 21, 2019, that Respondent knew Mr. Napier’s name, that he purposefully declined to give it to Corporal Harvey during questioning, and that he lied about the matter during the sworn

statement and the hearing. By making these findings, you must also make corresponding conclusions that Respondent violated WVCJC Rule 1.1 by obstructing the investigation, WVCJC Rule 1.2 by being uncooperative, Rule 3.1(C) for undermining the integrity of the judiciary and Rules 1.1 and 2.16(A) for lying about Mr. Napier during the sworn statement and at hearing.

C. THE JHB ERRED IN FINDING THAT ANY MISTATEMENT DURING THE RESPONDENT'S SWORN STATEMENT WAS NOT A VIOLATION OF WVCJC RULE 1.1.¹³

WVCJC 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 of the Recommended Decision, 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 WVCJC Rule 2.16(A) for his misstatements during the sworn statement, logic dictates that the Hearing Board should also have found a violation of WVCJC Rule 1.1.

The Clerk’s Notes on Rule 1.1 which was adopted by the Court on November 12, 2015, and became effective December 1, 2015 notes that the Rule follows the 2007 Model Code. The Clerk’s Notes provide that “[i]n keeping with the primary objective of the 2007 Model Code revisions, the new rules are designed to be black-letter statements about what judges ‘must’ do” Importantly, WVCJC Preamble [6] states that “the black letter of the Rules is binding and enforceable.”

¹³ This argument addresses Conclusions of Law Paragraph No. 12.

Respondent repeatedly lied about four things in his October 12, 2018 sworn statement. Respondent lied about whether a third man was fishing with his father and him on February 21, 2017, and his knowledge concerning the identity of the third man. Respondent also lied about his behavior when Officer Miller and Corporal Harvey interacted with him on that day. Respondent lacked candor when he consistently maintained that he only caught one extra fish. In reality, Respondent caught two extra fish. He also changed his story from his May 3, 2018 written response in which he stated he did not show his Supreme Court identification at all to accidentally showing it when he was looking for his driver's license. The same lies were reiterated by Respondent at hearing.

At the time, Respondent made these misstatements, he had been in office for almost two years and knew that he could not violate the Code of Judicial Conduct and that it was a violation in and of itself pursuant to Rule 1.1 to violate the Code. Therefore, Respondent could be charged with the actual WVCJC violations and Rule 1.1 for violating the body of the law as a whole. Accordingly, this Court should find that any misstatements by Respondent in his October 12, 2018 sworn statement are not only violations of WVCJC Rule 2.16(a) but also violations of Rule 1.1 for violating the body of law as a whole. The Code is a document like the Declaration of Independence, the United States Constitution or the West Virginia Constitution. It should be revered and followed by Judges in whole in an effort to preserve the integrity, independence and impartiality of the judiciary. Therefore this Court should find that Respondent also violated WVCJC Rule 1.1 for the misstatements he made during the sworn statement and at hearing and consider those added violations when determining sanctions.

D. THE JHB ERRED IN FINDING SO MUCH MITIGATION IN THIS CASE WHEN THE ONLY TRUE JUSTIFICATION WAS THAT RESPONDENT WAS A RELATIVELY NEW MAGISTRATE ON

FEBRUARY 21, 2017, AND HAS NOT BEEN THE SUBJECT OF ANY PRIOR DISCIPLINE.¹⁴

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 intemperate and egregious conduct displayed by the Respondent while receiving the ticket from the DNR officers, and the lies told by him in his written response to the ethics complaint, during his sworn statement and during 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* 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.”

This 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

¹⁴ This argument addresses Recommended Discipline Paragraph Nos. 27 and 30.

indicted, and (5) any mitigating or compounding factors which might exist. Syl. Pt. 3, *In re Cruickshanks*.

JDC 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, the use of his position in an effort to get out of the ticket, and his repeated lies clearly demonstrate a callous disregard for the Court system as a whole.

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 about three and one half months. However, at the time he gave his sworn statement to JDC, Respondent had been a magistrate for almost one 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 also 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 calm down.

The JHB also utilizes "prior cases prosecuted by certain DNR officers in whom the Respondent and his father had made rulings with which those officers did not agree as mitigation." This is not mitigation and there was no evidence introduced at hearing to support this statement. At the time of the incident, Respondent had been on the bench for about three and a half months and had heard one DNR case. Neither of the officers who testified at hearing was 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 lawyer¹⁵ at the time he wrote his May 3, 2018 statement or participated in the October 12, 2018 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 his June 24, 2019 hearing and it didn't help. He lacked candor at the hearing. The lack of a lawyer as mitigation also sets a dangerous precedent 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.

The only acceptable mitigation introduced into evidence at hearing is that Respondent was a relatively new magistrate on February 21, 2017, and he has not been the subject of any prior discipline. There is no evidence to establish any of the other mitigating factors set forth by the JHB in either Recommended Discipline Paragraph Nos. 27 or 30. Therefore, JDC respectfully requests that this Court not include these factors in its final opinion or in its decision regarding sanctions.

**E. RESPONDENT'S MISCONDUCT SHOULD RESULT IN A
CENSURE AND A FIFTEEN MONTH SUSPENSION IN
ADDITION TO THE \$2,000.00 FINE AND COSTS ORDERED BY
THE JHB.**

¹⁵ Respondent was asked at hearing whether he consulted with an attorney prior to writing his response to the ethics complaint and whether he consulted with an attorney prior to the sworn statement (HTr. at 300, 309). Respondent replied "no" to both questions. Respondent was then asked whether he was "advised that [he] could have consulted an attorney before that" and he said "no" (HTr. at 309-310). Respondent was then asked if he thought he "needed to consult an attorney for that" and he replied "no" (HTr. at 310). This was the sum total of the questions asked on attorney representation.

WVRJDP 4.12 sets forth the permissible sanctions and provides in pertinent part:

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. . . .

The Rule also provides that "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." *Id.* The Court may impose one sanction per violation of the Code of Judicial Conduct or multiple sanctions for each violation. *See Callaghan, supra.* The Court may run the sanctions concurrently or consecutively, and it may impose a suspension without pay which is greater than the judge's term of office. *See Toler, supra.*

A reprimand, which is a less severe sanction, "constitutes a severe reproof to a judge who has engaged in conduct which violated the Code of Judicial Conduct." *See* WVRJDP 4.12. A censure, which is the most serious of the written reprimands, "constitutes formal condemnation of a judge who has engaged in conduct which violated the Code of Judicial Conduct." *Id.* The severity of a public censure was addressed in *In re Binkoski*, 204 W. Va. 664, 515 S.E.2d 828 (1999).

In *Binkoski*, a magistrate was charged with violating Rules 1 and 2A of the former Code of Judicial Conduct after having been charged with the misdemeanor offenses of driving under the influence of alcohol and simple possession of marijuana and attempting to encourage a witness to be less than candid about the magistrate's behavior on the night he was arrested. *Id.*

The magistrate did not contest the charges and entered into an agreement with the JDC which called for a one year suspension without pay and drug testing/treatment. *Id.* After the JHB issued its recommended decision adopting the agreement, Respondent resigned his position. *Id.* Instead of suspending the Magistrate without pay, the Court censured him. *Id.* The Court stated that “the conduct admitted to by [the magistrate] was addressed by the proposed agreement. However, [his]’s resignation renders the issues of suspension, drug testing and treatment moot. The only remaining reasonable sanction open to this Court is public censure.” *Id.* at 667, 515 S.E.2d at 831.

In *Riffle*,¹⁶ *supra*, 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. *Id.* 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. *Id.* 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. *Id.* 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

¹⁶ JDC objects to JHB Recommended Discipline Paragraph No. 31, which addresses *Riffle*. The JHB noted in the instant matter that “the Respondent’s misconduct in this case falls well short of the misconduct in that case” (8/1/2019 JHB Recommended Decision at 13). As set forth in this brief, the conduct sanctioned in *Riffle* involved only the false reporting. Therefore, *Riffle*, by necessity, dictates that Respondent deserves a more severe penalty in the instant matter.

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 attributable to her lack of candor and not to her criminal convictions.

In *In re Watkins*, *supra*, a family court judge was suspended without pay from the bench for four years, in part, for his intemperance while on the bench. He was found to have yelled and/or been verbally abusive to litigants, used profanity and made threats which demonstrated a distinct lack of impartiality. *Id.* The Court stated:

A Clarksburg lawyer (who rose to be chief counsel for the IRS) once wrote, “A judge is a leader whether he wants to be or not. He cannot escape responsibility in his jurisdiction, for setting the level of the administration of justice and of the practice of law.” Citizens judge the law by what they see and hear in courts, and by the character and manners of judges and lawyers. “The law should provide an exemplar of correct behavior. When the judge presides in court, he personifies the law, he represents the sovereign administering justice and his conduct must be worthy of the majesty and honor of that position.” Hence, a judge must be more than independent and honest; equally important, a judge must be perceived by the public to be independent and honest. Not only must justice be done, it also must appear to be done.

Id. at 182, 757 S.E.2d at 606.

In *Callaghan*, *supra*, a newly elected 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. The Court stated:

The West Virginia Code of Judicial Conduct requires that those within the judiciary “respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.” It critically mandates that the judiciary “maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety ... [and] aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.” While not naive enough to suggest that the public believes the judiciary to be infallible, judicial officers . . . must minimally conduct themselves such as to preserve the institutional veneration with which the judiciary is historically imbued. We agree wholeheartedly that “[t]he public at large is entitled to honesty and integrity in judicial officials elected to mete out justice, apportion equity, and adjudicate disputes. We cannot ask for more, but we should certainly not expect less, particularly when it is the robed arbiter who, when administering the oath to witnesses, cautions them to tell the truth, the whole truth, and nothing but the truth.

Id. at 512, 796 S.E.2d at 621 (citations omitted).

In a case that is similar to the one at hand, the Pennsylvania Conduct Board filed a disciplinary action against a Pittsburgh Municipal Magistrate who repeatedly parked her car at expired parking meters, displayed parking tickets issued to other people in an effort to avoid having to pay and denying her identity to an investigative reporter who was working on a story about the conduct. *In re Harrington*, 877 A.2d 870 (PA 2005). Specifically, she was charged with engaging in activity prohibited by law and conduct that brought her judicial office in disrepute. In finding in favor of the rule violations¹⁷ and barring the magistrate from holding judicial office for five years, the Court of Judicial Discipline of Pennsylvania stated:

We think the reasonable expectations of the public would include the expectation that a judicial officer would obey a common ordinance which applies to all who might wish to park a motor vehicle on the streets of Pittsburgh and certainly would include the expectation that she would not devise and carry out a scheme to “fool” the enforcing officer in order to defeat the enforcement of the law. It is after all, “the law” that she is entrusted to enforce and expected to respect. We certainly recognize that no one would consider parking at an expired meter to be a

¹⁷ Interestingly, the Court noted that the stipulations entered into by the parties did not include any information on how the magistrate obtained the used tickets but “it is quite reasonable to conclude that she took them off other cars which had been ticketed.” *Id.* at 576. The stipulations also didn’t detail the purpose for her actions but “no announcement is necessary” since “it is obvious the purpose was to enable her to park without paying the trifling amount required and to deceive the enforcing officer . . .” *Id.*

heinous crime, but it is the very triviality of the offense which makes Respondent's determination to defeat its application to her so unbecoming a judicial officer.

There are few among us who operate motor vehicles on a regular basis who have not been the recipient of an overtime parking ticket, and few of us who have not experienced some degree of vexation on those occasions. But the ordinary citizen either puts the coin in the slot or pays the fine. We daresay Respondent's conduct here described . . . is exactly the type of conduct which causes an ordinary citizen to believe that judges – i.e. all judges – consider themselves to be “above the law” – a privileged class. It is exactly this type of conduct which gives judges a “bad name” and which brings the judicial office itself into disrepute.

Id. at 576-577.

The judicial disciplinary system is neither civil nor criminal in nature, but *sui generis* – designed to protect the citizenry by ensuring the integrity of the judicial system. *See generally, In re Conduct of Pendleton*, 870 N.W.2d 367 (MN 2015). West Virginia has already recognized the same with respect to attorney disciplinary cases:

Proceedings before the Lawyer Disciplinary Board are *sui generis*, unique, and are neither civil nor criminal in character. As one court noted, disbarment and suspension proceedings are neither civil nor criminal in nature but are special proceedings, *sui generis*, and result from the inherent power of courts over their officers. Such proceedings are not lawsuits between parties litigant but rather are in the nature of an inquest or inquiry as to the conduct of the respondent. They are not for the purpose of punishment, but rather seek to determine the fitness of an officer of the court to continue in that capacity and to protect the courts and the public from the official ministration of persons unfit to practice. Thus the real question at issue in a disbarment proceeding is the public interest and an attorney's right to continue to practice a profession imbued with public trust. . . . We have likewise found that, “Attorney disciplinary proceedings are not designed solely to punish the attorney, but rather to protect the public, to reassure it as to the reliability and integrity of attorneys and to safeguard its interest in the administration of justice.”

Lawyer Disciplinary Board v. Stanton, 233 W. Va. 639, 649, 760 S.E.2d 453, 463 (2014) (citations omitted). Moreover, the Court has stated that in determining what discipline is warranted, each case must be decided on its own particular facts. *See Committee on Legal Ethics of the West Virginia Bar v. McCorkle*, 192 W. Va. 286, 452 S.E.2d 377 (1994).

WVCJC Preamble [6] cautions a “reasonable and reasoned application” in determination whether discipline should be imposed. Factors to be considered include but are not limited to “the seriousness of the transgression, the facts and circumstances that existed at the time of the transgression, the extent of any improper activity, whether there have been previous violations, and the effect of the improper activity upon the judicial system or others.” *Id.* The JIC believes the facts of this case are egregious and warrant a fifteen month suspension without pay.

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. Like the judge in *Watkins*, Respondent behaved badly but off the bench. Like the judges in *Binkoski* and *Harrington*, Respondent endeavored to game the system by using his judgeship to try and get out of a ticket.

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 lies, the cover-up, the intemperate behavior, and the lack of meaningful mitigation or remorse. As with *Harrington*, this case may not seem so big on the surface but underneath it all it’s really about a big fish in a little pond. The ordinary citizen would have paid the ticket, but Respondent believes himself “above the law.” As such, his conduct merits a censure, a fifteen month (15) month suspension, a \$2,000.00 fine and costs.

V.

CONCLUSION

Based upon the foregoing, JDC respectfully requests that this Court adopt the findings, and conclusions of the Judicial Hearing Board that were not objected to by Disciplinary Counsel.

Where JDC has objected to the findings and conclusions, Disciplinary Counsel asks the Court to adopt its provisions contained herein. The JDC further asks the Court to ignore any mitigation by the JHB except for its finding that Respondent was a relatively new magistrate at the time of the February 21, 2017 incident and that he has not been the subject of any prior discipline. Lastly, JDC requests that this Court censure Respondent for each violation of the Code of Judicial Conduct, suspend him without pay for a total of fifteen (15) months, fine him \$2,000.00 and award costs.

Respectfully submitted,

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