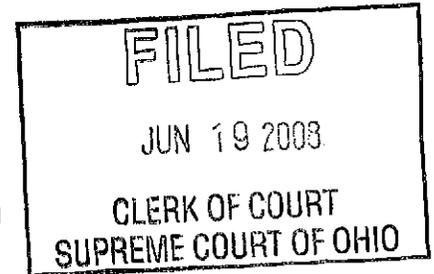


**BEFORE THE BOARD OF COMMISSIONERS
ON
GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO**



In Re: : **08-1200**

Complaint against : **Case No. 05-037**

Don S. McAuliffe : **Findings of Fact,**
Attorney Reg. No. 0014629 : **Conclusions of Law and**
: **Recommendation of the**
Respondent : **Board of Commissioners on**
: **Grievances and Discipline of**
Disciplinary Counsel : **the Supreme Court of Ohio**

:
Relator :
:

1. This matter was heard on April 10, 2008, in Columbus, Ohio, before a panel consisting of members Judge Beth Whitmore, John H. Siegenthaler and Lawrence R. Elleman, Chair. None of the panel members was from the district from which the complaint arose or a member of the probable cause panel in this matter. Relator was represented by First Assistant Disciplinary Counsel, Lori J. Brown. Respondent was represented by David J. Graeff. Respondent was not present at the hearing because he is in federal custody, but his counsel represented to the panel that he was in contact with Respondent and authorized to speak for Respondent at the hearing.

FINDINGS OF FACT

2. At the hearing, Relator offered the Stipulations appended hereto as Exhibit 3. The panel unanimously adopts the Stipulations of the parties as part of its finding of fact in this matter. Relator also offered, without objection, the sentencing memorandum filed by Respondent's counsel

in the United States District Court for the Southern District of Ohio, Eastern Division, and the response thereto by the United States Attorney as Exhibits 1 and 2 respectively. Exhibits 1 and 2 were offered as background, but these exhibits were not given weight by the panel on the issues of aggravation and mitigation because they represented only arguments of counsel in a different proceeding.

3. Relator rested without presenting any witness testimony. Respondent rested without presenting any evidence and specifically declined to present any evidence of mitigation. The panel finds that the following facts were proved by clear and convincing evidence.

4. Subsequent to the hearing, Respondent filed a Motion to Supplement the Record with his motion filed in the United States District Court for the Southern District of Ohio to vacate his criminal sentence pursuant to 28 U.S.C. § 2255. A copy of the Section 2255 motion was attached to the motion filed with the Board. The Section 2255 motion is therefore a part of the record in this disciplinary proceeding but was not considered by the panel as admissible evidence in this proceeding.

5. At the time of the conduct leading to the allegations of misconduct, Respondent was subject to the Code of Judicial Conduct, the Code of Professional Responsibility, and the Rules for the Government of the Bar of Ohio.

6. On or about April 24, 2003, a federal grand jury indictment was filed against Respondent in the United States District Court for the Southern District of Ohio, Eastern Division. On February 13, 2004, the jury returned a verdict finding Respondent guilty of all counts in the indictment as follows:

<u>Count Number</u>	<u>Title & Section</u>	<u>Offense</u>
One & Two	18 U.S.C. §1341	Mail Fraud

Three	18 U.S.C. §§844(h) and 2	Use of fire to commit mail fraud
Four	18 U.S.C. §844(m)	Conspiracy to use fire to commit mail fraud
Five & Six	18 U.S.C. §1957	Money Laundering

Respondent appealed from the judgment of conviction, which judgment was modified in certain respects not relating to guilt or innocence and not material to the resolution of this disciplinary proceeding. The judgment of conviction, as modified, was affirmed by the Sixth Circuit Court of Appeals and *certiorari* was denied in the United States Supreme Court.

7. Counts One and Two of the indictment, pursuant to which Respondent was convicted, allege that, among other things, Respondent devised and intended to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises; that as part of the scheme and artifice to defraud, he agreed with another person to damage or destroy, by means of fire, a dwelling and its contents for the purpose of collecting insurance proceeds; that he and another person did in fact damage or destroy, by means of fire, such dwelling and its contents; that he falsely represented to the insurance company that the fire was not caused by design or procurement on his part, although he well knew otherwise; and that he submitted two sworn statements of proof of loss to the insurance company which he knew to be false.

8. Count Three of the indictment, pursuant to which Respondent was convicted, alleges, among other things, that Respondent knowingly used fire to commit mail fraud, as more fully set forth in Counts One and Two.

9. Count Four of the indictment, pursuant to which Respondent was convicted, alleges, among other things, that Respondent knowingly, willfully and unlawfully combined and conspired

and agreed with at least one other person to use fire to commit mail fraud as more fully set forth in Counts One and Two.

10. Counts Five and Six of the indictment, pursuant to which Respondent was convicted, allege, among other things, that Respondent knowingly engaged and attempted to engage in certain monetary transactions constituting money laundering.

11. Respondent is currently serving a 36-month prison term on Counts One, Two, Four, Five and Six of the indictment to run concurrently, and 120 months on Count Three to run consecutive to Counts One, Two, Four, Five and Six. Upon release from prison, Respondent is subject to a three-year term of supervised release upon conditions.

12. Respondent was ordered to pay a fine of \$150,000 and make restitution to the Grange Insurance Company of \$235,000, which criminal judgment has since been satisfied.

13. On January 24, 2005, Respondent's license to practice law in the State of Ohio was suspended on an interim basis by the Supreme Court of Ohio pursuant to Gov. Bar R.V(A)(1)(a) (felony conviction).

CONCLUSIONS OF LAW

14. Respondent's stipulation of a criminal conviction is conclusive evidence that he committed the crimes with which he was charged in the indictment. *Disciplinary Counsel v. Woods* (1986), 28 Ohio St.3d 245.

15. Respondent's conduct for which he was convicted violated the Code of Judicial Conduct: Canon 2 (a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary) and Canon 4 (a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities).

These canons relate to the conduct of a judge when acting in a private capacity as well as conduct of a judge in the course of official duties. *Disciplinary Counsel v. Gallagher* (1998), 82 Ohio St.3d 51, 1998-Ohio-592; *Disciplinary Counsel v. Connor*, 105 Ohio St.3d 100, 2004-Ohio-6902.

16. Respondent's conduct for which he was convicted violated the Code of Professional Responsibility: DR 1-102(A)(3) (a lawyer shall not engage in illegal conduct involving moral turpitude); DR 1-102(A)(4) (a lawyer shall not engage in conduct involving dishonesty, deceit, fraud or misrepresentation); DR 1-102(A)(5) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice); and DR 1-102(A)(6) (a lawyer shall not engage in any other conduct that adversely reflects on the lawyer's fitness to practice law).

AGGRAVATION AND MITIGATION

17. **Aggravating Factors:**

- a. Respondent acted with a dishonest and selfish motive.
- b. Respondent is guilty of multiple offenses.
- c. Respondent has refused to acknowledge the wrongful nature of his conduct.
- d. Respondent did not make restitution until ordered to do so.
- e. Respondent's conduct occurred at a time when he was a member of the judiciary and has brought disrepute to the judicial system and constitutes a breach of the public trust. *Disciplinary Counsel v. Gallagher, supra*, at 52.

18. **Mitigating Factors:** Respondent specifically declined to present evidence of mitigating factors. However, the record does reflect that Respondent cooperated in these disciplinary proceedings and that he made restitution in satisfaction of the criminal judgment against him to do so. There is no evidence of a prior disciplinary record.

RECOMMENDATIONS

19. Relator recommended permanent disbarment.

20. Respondent recommended that instead of making a sanctions recommendation based on the aggravating and mitigating factors, the Board should "certify" to the Supreme Court the following questions:

"Does the board have any authority to recommend indefinite suspension when an elected Ohio judge is found guilty and sentenced pursuant to a felony conviction?"

Closely associated with the above would obviously be whether the relator-disciplinary counsel, has any authority, considering mitigating circumstances, to negotiate sanctions less than disbarment?"

The Board has no authority to certify questions regarding sanctions to the Supreme Court. The Board is required to make recommendations for sanctions against any justice, judge, or attorney found guilty of misconduct in accordance with Gov. Bar R. V(6)(B).

21. Alternatively, Respondent has urged the Board to recommend an indefinite suspension until judicial resolution of his collateral attack of his conviction pursuant to 28 U.S.C. §2255. This section of the federal law is the functional equivalent of *habeas corpus*. Respondent is already serving an interim suspension imposed by the Supreme Court. The Supreme Court has held that it is not necessary that the Board delay a decision on permanent disbarment pending final determination of post-conviction relief pursuant to a writ of *habeas corpus*. "It is theoretically possible for Respondent to repeatedly file *habeas corpus* petitions. There must be some finality to our disciplinary process." *Bar Association of Greater Cleveland v. Steele* (1981), 65 Ohio St.2d 1.

22. Based on the evidence before the panel, the nature of the misconduct involved and the fact that Respondent has breached the public trust in him as a judicial officer, the panel recommends that Respondent be permanently disbarred from the practice of law. *Disciplinary Counsel v.*

Gallagher, supra; Disciplinary Counsel v. Stern, 106 Ohio St.3d 266, 2005-Ohio-4804; *Disciplinary Counsel v. Tsanges* (1990), 49 Ohio St.3d 57; *Disciplinary Counsel v. Sweeney*, 84 Ohio St.3d 388, 1999-Ohio-486.

BOARD RECOMMENDATION

Pursuant to Gov. Bar Rule V(6)(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on June 5, 2008. The Board adopted the Findings of Fact, Conclusions of Law and Recommendation of the Panel and recommends that the Respondent, Don S. McAuliffe, be permanently disbarred from the practice of law in the State of Ohio. The Board further recommends that the cost of these proceedings be taxed to the Respondent in any disciplinary order entered, so that execution may issue.

Pursuant to the order of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendations as those of the Board.



JONATHAN W. MARSHALL, Secretary

**Board of Commissioners on
Grievances and Discipline of
the Supreme Court of Ohio**

**BEFORE THE BOARD OF COMMISSIONERS
ON GRIEVANCES AND DISCIPLINE
OF THE SUPREME COURT OF OHIO**

FILED

Disciplinary Counsel

APR 07 2008

Relator

BOARD OF COMMISSIONERS
ON GRIEVANCES & DISCIPLINE

**AGREED
STIPULATIONS
BOARD NO. 05-037**

Don S. McAuliffe
Atty. Reg. No.: 0014629

Respondent

AGREED STIPULATIONS

Relator, Disciplinary Counsel, and respondent, Don S. McAuliffe, do hereby stipulate to the admission of the following facts and to the authenticity and admissibility of the following exhibits:

STIPULATED FACTS

1. Respondent, Don S. McAuliffe, was admitted to the practice of law in the state of Ohio on November 4, 1972.
2. On or about February 22, 1997, respondent was sworn in as a judge of the Fairfield County Municipal Court.
3. At the time of the conduct leading to the allegations of misconduct set forth in the formal complaint, respondent was subject to the Code of Judicial Conduct, the Code of Professional Responsibility, and the Rules for the Government of the Bar of Ohio.

4. A federal grand jury indictment was filed against respondent in the United States District Court for the Southern District of Ohio on or about April 24, 2003.
5. Respondent pled not guilty to the charges in the indictment and was tried to a jury beginning on January 26, 2004.
6. On February 13, 2004, the jury returned a verdict finding respondent guilty on all counts in the indictment:

<u>Count Number</u>	<u>Title & Section</u>	<u>Offense</u>
One & Two	18 U.S.C. §1341	Mail Fraud
Three	18 U.S.C. §§844(h) and 2	Use of fire to commit mail fraud
Four	18 U.S.C. §844(m)	Conspiracy to use fire to commit mail fraud
Five & Six	18 U.S.C. §1957	Money Laundering

7. On September 14, 2004, the court issued an opinion and order granting the government's request for forfeiture and ordering respondent to forfeit the two parcels of real property and automobile described in the indictment.
8. Respondent was originally sentenced by entry filed December 16, 2004.
9. Respondent filed a notice of appeal as to the December 16, 2004 judgment.
10. On January 24, 2005, respondent's license to practice law in the state of Ohio was suspended by the Supreme Court of Ohio pursuant to Gov. Bar R.V(A)(3) (felony conviction). See *In re: Don S. McAuliffe*, Supreme Court of Ohio Case No. 2004-2143.
11. By entry filed June 2, 2005, the Sixth Circuit Court of Appeals remanded respondent's case to the District Court for re-sentencing pursuant to *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621.

12. By amended judgment entry filed December 20, 2005, the District Court for the Southern District of Ohio committed respondent to the custody of the United States Bureau of Prisons to be imprisoned for a term of 36 months on counts one, two, four, five and six to run concurrently and 120 months on count three to run consecutive to counts one, two, four, five and six. Upon release from prison, respondent is subject to a three-year term of supervised release upon conditions.
13. Respondent filed a notice of appeal as to the December 20, 2005 judgment.
14. A corrected amended judgment entry was filed on January 11, 2006. This entry modified only the portion of the December 20, 2005 entry pertaining to restitution. Pursuant to the amendment, respondent was ordered to pay a fine of \$150,000 immediately; make restitution to Grange Insurance Co. of \$235,000; and, forfeit two pieces of real estate and a vehicle. The District Court ordered respondent to liquidate his accounts to satisfy these obligations.
15. By judgment filed June 22, 2007, the Sixth Circuit Court of Appeals affirmed respondent's convictions and sentences.
16. On August 10, 2007, the United States filed a "satisfaction of criminal judgment" authorizing the clerk to cancel the judgment against respondent regarding monetary penalties. In satisfaction of the judgment, respondent paid the fine (\$150,000) and restitution to Grange Insurance (\$235,000) plus interest.
17. On September 14, 2007, respondent filed a petition for certiorari in the United States Supreme Court. Respondent's petition was denied on October 15, 2007.

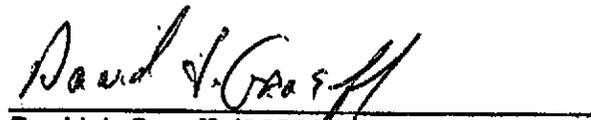
STIPULATED EXHIBITS

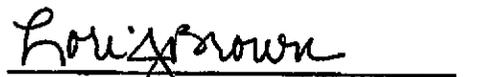
- Exhibit 1 Indictment, April 24, 2003
- Exhibit 2 Judgment Entry, ~~September 17, 2004~~ December 3, 2004
- Exhibit 3 Sentencing Entry, December 16, 2004
- Exhibit 4 Court of Appeals Judgment Entry, June 2, 2004
- Exhibit 5 Amended Judgment Entry, December 20, 2005
- Exhibit 6 Corrected Amended Entry, January 11, 2006
- Exhibit 7 Court of Appeals Entry and Opinion, June 22, 2007
- Exhibit 8 Satisfaction of Criminal Judgment, August 10, 2007

CONCLUSION

The above are stipulated to and entered into by agreement by the undersigned parties on this 7th day of April 2008.


Jonathan E. Coughlan (0026424)
Disciplinary Counsel


David J. Graeff (0020647)
Counsel for Respondent


Lori J. Brown (0040142)
First Assistant Disciplinary Counsel


Don S. McAuliffe (0014629) / *consent*
Respondent