ORIGINAL

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

14-2157

In Re: :

Case No. 2012-009

Complaint against :

Steven James Terry
Attorney Reg. No. 0041460

Respondent

Disciplinary Counsel

Relator

FILED
DEC 15 2014
CLERK OF COURT
SUPREME COURT OF OHIO

Findings of Fact, Conclusions of Law, and Recommendation to the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio

OVERVIEW

{¶1} This matter was heard on September 5, 2014, in Columbus before a panel consisting of Alvin R. Bell, David L. Dingwell, and Judge Robert Ringland, chair. None of the panel members resides in the district from which the complaint arose or served as a member of a probable cause panel that reviewed the complaint pursuant to Gov. Bar R. V, Section 6(D)(1).

{¶2} Since Respondent is incarcerated at the McDowell Federal Correctional Institution, he was not present at the hearing but was made available through a deposition. Richard Koblentz appeared on behalf of Respondent. Donald Scheetz appeared on behalf of Relator.

{¶3} The complaint in this matter arose pursuant to a conviction occurring on June 13, 2011 in federal court on three counts involving mail fraud and honest services mail fraud. Pursuant to the above conviction, Respondent was sentenced on October 4, 2011 to a term of 63 months incarceration on each of the three counts, to run concurrently.

{¶4} On October 26, 2011, the Supreme Court of Ohio suspended Respondent for an interim period based upon the felony convictions. *In re Terry*, 130 Ohio St.3d 1403, 2011-Ohio-5473.

{¶5} Relator and Respondent submitted stipulated facts, exhibits, and mitigating and aggravating factors.

{¶6} Relator and Respondent agreed and stipulated that Respondent's conduct violated the following:

- Canon 1 of the Code of Judicial Conduct [a judge shall uphold the integrity and independence of the judiciary];[1]
- Canon 2 of the Code of Judicial Conduct [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];
- Canon 3(B)(7) of the Code of Judicial Conduct [a judge shall not initiate, receive, permit or consider communications made to a judge outside the presence of the parties or their representatives concerning a pending or impending proceeding];
- Canon 3(E) of the Code of Judicial Conduct [a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might be reasonably be questioned];
- Canon 4 of the Code of Judicial Conduct [a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities];
- Prof. Cond. R. 8.4(d) [conduct prejudicial to the administration of justice]; and
- Prof. Cond. R. 8.4(h) [conduct that adversely reflects on the lawyer's fitness to practice law].

{¶7} In addition to the stipulations, nine exhibits were stipulated to including the indictment, common pleas court cases which are the subject of the disciplinary violation, a CD recording of Respondent's conversations of July 17, and 18, 2008, transcript of Respondent's testimony during his criminal trial, the court case docket of *United States v. Terry*, transcript of Respondent's sentencing hearing, sentencing judgment entry, and 38 character letters.

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[1] Citations in this report to the Code of Judicial Conduct are to the former version of the Code that was in effect prior to March 1, 2009.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶8} Respondent was admitted to the practice of law in the state of Ohio on May 8, 1989 and subject to the Code of Judicial Conduct, Rules of Professional Conduct, and the Rules for the Government of the Bar of Ohio.

{¶9} On or about April 20, 2007, Respondent was appointed by the governor to fill an open seat on the Cuyahoga County Court of Common Pleas. As a result of this appointment, Respondent was required to run for election in November 2008 to retain this judicial position. Stipulation 2.

{¶10} Cuyahoga County Auditor Frank P. Russo provided substantial and continuous support to Respondent for Respondent's 2008 election campaign. Stipulation 3.

{¶11} After Respondent was appointed, he inherited numerous pending court cases, including *K & L Excavation, Ltd. v. Auburn Building Company, et al.*, Case No. CV-03-51572 and *Avon Poured Wall, Inc. v. Brian Lane, et al.*, Case No. CV-04-519620. These two cases were consolidated by the trial court in June 2005. Stipulation 4.

{¶12} The *K & L Excavation* and *Avon Poured Wall* cases were a multi-party civil foreclosure action involving a house under construction by Brian and Erin Lane. As a part of this litigation, American Home Bank sought $190,000 in damages from the Lanes. Stipulation 5.

{¶13} In these matters, Attorney Joseph O'Malley represented the Lanes and Attorney Thomas Henderson represented American Home Bank.

{¶14} On or about November 27, 2006, the Lanes filed a motion for summary judgment. On or about March 28, 2008, American Home Bank filed a motion for summary judgment.

{¶15} In May 2008, Russo spoke to Respondent and gave him a note regarding the American Home Bank court case. Stipulation 8.

{¶16} Russo's note and conversation with Respondent directed Respondent to deny American Home Bank's motion for summary judgment.

{¶17} Respondent did not disclose this contact with the other parties to the *K & L Excavation* and *Avon Poured Wall* cases.

{¶18} In July 2008, a staff member working for Russo at the auditor's office called Respondent, provided him with the case numbers for the *K & L Excavation* and Avon *Poured Wall* cases and asked Respondent to call Russo. Stipulation 11.

{¶19} On or about July 17, 2008, Respondent called Russo. During the call, the following conversation between Respondent and Russo took place about the *K & L Excavation* and *Avon Poured Wall* cases:

Frank Russo:	Hello.
Respondent:	Frank, your favorite Judge.
Frank Russo:	Hey, Stevie, how are you?
Respondent:	I'm doing well, how are you?
Frank Russo:	I'm doing really, really, really good . . .
	* * * *
Respondent:	. . . Hey Renee called and said you wanted me to call you?
Frank Russo:	Yeah, I just wanted to let you know. Did Robin give you those case numbers?
Respondent:	Yes.
Frank Russo:	OK. In other words, I talked to you about this once before, it's about denying the motions for summary judgment.
Respondent:	Yep. I still have the note that you gave me.
Frank Russo:	OK. Good. Deny the motions for summary judgment. OK. Good.
Respondent:	Got it.
Frank Russo:	Ok, good. No that was all, I just wanted to touch base with you on that, and that's it . . .

Stipulated Ex. 3, Track 1.

{¶20} Respondent did not disclose this contact with the other parties to the *K & L Excavation* and *Avon Poured Wall* cases.

{¶21} Respondent then called Magistrate Monica Klein, who was assigned to the American Home Bank case. During this conversation, Respondent instructed Klein to deny American Home Bank's motion for summary judgment, without providing any explanation for his decision. Stipulation 14.

{¶22} Respondent advised Klein to make this ruling based solely upon Respondent's review of the court case docket available on the Internet. Stipulated Ex. 2.

{¶23} Respondent did not examine the court case file or read any of the relevant pleadings prior to instructing Klein to deny American Home Bank's motion for summary judgment.

{¶24} On or about July 18, 2008, Respondent signed an entry denying American Home Bank's motion for summary judgment. Stipulation 16.

{¶25} On the same date, after signing the entry, Respondent advised O'Malley that he had just denied the American Home Bank's motion for summary judgment.

{¶26} On or about July 18, 2008, Russo also called Respondent and the following conversation between Respondent and Russo took place about the *K & L Excavation* and *Avon Poured Wall* cases:

Respondent:	Hello?
Frank Russo:	Good morning.
Respondent:	How are you?
Frank Russo:	Good, buddy, how 'bout yourself?
Respondent:	Good. This is so ironic that you're calling me right now, because I called you just to tell you that, um, I took care of those two issues with those two cases that we talked about.
Frank Russo:	OK.
Respondent:	I just did it this morning, right?
Frank Russo:	OK.
Respondent:	Denied everything, and then, who's over in my courtroom right now but Joe O'Malley?
Frank Russo:	Oh, he's over there?
Respondent:	He, he, he . . .

Frank Russo:	Oh, he's over there? All right.
Respondent:	Yeah. So everyone's, we're all on the same page.
Frank Russo:	Very good. Very good. Uh, tell him I said hi.
Respondent:	OK. . .

Stipulated Ex. 3, Track 2.

{¶27} Respondent did not disclose this contact with the other parties to the *K & L Excavation* and *Avon Poured* Wall cases.

{¶28} On or about October 7, 2008, American Home Bank agreed to settle the case for a judgment against the Lanes in the amount of $27,000. Stipulation 20.

{¶29} On November 4, 2008, Respondent was elected to a full-term as a judge on the Cuyahoga County Court of Common Pleas.

{¶30} On September 14, 2010, a five-count indictment was filed against Respondent, alleging that he engaged in one count of conspiracy to commit mail fraud and honest services mail fraud, one count of mail fraud, and three counts of honest services mail fraud. *United States v. Terry*, Case No. 1:10-CR-390.

{¶31} Pursuant to Gov. Jud. R. III, Section 6(A), and as a result of this felony indictment, Respondent was immediately disqualified from acting as a judge.

{¶32} On March 9, 2011, a superseding five-count indictment was filed against Respondent. Stipulated Ex. 1.

{¶33} Count One of the superseding indictment alleged that Russo provided financial and other types of support to Respondent's 2008 judicial campaign, and in return Respondent provided favorable judicial treatment for the benefit of Russo, in violation of Title 18 of the U.S. Code, §§1341,1346, and 1349. *Id.*

{¶34} Count Two alleged that Respondent engaged in improper *ex parte* conversations with Russo and O'Malley regarding the American Home Bank litigation and issuing a decision

for the benefit of O'Malley's client was in violation of Title 18 of the U.S. Code, §§1341 and 2. *Id.*

{¶35} Counts Three, Four, and Five alleged that Respondent solicited and accepted gifts, payments and other things of value from Russo and others in return for Respondent providing favorable official action in violation of Title 18 of the U.S. Code, §§1341, 1346, and 2. *Id.*

{¶36} On June 13, 2011, after a five-day jury trial, Respondent was found guilty of Count One [conspiracy to commit mail fraud and honest services mail fraud], Count Three [honest services mail fraud], and Count Four [honest services mail fraud]. Respondent was acquitted of the two remaining counts. Stipulated Ex. 7.

{¶37} On June 14, 2011, Respondent resigned his judicial position on the Cuyahoga County Court of Common Pleas.

{¶38} On October 4, 2011, Respondent was sentenced to a term of 63 months incarceration on each of three counts, to run concurrently. The court ordered Respondent to pay $16,380.79 in restitution to Cuyahoga County and $11,500 in restitution to American Home Bank, for a total of $27,880.79. Respondent was further sentenced to two years of supervised release and ordered to complete 250 hours of community service. *Id.*

{¶39} In 2010, O'Malley pled guilty to felony charges, related in part, to his conduct in the American Home Bank litigation.

{¶40} In 2010, Russo pled guilty to 21 felonies, in part related to his conduct in the American Home Bank litigation.

{¶41} Based upon the joint stipulations as to facts, rule violations, exhibits, mitigation, and aggravation, the panel finds by clear and convincing evidence that Respondent violated the following: Canon 1 of the Code of Judicial Conduct, Canon 2 of the Code of Judicial Conduct,

Canon 3(B)(7) of the Code of Judicial Conduct, Canon 3(E) of the Code of Judicial Conduct, Canon 4 of the Code of Judicial Conduct, Prof. Cond. R. 8.4(d), and Prof. Cond. R. 8.4(h).

AGGRAVATION, MITIGATION, AND SANCTION

{¶42} When recommending sanctions for attorney misconduct, the panel must consider relevant factors, including the ethical duties the respondent violated and the sanctions imposed in similar cases. *Stark Cty. Bar Assn. v. Buttacavoli*, 96 Ohio St.3d 424, 2002-Ohio-4743. The panel must also weigh evidence of the aggravating and mitigating factors listed in BCGD Proc. Reg. 10(B). *Disciplinary Counsel v. Broeren*, 115 Ohio St.3d 473, 2007-Ohio-5251.

{¶43} The panel finds the following aggravating factors: Respondent acted with a dishonest or selfish motive. The panel also found that Respondent's actions were premeditated and occurred over time as opposed to impromptu.

{¶44} The panel finds the following mitigating factors: Respondent has no prior disciplinary history, good character and reputation in the community, he fully cooperated in the disciplinary proceedings, and that he suffered the imposition of other penalties or sanctions.

{¶45} The panel held its findings in abeyance until it could hear from Respondent by way of deposition. The delay occurred in scheduling the deposition with the authorities at McDowell Federal Correctional Institution.

{¶46} The panel received recommendations from Relator and Respondent as to sanctions. Relator urges disbarment while Respondent urges indefinite suspension keeping a door open for reinstatement at some later time. Relator notes that the court in the criminal cases sentenced Respondent to additional time based upon its findings that Respondent committed perjury during the trial. Relator's Closing Argument at 8.

{¶47} While the instant case involves Respondent's abuse of his judicial position and

the Supreme Court has held that judges are held to the highest possible standards of ethical conduct, *Disciplinary Counsel v. O'Neill*, 103 Ohio St.3d 204, 2004-Ohio-4704, the primary purpose of judicial discipline is to protect the public, *Ohio State Bar Assn. v. McCafferty*, 140 Ohio St.3d 229, 2014-Ohio-3075. The Supreme Court imposed an indefinite suspension in that case. In *McCafferty*, as well as the instant case, both had no prior disciplinary record, both had a cooperative attitude throughout the disciplinary proceeding, both provided the Board with letters attesting to their good character and reputation as a judge and member of the community, and both suffered the imposition of other penalties and sanctions. But unlike the respondent in *McCafferty*, Respondent acknowledges the severity of the violations committed.

{¶48} Therefore, the panel recommends an indefinite suspension with conditions of payment of all fines, cost and restitution ($16,380.79 to Cuyahoga County and $11,500 to America Home Bank), successful completion of supervised probation and community service (250 hours), that no reinstatement be filed for a minimum of four years, that he possess at that time the requisite character and fitness required of a new applicant to the bar, notwithstanding the previous disciplinary action, and that once application for reinstatement is filed, no less than one additional year take place before the application be adjudicated.

BOARD RECOMMENDATION

Pursuant to Gov. Bar R. V, Section 6, the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on December 12, 2014. The Board adopted the findings of fact and conclusions of law of the panel. With regard to sanction, the Board noted the observations of the sentencing judge that Respondent perjured himself at his criminal trial (Exhibit 6 at 139-140) and further expressed the view that there is no more egregious violation of the public's trust and confidence in the judiciary than Respondent's

conduct herein. The Board is further mindful of the Supreme Court's pronouncements "that judges are held to the highest possible standard of ethical conduct" [*Mahoning Cty. Bar Assn. v. Franko*, 169 Ohio St. 17, 23 and *Disciplinary Counsel v. Hoskins*, 119 Ohio St.3d 17, 2008-Ohio-3194, ¶42] and that "[w]hen a judge's felonious conduct brings disrepute to the judicial system, the institution is irreparably harmed" and "respondent deserves the full measure of * * * disciplinary authority" [*Disciplinary Counsel v. Gallagher*, 82 Ohio St.3d 51, 53, 1998-Ohio-592]. In light of these considerations, the Board voted to modify the sanction recommended by the hearing panel and recommends that Respondent, Steven James Terry, be permanently disbarred from the practice of law in Ohio. The Board further recommends that the costs of these proceedings be taxed to 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 Recommendation as those of the Board.

RICHARD A. DOVE, Secretary