Supreme Court of Ohio Clerk of Court - Filed February 09, 2015 - Case No. 2014-2157

IN THE SUPREME COURT OF OHIO

Disciplinary Counsel,	:	
	:	
Relator,	:	
	:	**CASE NO. 2014-2157**
vs.	:	
	:	
Steven James Terry,	:	
	:	
Respondent.	:	

RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS TO THE BOARD OF PROFESSIONAL CONDUCT'S REPORT AND RECOMMENDATIONS

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	:	
	:	

Now comes relator, Disciplinary Counsel, and hereby submits this answer to respondent's objections.

STATEMENT OF FACTS

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. Bd. Report ¶ 9. As a result of this appointment, respondent was required to run for election in November 2008 to retain his judicial position. *Id.* Then Cuyahoga County Auditor, Frank Russo, provided substantial and continuous support to respondent for respondent's 2008 election campaign. *Id.* at ¶ 10.

After his appointment, respondent inherited numerous pending court cases, including *K & L Excavation, Ltd.v. Auburn Building Company, et al.*, Case No. CV-03-515172 and *Avon Poured Wall, Inc. v. Brian Lane, et al.*, Case No. CV-04-519620 ("American Home Bank"). *Id.* at ¶ 11. These two cases were consolidated by the trial court in June 2005. *Id.* The *K & L*

Excavation and *Avon Poured Wall* cases were a multiparty civil foreclosure action involving a house under construction by Brian and Erin Lane. *Id.* at ¶ 12. As a part of this litigation, American Home Bank sought $190,000 in damages from the Lanes. *Id.* In these matters, Attorney Joseph O'Malley was Russo's friend and represented the Lanes. *Id.* at ¶ 13. Attorney Thomas Henderson represented American Home Bank. *Id.*

On or about November 27, 2006, the Lanes filed a motion for summary judgment, and, on or about March 28, 2008, American Home Bank filed a motion for summary judgment. *Id.* at ¶ 14. Then, in May 2008, Russo spoke to respondent and gave him a note regarding the American Home Bank court case. *Id.* at ¶ 15. Russo's note and conversation with respondent directed respondent to deny American Home Bank's motion for summary judgment. *Id.* at ¶ 16. Respondent did not disclose this contact with the other parties to the *K & L Excavation* and *Avon Poured Wall* cases. *Id.* at ¶ 17.

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. *Id.* at ¶ 18.

In response, respondent called Russo, who asked respondent to deny the motions for a second time. *Id.* at ¶ 19. 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 . . .

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

Respondent then called Magistrate Monica Klein, who was assigned to the American Home Bank case. During this conversation, respondent instructed Klein *only* to deny American Home Bank's motion for summary judgment, without providing any explanation for his decision. *Id.* at ¶ 21. Respondent did not examine the court's case file or read any of the relevant pleadings prior to instructing Klein to deny American Home Bank's motion for summary judgment. *Id.* at ¶ 23. Respondent only reviewed the case docket, which was available on the internet. *Id.* at ¶ 22. During respondent's criminal trial, an expert did testify on his behalf, stating that the denial of the motions was proper. However, Judge Lioi, who presided over respondent's criminal trial, completely disregarded that testimony stating that it was not "at all persuasive." Stipulated Ex. 6: 25:33 – 26:11.

The very next day, July 18, 2008, respondent signed an entry denying American Home Bank's motion for summary judgment. *Id.* at ¶ 24. 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. *Id.* at ¶ 25. While O'Malley was in respondent's courtroom, Russo 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 . . .

Id. at ¶ 26. Respondent did not disclose this contact with the other parties to the *K & L Excavation* and *Avon Poured Wall* cases. *Id.* at ¶ 27. Following the denial of the motions, American Home Bank agreed to settle the case for a judgment against the Lanes in the amount of $27,000. *Id.* at ¶ 28.

On November 4, 2008, respondent was reelected to a full term as a judge on the Cuyahoga County Court of Common Pleas. *Id.* at ¶ 29.

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. *Id.* at ¶ 30. 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. *Id.* at 31. Then, on March 9, 2011, a superseding five-count indictment was filed against respondent. *Id.* at ¶ 32.

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, Sections 1341 and 1346 and 1349. *Id.* at ¶ 33.

Count Two alleged that respondent's engagement in improper ex parte conversations with Russo and O'Malley regarding the American Home Bank ("AHB") litigation and issuing a decision for the benefit of O'Malley's client was in violation of Title 18 of the U.S. Code, Sections 1341 and 2. *Id.* at ¶ 34.

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, Sections 1341, 1346 and 2. *Id.* at ¶ 35.

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, including defrauding AHB of money and property by giving O'Malley's clients a secret advantage in the litigation], Count Three [honest services mail fraud] and Count Four [honest services mail fraud]. Respondent was acquitted of the two remaining counts. *Id.* at ¶ 36. On June 14, 2011, respondent resigned his judicial position on the Cuyahoga County Court of Common Pleas. *Id.* at ¶ 37 and Stipulated Ex. 1.

On October 4, 2011, respondent was sentenced to 63 months incarceration on each of the three counts, to run concurrently. Additionally, Judge Lioi enhanced respondent's sentence based upon her finding that respondent perjured himself <u>seven</u> times during his testimony. Bd. Report ¶ 46 & 49 and Stipulated Ex. 6, 88:4-93:12. Specifically, Judge Lioi stated "that [the] testimony and those exhibits absolutely convince this court that the defendant testified untruthfully regarding the material matters cited by the government in these seven false statements." Stipulated Ex. 6, 90:13-16. Judge Lioi further stated that "each of the statements...which the court specifically and independently adopts as perjurious, and the court finds that the defendant testified with a willful intent to provide false testimony and to substantially affect the outcome of the case." *Id.* at 90:17-22. 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. Bd. Report ¶ 38.

In 2010, O'Malley pled guilty to felony charges, related in part, to his conduct in the American Home Bank litigation. *Id.* at ¶ 39. Also In 2010, Russo pled guilty to 21 felonies, in part related to his conduct in the American Home Bank litigation. *Id.* at ¶ 40.

RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS

I. THE BOARD WAS JUSTIFIED IN RECOMMENDING DISBARMENT

The present case involves the abuse of power for political gain by a former member of our judiciary. The purpose of judicial discipline is not only to protect the public but also to guarantee the evenhanded administration of justice, and to bolster confidence in the institution. *Ohio State Bar Association v. McCafferty,* 140 Ohio St.3d 229, 2014-Ohio-3075, 17 N.E.3d 521, ¶ 20. Respondent's misconduct prejudiced the administration of justice, undermined the integrity of our judiciary, and eroded public confidence in our justice system. Additionally, respondent has yet to take full responsibility. As a result, respondent's misconduct, his subsequent criminal conviction, and his continued refusal to admit that he decided the AHB matter at Russo's direction warrant disbarment from the practice of law.

The Supreme Court has a history of disbarring judges who have been convicted of felony offenses. *See Disciplinary Counsel v. Gallagher,* 82 Ohio St.3d 51, 693 N.E.2d 1078 (1998) (judge disbarred after federal conviction for distributing cocaine) and *Disciplinary Counsel v. McAuliffe,* 121 Ohio St.3d 315, 2009-Ohio-1151, 903 N.E.2d 1209 (judge disbarred after being convicted of multiple federal offenses for burning down his house to defraud an insurance company). And the Supreme Court has disbarred a judge for dishonest conduct that has not resulted in a felony conviction. *Disciplinary Counsel v. Hoskins,* 119 Ohio St.3d 17, 2008-Ohio-

3194, 891 N.E.2d 324 (judge disbarred for multiple violations involving serious deceit and misrepresentation).

However, in *McCafferty*, which is a case related to the corruption probe in Cuyahoga County that revealed respondent's misconduct, the Court distinguished McCafferty's conduct from the above-cited cases and issued an indefinite suspension. In 2007, the FBI began investigating allegations of public corruption in and around Cuyahoga County. *McCafferty*, 2014-Ohio-3075 at ¶ 7. The FBI recorded thousands of phone calls, some of which involved McCafferty. *Id.* In September 2008, two FBI agents went to McCafferty's residence unannounced and interviewed her. *Id.* at ¶ 8. She lied during the interview, was indicted for making false statements to federal law enforcement, and was subsequently convicted. *Id.* at ¶ 9 – 11.

In imposing an indefinite suspension, this Court distinguished McCafferty's case from *Gallagher, McAuliffe,* and *Hoskins.* It noted that the judges in those cases had engaged in criminal conduct over a period of time, from a few days to months, and the misconduct was preplanned. *Id.* at ¶ 23. The Court then remarked that McCafferty's "conduct...occurred during a single impromptu conversation...rather than as a pattern of premeditated criminal conduct." *Id.* at ¶ 24. Additionally, this Court noted that the misuse of her judicial position was not charged in the criminal complaint and was not part of the disciplinary case. *Id.* at ¶ 7.

Respondent's case is clearly distinguishable from *McCafferty.* In the instant case, Russo first approached respondent about denying the bank's motion for summary judgment in the American Home Bank case ("AHB") in May 2008. Bd. Report ¶ 15. Then, in July 2008, a staff member from Russo's office contacted respondent about the AHB case and directed respondent

to call Russo. *Id.* at ¶ 18. On July 17, 2008, respondent called Russo and was again directed by Russo to deny the motions for summary judgment. *Id.* at ¶ 19. Respondent then contacted the magistrate assigned to the case, directed her to deny the motions, and signed the relevant entry the next day. *Id.* at ¶ 21 - 24. In contrast to McCafferty's conduct, respondent's conduct occurred over time. It was not the result of a single impromptu conversation, but was premeditated and affected the administration of justice in a civil case over which he presided. In fact, the Board found that to be an aggravating factor. *Id.* at ¶ 43. Further, unlike McCafferty's criminal conduct, which occurred at her home, respondent committed his criminal conduct while performing his official duties as a judge. As a result, respondent should be disbarred.

This Court specifically confirmed the adverse impact that respondent's conduct had upon the integrity of the judicial system in the related case of *Disciplinary Counsel v. O'Malley,* 137 Ohio St.3d 161, 2013-Ohio-4566, 998 N.E.2d 470. In addition to lying to the FBI and engaging in other misconduct related to his employment at the county auditor's office, O'Malley represented the two homeowners in the AHB case after leaving the auditor's office. *Id.* at ¶ *6-12.* O'Malley asked that then-auditor Russo approach respondent and request that he deny the pending summary judgment motions. *Id.* at ¶ 10. After respondent denied the motions, O'Malley was able to settle the case for a reduced settlement amount. *Id.* As a result of his misconduct, O'Malley was indefinitely suspended without credit for time served under the interim felony suspension that was imposed upon his conviction. *Id.* at ¶ 18. When imposing the sanction, the Court noted that O'Malley's conduct had "undermined the integrity of the judicial system." *Id.*

In an attempt to justify a lesser sanction, respondent also cites *Disciplinary Counsel v. Hale,* Slip Opinion No. 2014-Ohio-5053. However, *Hale* is also readily distinguishable. Unlike

respondent, Hale took full responsibility for his conduct and provided full and free disclosure during the disciplinary hearing. *Id.* at ¶ 37. Additionally, while very serious, the misconduct in *Hale* did not involve a broad conspiracy to trade political favors for favorable decisions on cases. Further, the judge in *Hale* did not commit several federal crimes warranting a 63-month prison sentence. Comparing the two cases is inapposite.

II. RESPONDENT HAS NOT ACCEPTED FULL RESPONSIBILITY FOR HIS MISCONDUCT AND REMAINS A DANGER TO THE PUBLIC

Respondent remains a danger to the public because he has yet to fully take responsibility for his actions. Although respondent states in his brief that relator stipulated that he took responsibility for, and fully disclosed, his conduct during the hearing, that is not the case. Relator only stipulated that respondent had a cooperative attitude toward the disciplinary process. Stipulations ¶ 38. Additionally, although the Board Report states that respondent stipulated that his conduct violated Prof. Conduct R. 8.4(d), respondent did not stipulate to the violation and maintains that his conduct was not prejudicial to the administration of justice. Respondent justifies his position on the preposterous argument that he properly denied the motions for summary judgment. His continued denial that he decided the motions in the AHB at the direction of Russo demonstrates that he has not taken full responsibility for his actions. That respondent continues to cling to this falsehood in the face of overwhelming evidence that clearly demonstrates otherwise further shows that he remains a danger to the public and does not possess the requisite fitness to practice law.

Examining the stipulated series of events clearly demonstrates that respondent took his orders from Russo. After his appointment to the bench, respondent needed to run in 2008 to retain his seat, and Frank Russo, the County Auditor, provided substantial support for the

election campaign. Stip. ¶ 2 and 3; Stip. Ex. 5: 918:1-950:20, 961:1-963:20. Russo's friend, Attorney Joseph O'Malley, represented the homeowners in the AHB case. Stip. ¶ 6; Resp. Depo. 62:8-16. Both parties filed motions for summary judgment. Stip. ¶ 7. In May 2008, Russo directed respondent to deny the bank's motion for summary judgment. Stip. ¶ 9 and 10. Then, in July, a member of Russo's staff provided respondent with information about the AHB case. Stip. ¶ 11. On July 17, 2008, respondent called Russo. Stip. ¶ 12. Again, Russo directed respondent to deny the bank's motion. *Id.* That same afternoon, respondent contacted the magistrate assigned to the case and directed her to deny the bank's motion for summary judgment. Stip. ¶ 12-14; Hearing Tr. 38:5-39:25. The next day, July 18th, respondent signed the entry denying the bank's motion, among others, and advised both O'Malley and Russo of the denial. Stip. ¶ 16-18. Thus, on the 17th, Russo reminded respondent to deny the bank's motion, and, within approximately 24 hours, respondent had denied the motion and advised Russo that he had carried out his order. In the face of this timeline, the fact that respondent was acting at Russo's direction is undeniable.

Additionally, throughout this series of events, respondent never resisted Russo's directives. Stip. Ex.'s 3 and 5: 967:6-14. As County Auditor, Russo had no legitimate interest in the AHB case. Nor did Russo's staff. Other than his friendship with O'Malley, Russo had no connection to the AHB case. Respondent offered no resistance because he knew how the game was played and what was expected of him.

At the hearing, respondent argued that the jury's acquittal of Count 2 of the Superseding indictment equated to proof that he did not act at Russo's direction. Respondent's testimony was not only self-serving and speculative, but it also underscored his refusal to accept complete responsibility for his misdeeds. In an attempt to deny the obvious, respondent misinterprets the

jury's verdict in an attempt to extract an inference that the jury found that he did not act at Frank Russo's direction. Resp. Depo. 53:11-55:22. Paragraphs 45 – 47 of the Superseding Indictment state that respondent ruled in the AHB case at Frank Russo's direction. Stip. Ex. 10. The jury acquitted respondent of that count. Stip. Ex. 11. However, this panel cannot draw the conclusion that respondent argues follows from that acquittal.

Count 2 was a charge of Mail Fraud. Stip. Ex. 10. As paragraphs 48 and 49 of the Superseding Indictment show, using the mail in furtherance of the scheme to defraud is a necessary element of that charge. If the jury did not believe that the mailing occurred or was in furtherance of the scheme, then they would have been obligated to acquit respondent of that count. *Id.*; Hearing Tr. 103:7-109:25. However, there is no evidence regarding what the jury found regarding Count 2. Neither the verdict form nor the jury itself stated exactly what element was not sufficiently proven to them. Stip. Ex. 11; Resp. Depo. 65:16 – 67:4. There is nothing in evidence that demonstrates that the jury found that respondent properly decided those cases; consequently, respondent's argument that he properly decided the summary judgment motions must fail.

In fact, the jury's verdict in Count 1 supports an inference that it believed that respondent did *not* properly decide the AHB motions. The jury found respondent guilty of Honest Services Mail Fraud by <u>conspiring</u> to <u>defraud</u> AHB. Stip. Ex. 10. Additionally, paragraphs 34 through 41 detail the unethical conversations and the denial of the motions in the AHB case. *Id.* Contrary to respondent's attempt to conjure an inference helpful to his defense, the guilty verdict in Count 1 supports an inference that the jury did believe that he denied the motions in question at Russo's behest, and it is likely that the jury acquitted on Count 2 because they did not believe the government sufficiently proved the mailing element of the crime.

Assuming, arguendo, that respondent's inference is correct, that verdict does not preclude this Court from finding that respondent decided those motions based upon instructions from Frank Russo. In *Disciplinary v. Hoskins*, the Ohio Supreme Court stated, "Respondent reminds us that he has been acquitted of criminal conduct...however, the lack of a conviction requiring proof beyond a reasonable doubt hardly precludes us from finding the same conduct to be unethical. Judges are accountable for much more than merely conducting themselves within the bounds of the criminal law." *Disciplinary Counsel v. Hoskins*, 119 Ohio St. 3d 17, 2008-Ohio-3194, 891 N.E.2d 324, ¶41. The facts in this case establish by clear and convincing evidence that respondent denied the summary judgment motion at Russo's direction.

Finally, the remaining cases cited by respondent in support of an indefinite suspension involve attorney discipline and are inapplicable to respondent's case. The instant case involves respondent's abuse of his judicial position. This Court has stated that judges are held to the highest possible standard of ethical conduct. *Mahoning Cty. Bar Assn. v. Franko,* 168 Ohio St. 17, 23, 151 N.E.2d 17 (1958). The Court elaborated on the higher standard to which judges are held and the basis for it in *Disciplinary Counsel v. O'Neill*, 103 Ohio St.3d 204, 217, 2004-Ohio-4704, 815 N.E.2d 286, 298:

> Because they are so important to our society, judges must be competent and ethical, and their actions must foster respect for their decisions as well as for the judiciary as a whole. Given that they hold positions of considerable authority and are entrusted with a great deal of power and discretion, judges are expected to conduct themselves according to high standards of professional conduct. Indeed, it is often said that judges are subject to the highest standards of professional behavior. Judges are held to higher standards of integrity and ethical conduct than attorneys or other persons not invested with the public trust. Judges should exercise their judicial functions with integrity, impartiality, and independence. They should perform their work with a high degree of competence, and should treat litigants, witnesses, attorneys, and others who appear before them

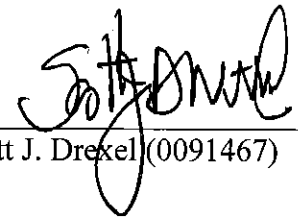
> with courtesy and respect. In sum, they should inspire trust and confidence, and should bring honor to the judiciary.

Further, the primary purposes of judicial discipline are to protect the public, guarantee the evenhanded administration of justice, and to bolster public confidence in the institution. *McCafferty*, 2014-Ohio-3075 at ¶ 20. By trading political favors, respondent abused the power that accompanied his judicial position. Given the elevated ethical obligations and professional standards of that position, respondent's case is distinguishable from the cases involving attorney discipline. In addition to the differences in the purposes of the judicial and attorney discipline, judges are held to a much higher standard. Thus, the attorney discipline cases cited by respondent are inapplicable.

CONCLUSION

Relator asks this Court to affirm the findings of the Board, adopt the recommended sanction, and disbar respondent from the practice of law.

Respectfully submitted,



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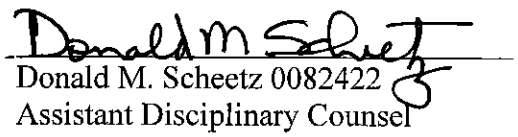

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing answer brief was served via U.S. Mail, postage prepaid, upon respondent's counsel, Richard Steven Koblentz, Esq., Koblentz & Penvose, LLC 55 Public Square, Suite 1170, Cleveland, OH 44113, , and upon Richard A. Dove, Director, Board of Professional Conduct, 65 South Front Street, 5th Floor, Columbus, Ohio 43215 this 9th day of February, 2015.

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