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IN THE

Supreme Court of Virginia

RECORD NO. 170889

JUDICIAL INQUIRY AND REVIEW
COMMISSION OF VIRGINIA,

Petitioner,

v.

KURT J. POMRENKE, JUDGE
OF THE TWENTY-EIGHTH JUVENILE AND
DOMESTIC RELATIONS JUDICIAL DISTRICT,

Respondent.

REPLY BRIEF OF THE COMMISSION

Katherine B. Burnett (VSB No. 25023)
Judicial Inquiry and Review Commission
100 North 9th Street, Suite 661
Richmond, Virginia 23219
Telephone: (804) 786-6636
Facsimile: (804) 371-0650
kburnett@vacourts.gov

Counsel for Petitioner

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

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THE COMMISSION'S REPLY BRIEF[1]

Judge Pomrenke concedes he violated the Canons of Judicial Conduct when he sent his note to Donald Bowman and left his voice message on Connie Moffatt's telephone, as charged by the Commission. (Judge's Brief at 16). He concedes he should be disciplined, and argues for censure instead of removal. The Commission found the charges to be well-founded and proven by clear and convincing evidence. (JA 115). The Commission takes no position before the Court as to whether censure or removal is the more appropriate sanction because the judge's actions constitute a sufficient basis for either. The judge engaged in misconduct while in office and engaged in conduct prejudicial to the proper administration of justice. *See* Va. Const. art. VI, § 10. The Commission replies to the judge's brief as follows:

1. The judge repeatedly asserts that his "actions did not relate to his actions on the bench or to any case before him." (Judge's Brief at 1, 2, 3, 9, 16, 18, 19, 21, 22, 23, 25, 28). He persists in characterizing his misconduct as being of a "personal," rather than an official, nature. (See,

[1] The judge's Brief identifies the judge as the "Respondent-Appellee," the Commission as the "Petitioner-Appellant," and refers to proceedings "below." This is an original jurisdiction proceeding. The Commission is an independent constitutional entity. There are no proceedings "below," no "appeal," and no "appellee" or "appellant."

e.g., Judge's Brief at 21). The judge clearly is asking this Court to consider off-bench misconduct as a lesser offense than on-bench misconduct. Nowhere in the Canons, however, is such gradation or distinction made or permitted. The Preamble to the Canons provides, in pertinent part, as follows:

> Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.

Preamble, Canons of Judicial Conduct.

Judge Pomrenke's misconduct was serious. He sent an implied threat to Bowman, his wife's supervisor whom he knew was assisting the federal authorities, in the guise of a "thank you" card. He implied that Bowman should not fire her and should agree she was innocent. Bowman took it as a threat and Judge Pomrenke now concedes the note reasonably was interpreted by Bowman. (Judge's Brief at 20). Judge Pomrenke tampered with the sanctity of a witness, Connie Moffatt, by instructing her how to testify in favor of his wife. This Court would be hard pressed to find more serious or flagrant violations of the Canons.

Judge Pomrenke's misconduct displayed a pattern of improper activity. In his attempt blindly to do everything he could think of to further his wife's interests, he sent Bowman the note to influence him not to fire his wife and to act favorably towards her in any testimony or interaction with the federal authorities. Three months later, and only days before his wife's trial, Judge Pomrenke brazenly interfered with Moffatt's ability to appear as a neutral witness, by expressly instructing her to be complicit in the orchestrated, non-responsive testimony he asked her to give. That misconduct showed a continuing pattern of improper activity.

The effect of Judge Pomrenke's misconduct on others, and on the administration of justice, cannot be overstated. The judge caused shock, disgust, and fear in the two potential witnesses he contacted. His actions in part prompted a prosecutor to bring contempt charges against his wife, and caused a United States Magistrate Judge to find Judge Pomrenke probably engaged in witness tampering or obstruction of justice. (JA 329). It cannot be denied that the judge's impliedly threatening note to Bowman, and his direct interference with Moffatt's testimony, had a deleterious effect on the administration of justice.

2. The judge now promises never to engage in this misconduct again and emphasizes what he describes as the unique, traumatic situation of his

wife being convicted and imprisoned for fraud and corruption. While other judges may not have experienced this particular challenge, judges, like all people, encounter traumatic family situations. Most judges thankfully do not throw aside their judicial reputations and ethical responsibilities when faced with family crises.

Judge Pomrenke candidly, and finally, admitted to the Commission that he could "see now where I was totally immersed and still am to the extent with the kids, making sure the kids are okay." (JA 246). There is nothing to indicate that, when faced with the next family challenge, he would not put "blinders" on, fail to step "out of himself," or fail to operate "with the necessary level of awareness with regard to his judicial responsibilities." (Judge's Brief at 4, 5, 15). Indeed, the judge's persistence for many months in asserting his confidence that he had not violated any Canon, and not relenting in that persistence until he had to testify before the Commission, should raise doubts about his ability to handle future life events without jettisoning the Canons again.

3. Finally, this Court must assess the extent of the judge's understanding of his misconduct. In every communication with the Commission prior to the formal hearing, the judge steadfastly insisted he had done nothing unethical. (See letter (JA 319), Informal Answer (JA 13),

Answer (JA 395)). In his brief before this Court, the judge admits his obvious misconduct but, at the same time, continues to defend it: his Bowman note was "misconstrued;" his Moffatt message was just personal and unrelated to his work as a judge; and his acts were not too serious because they were just "human reaction to family crisis." (Judge's Brief at 19-22). Certainly a promise to faithfully adhere to the Canons in the future should be predicated on a clear understanding of how past actions, at the time they were taken, violated the Canons.

CONCLUSION

When a judge leans on his wife's employer whom he knows is assisting the law enforcement authorities who are prosecuting his wife, and tells a potential witness how to testify, all to influence the outcome of the criminal trial against his wife, that judge is not acting "personally." He is acting contrary to the Canons of Judicial Conduct and to the public's trust in the judiciary.

The Court should find that Judge Pomrenke engaged in misconduct while in office and in conduct prejudicial to the proper administration of justice, and should sanction the judge with censure or removal, as the evidence warrants.

Respectfully submitted,
JUDICIAL INQUIRY and REVIEW
COMMISSION OF VIRGINIA,
Petitioner herein.

By Counsel:
s/Katherine B. Burnett, Commission Counsel
Virginia State Bar No. 25023
Judicial Inquiry And Review Commission
100 North Ninth Street, Suite 661
Richmond, Virginia 23219
telephone: (804) 786-6636
facsimile: (804) 371-0650
kburnett@vacourts.gov

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On October 13, 2017, the required copies of this Reply Brief of the Commission were filed with this Court electronically and hand delivered to the Clerk's Office in compliance with Rules 5:26 and 5:32. Pursuant to Rules 5:26(e) and 5:32(a)(3)(i), a copy of the Reply Brief of the Commission was emailed to counsel for Respondent at: john.lichtenstein@lichtensteinlawgroup.com.

s/Katherine B. Burnett, Commission Counsel