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STATE OF WISCONSIN

IN THE SUPREME COURT

03-22-2019

In the Matter of Judicial Disciplinary Proceedings
Against the Honorable Leonard D. Kachinsky

**CLERK OF SUPREME COURT
OF WISCONSIN**

WISCONSIN JUDICIAL COMMISSION,
Complainant

Case No. 18 AP 628-J

v.

THE HONORABLE LEONARD D. KACHINSKY,
Respondent

**KACHINSKY'S RESPONSIVE BRIEF REGARDING
JUDICIAL CONDUCT PANEL REPORT**

ON REVIEW FROM A JUDICIAL CONDUCT PANEL'S FINDINGS OF
FACT, CONCLUSIONS OF LAW AND RECOMMENDATION, THE
HONORABLE JOAN R. KESSLER, MARK D. GUNDRUM AND WILLIAM
W. BRASH III PRESIDING

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Municipal Judge, Respondent

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CONDUCT PANEL REPORT**

Leonard D. Kachinsky (Kachinsky) , submits the following in response to the Judicial Commission brief filed on March 13, 2019. As noted below, the Commission’s brief did not address some of the issues below due to the simultaneous filing of opening briefs. Kachinsky will address them in the context of the Commission’s proposed sanction which was the sole issue discussed in the Commission’s brief.

STATEMENT OF ISSUES

- I. DID THE EXECUTIVE BRANCH OF THE VILLAGE OF FOX CROSSING HAVE THE LEGAL AUTHORITY TO REGULATE KACHINSKY’S CONTACTS WITH THE MUNICIPAL COURT MANAGER?

The Commission did not address this issue in its initial brief.

II. DID SOME OF KACHINSKY’S ACTIONS CONSTITUTE RETALIATION TOWARD BARTELT OR INTIMIDATION OF HER?

The Commission addressed this issue by adopting the findings of the Judicial Conduct Panel (Panel) but did not address the issue of the definition of retaliation or intimidation in its initial brief.

III. WERE ANY OF THE JUDICIAL PANEL’S FINDINGS OF FACT CLEARLY ERRONEOUS?

The Commission appeared to argue they were not but did not address specific instances which Kachinsky argued were clearly erroneous.

IV. DID KACHINSKY’S ACTIONS IN AN EMAIL TO BARTELT REGARDING PROBLEMS IN ANOTHER COURT AND IN POSTING A PAPER CONTAINING THE VILLAGE SEXUAL HARASSMENT POLICY WHILE LEAVING ANOTHER POSTER ON HIS DESK NEAR THE PHONE VIOLATE THE RESTRAINING ORDER IN 18 CV 102?

The Commission’s brief appeared to argue that violations of the restraining order occurred.

V. WAS THE RECOMMENDED DISCIPLINE OF ONE TO THREE YEARS SUSPENSION OF ELIGIBILITY TO SERVE AS A RESERVE MUNICIPAL JUDGE WITH RESTRICTIONS AS TO SERVICE IN FOX CROSSING APPROPRIATE?

The Commission argued that the suspension imposed by this court on July 3, 2018 should be continued until the expiration of Kachinsky's term on April 30, 2019 and that Kachinsky never be eligible for appointment as a reserve municipal judge..

ARGUMENT

THE APPROPRIATE DISCIPLINE IN THIS CASE WOULD BE A NINE MONTH SUSPENSION WITH A RESTRICTION UPON TERMINATING BARTELT'S APPOINTMENT RATHER THAN RECOMMENDED DISCIPLINE OF ONE TO THREE YEARS SUSPENSION OF ELIGIBILITY TO SERVE AS A RESERVE MUNICIPAL JUDGE WITH RESTRICTIONS AS TO SERVICE IN FOX CROSSING OR DENIAL OF ELIGIBILITY FOR APPOINTMENT AS A RESERVE MUNICIPAL JUDGE.

The ideal situation for a functioning municipal court office was typified in the email exchange in Exhibit 5 which the Commission condemned as a failure to abide by Bartelt's wish's regarding communications. In those emails, Bartelt responded to comments on the need for open communication by stating, "Judge K: Yes I am glad we could talk things out and still have a good working relationship! This is great...and I know you appreciate it as well as I do! I hope you and Barb have a great evening out to eat!! It should be a nice weekend too. And yes Mason got to go have fun last night but we will extend that into the weekend since he was better, but not back to norm!." (April 21, 2017, 9:45 a.m.).

Later on in response to comments by me encouraging Bartelt to bring up problems if they occurred and some other subjects, Bartelt responded, "Judge K: Yes thank you for

the open communication that is what keeps things running smoothly! Yes got my workout in yesterday morning and then I did already this morning too!! Hope the day is going well for you” (April 21, 2017, 8:18 a.m.).

In the same e-mail chain, Bartelt expressed her opinion on occasional visits by me other than court sessions: “That is great as a boss to be genuinely interested in how the office is run...makes for a well-run office” (April 20, 2017, 10:31 a.m.).

That email exchange, which began as a discussion of a brief filed by an attorney, illustrates the flaw in the Commission’s contention that I bombarded Bartelt with personal emails. A case could easily be made either way that this was a personal or business email. This was after the April 18, 2018 email that asked for things to “be more work-related” (Exhibit 3).

The “work only” communication policy the Village attempted to impose upon the Municipal Court after May 26, 2017 when Bartelt went to Village Manager with her concerns was ill-advised and unworkable. Kachinsky largely abided by the “work only” policy even after he abolished it in late June 2017 (see p. 17 of initial brief). However, as that situation continued, it had the inevitable result of eroding any emotional bonds between Kachinsky and Bartelt that were essential for a high functioning municipal court. It was contrary to my preferred management style and that of most offices. Generally, communication among co-workers is a good thing. The periodic attempts to re-establish a better relationship were not successful but they did not violate either good policy or the Code of Judicial Conduct to try (see pages 16-17 of initial brief).

The Commission also compared this case to *In re Gorenstien*, 147 Wis.2d 861, 434 N.W.2d 603 (1989). Over a six year period Gorenstein's behavior included the following:

He berated black women with minor children appearing before him on probation status reviews for what he viewed as a wholesale abuse of the welfare system in Milwaukee by blacks who had illegitimate children and who did not want to work. He told public defenders they would or should go to jail if their clients failed to make restitution. He made intemperate remarks about appellate courts, as set forth below. He criticized a victim-witness, out of the presence of the jury, for crying during cross-examination. Upon learning that a defendant's probation had been revoked, he directed the man's lawyer to seek review of that decision, told him on what grounds to do so, offered to extend any time limits if necessary and said he would decide the case by putting the man back on probation. In three cases in which persons associated with a state mental health hospital testified as expert witnesses, Judge Gorenstein criticized that facility, stating that he had never found a doctor or any staff person associated with it to be qualified and that he had no faith in any of the state hospitals, despite the fact, as he later acknowledged, that he knew those statements were untrue.

Gorenstein, 147 Wis.2d at 862-863. Gorenstein was prohibited from being a judge for two years.

Gorenstein's conduct occurred in open court before many litigants and onlookers which certainly diminished respect for the courts and rule of law. In this case, the conduct complained of occurred primarily in the municipal court office or by email or Facebook postings that did not directly identify Bartelt as the person being referred to. This case also did not involve any bias based upon status as a victim, race, sex or other grounds.

The behavior complained about in this case was centered on Mandy Bartelt. Bartelt and I had an excellent relationship the first ten months of her employment.

Kachinsky had also had a good relationship from 1997 to 2016 with Bartelt's predecessor, Sue Hermus, with whom he talked about family members and other personal matters (TR: 390). Kachinsky had no prior experiences of problems with co-workers at Fox Crossing, his private law office or in the Army Reserve comparable to his difficulties with Bartelt (95: 137-139).

Language and demeanor sometimes needed in workplace relationships may be more harsh than what would be acceptable in open court. In many felony sentencings, a judge will make negative comments upon the offender's character that are far more negative than my private email comments about Bartelt being a "weakling" or "coward" for being afraid to be in the same room alone with me. Lack of willingness to be candid with one's boss was a concern I expressed to Bartelt on several occasions. It is well-recognized that candid communication is essential for a well-functioning office.

In an ideal world envisioned by Sec. 755.10(1), Wis. Stats., a judge and clerk who developed interpersonal difficulties would attempt to reconcile them. If reconciliation failed, the clerk would get transferred to a different job or terminated and a new clerk would be hired. In this case, Fox Crossing effectively blocked such a procedure by the Macy letter of June 29, 2017 (Exhibit 27) and the Village Board Resolution in May 2018 (Exhibit 219). Fox Crossing threatened to not recognize a termination and to make the hiring of a qualified replacement impossible. While I had the option of taking legal action, (as I eventually did regarding the involuntary monitoring), it was from personal funds with no assurance of ever being reimbursed. This was an \$8300 a year job for which spending thousands in legal fees made little economic sense.

Judges have to deal with situations that exist and not how they wish they would be. At times, tensions boiled over with two incompatible persons having to work together, resulting in the demeanor type of violations that I have admitted.

The violations of the Judicial Code supported by the evidence are primarily matters of demeanor in out-of-courtroom interactions with Bartelt. The Facebook postings did not specifically identify Bartelt but persons who knew them well could figure out to whom Kachinsky was referring. Similarly, labelling Bartelt was a “weakling” and “coward” may have fallen below the high standards to which judges are supposed to adhere. However, one has to consider how difficult Bartelt was to interact with after her May 26, 2017 meeting with Sturgell.

Kachinsky already discussed Bartelt’s clearly exaggerated belief that she was a victim of sexual harassment (see pages 33-34 of initial brief). In addition, Bartelt feared, without substantial evidence, that she was being subjected to electronic eavesdropping in the municipal court office and to surveillance by me at her home and at her gym (TR 163-173; see discussion on page 30 of initial brief). There were also exhibits admitted into evidence at the hearing by the Commission but not testified about that further illustrate what Bartelt found objectionable. This included:

1. A poster of animals hugging each other with the caption, “Can’t we just get along.” (Exhibit 48).
2. A “Welcome Back” poster to greet Bartelt when she returned from a trip (Exhibits 49 and 50).
3. A Thanksgiving greeting (Exhibit 65).

4. The birthday card, snow removal off of vehicles and other items discussed in Exhibit 70. Although it would have required little effort to do so, Bartelt refused to return Christmas greetings twice in one night.
5. The conduct set forth in the rationale for the termination on March 26, 2018 which included the refusal to return Easter greetings (Exhibit 87).

Village Manager Jeff Sturgell, by inaction, supported Bartelt's cold, impolite, rude and unfriendly conduct (TR: 368; pages 16-17 of initial brief).. This provided Bartelt with no reason to change it or consider some kind of reconciliation.

Most employees in most workplaces would be thrilled to have a supervisor that expressed some interest in their happiness and well-being. Bartelt was such an employee for her first ten months. Most supervisors faced with an employee with a persistent negative attitude toward them would transfer the employee to another section or terminate the person's employment. That was not a realistic option because the Village had no available positions and was willing to threaten what amounted to a shutdown of the municipal court operations in retaliation. In spite of the illegality of the Village's threats and its continued involuntary monitoring, I was expected under the Judicial Code to maintain high standards of conduct. It was similar to the challenges a judge faces with belligerent litigants. Occasionally, outside the presence of the general public, I failed to maintain proper demeanor as the negative work situation dragged on month after month. Fortunately, as a reserve judge, I would never be in the position of having to fight illegal intrusions upon my authority to manage the court by my own municipality.

The Commission argued that no municipality would ever want me as a reserve municipal judge (p. 11 of Commission's brief). The three reasons given all relate to the immediate situation in this case and not what would exist on May 1, 2019 and thereafter. Already, two of the three civil actions (one of which was initiated by me) have been dismissed. The restraining order expires May 1, 2019. A decision by this court is likely in late April or early May 2019 so disciplinary action would be over by then. The Commission's argument also did not consider the expertise in the law applicable to municipal courts I developed from 22 years on the bench and in private practice. This court is aware of that from its own interactions with me in other cases.

Assignments as a reserve municipal judge are usually one case at a time due to a recusal or substitution or for a limited number of court dates at a location due to the unexpected absence of the elected municipal judge. They do not involve long term interaction with the court clerk. I am an experienced trial attorney and judge qualified to handle cases that might be particularly difficult and for which other municipal judges in the area would not be available.

All of this demonstrates that the personality conflict between Kachinsky and Bartelt soon morphed into a battle between the branches of Village government. Kachinsky, unlike VanSustern and Staeger, did not defy clearly established authority. He stood his ground to protect the separation of powers. Over the 14 month period when Kachinsky was subject to the involuntary monitoring, , there was no obscene, profane or vulgar language in spite of the unrelenting tensions of the situation. The most significant

activity that undermined public confidence in system of justice was the distribution of my booking photo in the media after my arrest on July 2, 2018 for charges that were dropped or resulted in a not guilty verdict. Other than possibly the frustrated remarks about Harvey Weinstein and Bill O'Reilly, there was nothing that came close to yelling. The problems never manifested themselves in the courtroom to the general public.

CONCLUSION

For the reasons stated above and in my brief-in-chief, Kachinsky requests that this court impose a suspension of nine months which would be commensurate with seriousness of the proven violations. I also request that I be eligible for appointment as a reserve municipal judge at the discretion of the District Judge.

Dated this 22nd day of March 2019

LEN KACHINSKY
Municipal Judge, Respondent
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CERTIFICATION AS TO BRIEF LENGTH

I hereby certify that this brief conforms to the rules contained in Sec. 809.19(8)(b) and (c) for a brief and appendix produced with a serif proportional spaced font. This brief has 2581 words, including certifications.

Dated this 22nd day of March 2019

LEN KACHINSKY

CERTIFICATION OF ELECTRONIC FILING

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Rule 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 22nd day of March 2019

LEN KACHINSKY