

6/25/99

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X

MICHAEL MANTELL,

Index No.: 108655/99

Petitioner,

-against-

NEW YORK STATE COMMISSION ON JUDICIAL
CONDUCT,

Respondent.

-----X

RESPONDENT'S MEMORANDUM OF LAW IN
SUPPORT OF THE CROSS-MOTION TO
DISMISS THE AMENDED PETITION

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Preliminary Statement

This memorandum of law is respectfully submitted on behalf of the Commission on Judicial Conduct of the State of New York ("Commission") in support of the cross-motion to dismiss the amended petition pursuant to Rule 3211 and Section 7804 of the New York Civil Practice Law and Rules ("CPLR").¹ Petitioner, Michael Mantell, brings this proceeding pursuant to Article 78 of the CPLR seeking an order compelling the Commission to conduct an investigation of the Honorable Donna G. Recant, Justice of the

¹Any challenge that petitioner may raise to the authority of the Attorney General to represent the Commission in this proceeding is not proper. The Commission is entitled to such representation and the Attorney General is statutorily authorized to defend this proceeding. Executive Law 63(1); Sassower v. Signorelli, 99 A.D.2d 358 (2d Dept. 1984).

Supreme Court, New York County. The petition should be dismissed and the Commission's January 4, 1999 decision to dismiss the complaint affirmed because the Commission had the authority and discretion to refuse to investigate or prosecute the justice against whom petitioner complains; this Court cannot grant petitioner the relief he seeks; this Court lacks subject matter jurisdiction; and the petitioner lacks standing to challenge the determination.

Statement of Facts

A. Statutory Framework

The Commission was established pursuant to the New York State Constitution and Judiciary Law to receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the United Court System. See N.Y.S. Const., Article VI, § 22(a); Jud. L. §§ 41.1, 42.1.

The Commission has general jurisdiction to investigate and hear complaints with respect to the conduct, qualifications, fitness to perform, or performance of official duties of any New York State judge. See Jud. L. § 44.1. Jud. L. § 44.1 provides in pertinent part, that:

... Upon receipt of a complaint (a) the

commission shall conduct an investigation of the complaint; or (b) the commission may dismiss the complaint if it determines that the complaint on its face lacks merit ...

Further, 22 NYCRR § 7000.3 (b), which was promulgated pursuant to the Commission's powers and duties as set forth in Judiciary law § 42(5) (the Commission has the power and duty to adopt and promulgate rules and procedures to carry out the provisions and purposes of this article), follows the language of Jud. L. § 44(1) and states, in pertinent part, that:

Upon receipt of a complaint, or after an initial review and inquiry, the complaint may be dismissed by the Commission, or, when authorized by the Commission, an investigation may be undertaken ...

B. Petitioner's Allegations

On September 28, 1999, petitioner filed a complaint with the Commission against Justice Recant. See Amended Petition ¶ 5. The complaint alleged that Justice Recant: (a) changed her ruling on a matter before her on the basis of her personal reaction to petitioner; (b) engaged in a display of "intemperate conduct"; (c) made remarks on the record which were a gross departure from required courtesy and civility; (d) engaged in ex parte communications with petitioner; (e) advised petitioner what should be done by petitioner to change the "court's attitude"; and (f)

removed petitioner from the courtroom. See Amended Petition ¶¶ 6 (I) - (VI).

By letter dated January 4, 1999, the Commission advised petitioner that it dismissed his complaint. See Amended Petition ¶ 7. The Commission concluded "that there was no indication of judicial misconduct upon which to base an investigation." Id; Exh. B. Petitioner alleges that the Commission's refusal to conduct an investigation was arbitrary and capricious and a failure to perform a duty enjoined upon it by law and respectfully requests this Court enter an order directing the Commission to conduct an investigation into his accusations. See Amended Petition ¶ 8; Wherefore Clause.

ARGUMENT

POINT I

COMMISSION'S DECISION TO DISMISS PETITIONER'S COMPLAINT WAS NEITHER ARBITRARY, CAPRICIOUS NOR CONTRARY TO LAW AND SHOULD BE UPHELD

Though the petitioner asserts that the Commission's decision to dismiss his complaint against Justice Recant was arbitrary, capricious and contrary to law, as shown below, the Commission's decision has a rational basis and should be upheld.²

²The Commission contends that its decision to dismiss the complaint pursuant to Jud. L. § 44.1 (b) is a matter of executive or quasi-judicial discretion which is not subject to judicial review. See Point III infra.

A court's function in an Article 78 proceeding is to determine whether a rational basis exists for the action of an administrative body or officer. Matter of Colton v. Berman, 21 N.Y.2d 322, 287 N.Y.S.2d 647 (1967). Judicial review is limited to whether the action is arbitrary and capricious or affected by error of law. Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Serv., 77 N.Y.2d 753, 758 (1991). An action is only arbitrary when it "is without sound basis in reason and is generally taken without regard to the facts." Pell v. Board of Education, 34 N.Y.2d 222, 231, 356 N.Y.S.2d 833, 839 (1974).

Where there is a rational basis for the action, the court may not disturb it. Pell, 34 N.Y.2d at 231; County of Monroe v. Kaladjian, 83 N.Y.2d 185, 189 (1994); see also Diaz v. Abate 215 A.D.2d 275, 276 (1st Dept. 1995); Gandolfo v. White, 224 A.D.2d 526, 528 (2d Dept. 1996). Only when "no reasonable mind could reach the administrative determination actually made" should the court interfere. Buck v. State Liquor Authority, 19 Misc.2d 912, 915 (Sup. Ct. Kings Co.), aff'd, 8 A.D.2d 851 (2d Dept. 1959). Thus, if the decision under review is reasonable, the court should not substitute its judgment for that of the agency or direct a different evaluation. Donovan v. Bellacosa, 129 A.D.2d 152, 154

(1st Dept. 1987). Further, "[w]here the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute. If its interpretation is not irrational or unreasonable, it will be upheld." Kurcsis v. Merchants Mutual Insurance Co., 49 N.Y.2d 451, 459 (1980). Accord, Howard v. Wyman, 28 N.Y.2d 434, 438 (1971).

The petitioner alleges that the Commission's refusal to conduct an investigation was a failure to perform a duty enjoined upon it by law. See Amended Petition ¶8. Petitioner is incorrect. Jud. L. § 44(1) provides in pertinent part, that: "[u]pon receipt of a complaint (a) the commission shall conduct an investigation of the complaint; or (b) the commission may dismiss the complaint if it determines that the complaint on its face lacks merit ..." Emphasis added. The Commission clearly acted within its statutory authority when it dismissed petitioner's complaint, determining "that there is no indication of judicial misconduct upon which to base an investigation." See Amended Petition ¶ 7, Exh. B. Accordingly, the Commission's determination to dismiss petitioner's complaint should be upheld because it was rationally based, and

neither arbitrary, capricious nor contrary to law.

POINT II

A PROCEEDING IN THE NATURE OF
MANDAMUS IS INAPPROPRIATE BECAUSE IT
SEEKS TO COMPEL A PURELY
DISCRETIONARY ACT

It is well settled that mandamus to compel is unavailable where a petitioner seeks a court order compelling a body or officer to perform a statutory duty which is entirely discretionary. County of Fulton v. State of New York, 76 N.Y.2d 675, 678 (1991); Klosterman v. Cuomo, 61 N.Y.2d 525, 539 (1984); Hampton Hosp. v. Moore, 52 N.Y.2d 88, 96 (1981).

Mandamus to compel is only available "to compel the performance of a purely ministerial act where there is a clear legal right to the relief sought." Matter of Legal Aid Society of Sullivan County v. Scheinman, 53 N.Y.2d 12, 16 (1981). See also Harper v. Angiolillo, 89 N.Y.2d 761, 765 (1997). The right to performance "must be so clear as not to admit of reasonable doubt or controversy." Ass'n of Surrogates and Supreme Court Reporters Within the City of New York v. Bartlett, 40 N.Y.2d 571, 574 (1976) (citing Matter of Burr v. Voorhis, 229 N.Y. 382, 387 (1920)); Rosen v. Brewster, 160 A.D.2d 946, 946 (2d Dept. 1991).

"A ministerial act. . . has been defined as a specific

act which the law requires a public officer to do in a specified way." Posner v. Levitt, 37 A.D.2d 331, 332 (3d Dept. 1971). The relief demanded in the petition must be specifically and "clearly imposed by law . . . It is not enough that the act, performance of which is sought, is not prohibited, its performance must be directed." Burr v. Voorhis, 229 N.Y. at 387; Rosen v. Brewster, 160 A.D.2d at 946. Mandamus "will not be awarded to compel an act in respect to which the officer may exercise judgment or discretion." Gimprich v. Board of Education of the City of New York, 306 N.Y. 401, 406 (1954) (quoting People ex rel. Hammond v. Leonard, 74 N.Y. 202 (1878)); see also Matter of Mullen v. Axelrod, 74 N.Y.2d 580, 583 (1989).

The burden is on the applicant requesting this equitable remedy to demonstrate the necessity and propriety of its use and it "should be denied if there is any doubt of its necessity or propriety." Towner v. Jimerson, 67 A.D.2d 817, 817-18 (4th Dept. 1979). See Coombs v. Edwards, 280 N.Y. 361, 364 (1936). Indeed, the Court of Appeals has long established, that "only where the case presented shows no room for the exercise of discretion may it be held as a matter of law that there is an abuse of discretion." Coombs v. Edwards, 280 N.Y. at 364; see also Matter of NYPIRG v. Dinkins, 83 N.Y.2d 377, 387 (1994); Sheerin v. New York Fire

Department, 46 N.Y.2d 488, 496 (1979).

This proceeding constitutes an improper use of mandamus. Indeed, by demanding that the Court order the Commission to conduct an investigation of Justice Recant, petitioner seeks to compel an act which is within the discretionary authority of the Commission. Jud. L. § 44(1) provides in pertinent part, as follows: "[u]pon receipt of a complaint (a) the commission shall conduct an investigation of the complaint; or (b) the commission may dismiss the complaint if it determines that the complaint on its face lacks merit ..." Emphasis added. Further, 22 NYCRR § 7000.3 (b), states, in relevant part: "[u]pon receipt of a complaint, or after an initial review and inquiry, the complaint may be dismissed by the Commission, or, when authorized by the Commission, an investigation may be undertaken ..." Emphasis added.

The statutory language used by the legislature makes plain that the Commission is vested with discretion to determine whether to investigate or dismiss a written complaint and cannot be compelled in a particular way by mandamus. The cited statutory language does not require or compel the Commission conduct an investigation merely because a complaint is filed alleging judicial misconduct.

Accordingly, mandamus cannot be used to compel the

particular relief that petitioner requests, i.e., ordering the Commission to conduct an investigation into plaintiff's allegations of judicial misconduct on the part of Justice Recant. Chessin v. New York City Conciliation and Appeals Board, 100 A.D.2d 297, 302 (1st Dept. 1984). Therefore, this CPLR Article 78 proceeding should be dismissed.

POINT III

PETITIONER'S CLAIM IS NON-JUSTICIABLE

Petitioner seeks judicial review of the Commission's decision to dismiss his complaint and its refusal to further investigate or prosecute Justice Recant. However, this claim is non-justiciable and must be dismissed as a matter of law. CPLR 7804(f); 3211(a)(2).

It is well settled that questions of broad legislative and administrative policy are non-justiciable and beyond the scope of judicial correction. Jones v. Beame, 45 N.Y.2d 402, 408 (1978). As set forth in N.Y.S. Law Enforcement Employees v. Cuomo, 64 N.Y.2d 233, 238-40 (1984), the doctrine of justiciability has developed to reaffirm the separation of powers of our tripartite government, and to identify appropriate occasions for the exercise of judicial authority:

[E]ach department of government should be free

from interference, in the lawful discharge of duties expressly conferred, by either of the other branches ... [Q]uestions of judgment, allocation of resources and ordering of priorities ... are generally not subject to judicial review ... While it is within the power of the judiciary to declare the vested rights of a specifically protected class of individuals, in a fashion recognized by a statute, (Klosterman v. Cuomo, 61 N.Y.2d 525 [1984]), the manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the political branches of government (citation omitted). Where, as here, policy matters have demonstrably and textually been committed to a coordinate, political branch of government, any consideration of such matters by a branch or body other than that in which the power expressly is reposed would, absent extraordinary or emergency circumstances (citation omitted), constitute an ultra vires act.

Id. at 239-240.

Here, the New York State Constitution and Judiciary Law have established the Commission to receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the United Court System. See N.Y.S. Const., Article VI, § 22(a); Jud. L. §42.1. See Matter of Wilk v. NYS Commission on Judicial Conduct, 97 A.D.2d 716 (1st Dept. 1983). The State's interest in an impartial judiciary requires that the Commission be free to investigate those complaints that it deems appropriate for

investigation, and to initiate formal charges only when it deems such action appropriate. Matter of Nicholson v. State Commission on Judicial Conduct, 50 N.Y.2d 597, 608 (1980).

While the Constitution and enabling statutes creating the Commission permit judicial review of a determination to discipline a judge by the Court of Appeals at the request of the judge who is the target of the investigation -- see N.Y.S. Const., Art. VI, § 22(a), (d), (e); Jud. L §§ 44.7, 44.8, 44.9, see also Matter of Wilk v. N.Y.S. Commission on Judicial Conduct, 97 A.D.2d at 716 -- there is no comparable statutory provision for judicial review of a determination not to investigate or prosecute at the request of the complainant. Indeed, the determination whether to dismiss a case that, in the Commission's determination, lacks merit on its face is a matter vested to the Commission's discretion and is not reviewable.

Here, the Constitution and Judiciary Law impose a general duty that is "surrounded by permissive and non-absolute implications, and is intended by the Legislature not so much as to require action as to preserve the right to act when sound discretion dictates." Johnson v. Boldman, 24 Misc.2d 592, 594 (Sup., Ct., Tioga Co., 1960). The power and authority to determine whether to investigate or prosecute a complaint of judicial

misconduct, and whether to dismiss it where the Commission determines "that the complaint on its face lacks merit," Jud. L. §44.1(b), has been vested to the discretion of the Commission. In exercising that discretion, the Commission, like a prosecutor, must be able to exercise "independence of judgment" in deciding how to use the limited resources of the office. See Clouden v. Lieberman, n.o.r. 1992 WL 54370 (E.D.N.Y.) (Weinstein, J.) (March 5, 1992) (plaintiff can not compel disciplinary committee to conduct "full scale" investigation of his complaint against an attorney). Accordingly, the Commission's decision to dismiss a complaint where, as here, the complaint lacks merit on its face, is a matter over which the Court's have no oversight. Hassan v. Magistrate's Court of the City of New York, 20 Misc.2d 509, 513 (Sup. Ct., Queens Co., 1959), appeal dismissed, 10 A.D.2d 908 (2d Dept.), motion for leave to appeal denied, 8 N.Y.2d 750 (1960), cert. denied, 364 U.S. 844 (1960).

The petition should, therefore, be dismissed as a matter of law. CPLR 7804(f), 3211(a)(2).

POINT IV

PETITIONER LACKS STANDING TO SUE

Petitioner also lacks standing to challenge the Commission's determination to dismiss the complaint pursuant to

Judiciary Law §44.1(b) and 22 NYCRR §7000.3 upon the ground that the complaint on its face, lacked merit.

In order to establish standing to challenge State officials' determination, petitioner must show, inter alia, that 1) the interest asserted is arguably within the zone of interest to be protected by the statute, and 2) the determination had a harmful effect upon him. Matter of Dairylea Cooperative, Inc. v. Walkley, 38 N.Y.2d 6, 8-11 (1975). See also Mobil v. Syracuse Indus. Div., 76 N.Y.2d 428, 433 (1991). Petitioner fails to meet these criteria.

First, petitioner is not within the zone of interest protected by the statute. While the statutes and regulations governing judicial misconduct proceedings are designed, in part, to protect the public in general from unqualified or incompetent judges, such a generalized purpose is insufficient to confer standing on a member of the general public -- even upon the person who files the complaint against a judge. To give standing to every dissatisfied complainant whose complaint is not acted upon by the Commission in the way that the complainant would like, would unnecessarily and unduly burden it with litigation and interfere with the exercise of its discretion.

In Matter of Dolphin v. The Association of the Bar of the

City of New York, 240 N.Y. 89 (1925), the Court of Appeals held that the bar association which had presented a petition to the Appellate Division alleging misconduct on the part of an attorney was not "aggrieved" by and could not challenge the Appellate Division's decision not to take action against the attorney. The Court found that, although the bar association had an interest in and responsibility to uphold the standards of the profession, "this interest is of a general character such as theoretically is shared by every member of the profession and that it is not such a specific, personal and legal interest as makes the association a party legally aggrieved within the meaning of our statutes." Id. 240 N.Y. at 94. See also Gardner v. Constantine, 155 A.D.2d 823, 825 (3d Dept. 1989) (noting, without deciding, that "serious questions exist" whether a District Attorney has standing to compel the State Police to complete an internal investigation), aff'g, 140 Misc.2d 894, 898 (Sup. Ct., St. Lawrence Co. 1988) ("court has some doubt that the mere fact that the petitioner initiated the complaints against the members of the New York State Police should in and of itself confer standing, ..." but finding that he had standing as the District Attorney).

Petitioner also fails to establish the second requirement for standing because he does not allege any injury in fact. The

institution of disciplinary proceedings can have severe implication for the judge, as it can result in the suspension or removal from office. Jud. L. § 44.7. To be sure, the powers of the Commission must be used and administered in a particularly judicious and lawful manner that balances the need for public confidence in our state judicial system with the need to avoid unwarranted injury to judicial reputations. Cunningham v. Stern, 93 Misc.2d 516, 518 (Sup. Ct., Eire and Niagra Co., 1978). However, the initiation of an investigation or disciplinary proceeding against a judge has no direct benefit to petitioner because it results in neither monetary nor injunctive relief for the complainant.

Petitioner is thus not harmed by the Commission's determination to dismiss the complaint, rather than proceed with a more formal investigation or charges. Accordingly, the petition should be dismissed for lack of standing. Matter of Dolphin v. The Association of the Bar of the City of New York, supra.

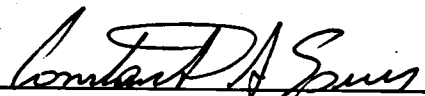
CONCLUSION

FOR THE ABOVE REASONS, THE DECISION
OF THE COMMISSION SHOULD BE AFFIRMED
AND THE ARTICLE 78 PROCEEDING SHOULD
BE DISMISSED

Dated: New York, New York
June 23, 1999

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