



STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL

R/H 9/7/00

ELIOT SPITZER  
Attorney General

(212) 416-8567

RICHARD RIFKIN  
Deputy Attorney General  
State Counsel Division

September 6, 2000

JAMES B. HENLY  
Assistant Attorney General in Charge  
Litigation Bureau

**BY HAND**

Honorable Catherine O'Hagen Wolfe  
Clerk of Court  
Appellate Division, First Department  
27 Madison Avenue  
New York, New York 10010

Re: Mantell v. Commission on Judicial Conduct  
Sup. Ct. N.Y. Co. Index No. 108655/99

Dear Ms. Wolfe:

This office represents respondent New York State Commission on Judicial Conduct. Enclosed please find ten copies of Sassower v. Commission on Judicial Conduct, Index No. 109141/95 (Sup. Ct. N.Y. Co. 1995) and Sassower v. Commission on Judicial Conduct, Index No. 108551/99 (Sup. Ct. N.Y. Co. 1999) unreported decisions cited to by respondent in its brief. Thank you for your attention to this matter.

Respectfully submitted,

Constantine A. Speres  
Assistant Attorney General

cc: Michael Mantell, Esq.  
Petitioner-Appellant Pro Se  
1211 Avenue of the Americas  
New York, New York 10036  
(w/encl.)

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 49

-----X  
DORIS L. SASSOWER, -

Plaintiff(s),

-against-

INDEX NO. 109141/95

COMMISSION ON JUDICIAL CONDUCT OF  
THE STATE OF NEW YORK, et al.

Defendant(s).

-----X  
CAHN, J.

Petitioner brings this Article 78 proceeding seeking a declaration that a certain rule (22 NYCRR §7000.3) promulgated by Respondent-Commission on Judicial Conduct, ("Commission") is unconstitutional. In essence, Petitioner asserts that the Commission has, via this rule, wrongfully transformed its mandatory duty to "investigate and hear" complaints of misconduct (NY Const. art. VI, §22[a]) into an optional one, with no requirement, that it first make a determination that the "complaint on its face lacks merit..." (Jud. Law §44.1), prior to summary dismissal of a complaint.

Respondent moves to dismiss the petition for failure to state a cause of action, CPLR §3211(a)(7) and §7804(f).

Art. 6, sect. 22 of the State Constitution established the Commission, and sets forth its mission. It reads, in part, as follows:

§ 22. [Commission on judicial conduct]

a. There shall be a commission on judicial conduct. The commission on judicial conduct shall receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge...

\* \* \*

c. The organization and procedure of the commission on judicial conduct shall be as provided by law. The commission on judicial conduct may establish its own rules and procedures not inconsistent with law.... [Emphasis added]

Tracking the language of the Constitution, Article 2-A of the Judiciary Law provides in pertinent part:

§ 44. Complaint; investigation; hearing and disposition.

1. The commission shall receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform, or performance of official duties of any judge,...

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....

\* \* \*

§ 42. Functions; powers and duties.

\* \* \*

5. To adopt, promulgate, amend and rescind rules and procedures, not otherwise inconsistent with law, necessary to carry out the provisions and purposes of this article....

The Commissions' Operating Procedures and Rules (22 NYCRR part 7000), in relevant part, provide:

7000.2 Complaints. The commission shall receive, initiate, investigate and hear complaints against any judge with respect to his qualifications, conduct, fitness to perform or the performance of his official duties....

7000.3 Investigations and dispositions.

(a) When a complaint is received or when the administrator's complaint is filed, an initial review and inquiry may be undertaken.

(b) 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.

7000.1 Definitions. For the purpose of this Part...

(i) Initial review and inquiry means the preliminary analysis and clarification of the matters set forth in a complaint, and the preliminary fact-finding activities of commission staff intended to aid the commission in determining whether or not to authorize an investigation with respect to such complaint.

(j) Investigation, which may be undertaken only at the direction of the commission, means the activities of the commission...intended to ascertain facts relating to the accuracy, truthfulness or reliability of the matters alleged in the complaint....

Petitioner asserts that between October 5, 1989 and December 5, 1994, she filed eight complaints with the Commission against various members of the judiciary. She asserts that all eight were dismissed by the Commission. Petitioner was notified by letter of each dismissal, which letters stated that "The Commission has reviewed your letter of complaint dated..."

Petitioner commenced this Article 78 proceeding challenging the constitutionality of one of Respondent-Commission's rules (22 NYCRR 7000.3) as written, and as applied. Essentially petitioner maintains that the Commission's rules have somehow diluted or diminished its constitutional mandate by substituting the words "may" for "shall."

To prevail over Respondent-Commission's construction of the relevant statute, Petitioner must establish not only that her interpretation is a possible one but, also, that her interpretation is the only reasonable construction (see, Blue Spruce Farms, Inc. v. NYS Tax Com'n., 99 AD2d 867, aff'd 64 NY2d 682). An examination of the petition and supporting papers, shows that the Petitioner will not be able to meet that burden; i.e. the Petition as pleaded fails to state an actionable claim.

The constitution is to be construed to give practical effect to its provisions and to allow it to receive a liberal construction, not only according to its letter, but also according to its spirit and the general purposes of its enactment (Ginsberg v. Purcelli, 51 NY2d 272, rearg. denied, 52 NY2d 899; Pfingst v. State, 57 AD2d 163; In Re: Harvey v. Finnicks, 88 AD2d 40 (4th Dept., 1982).

The construction of a statute, and regulations promulgated by the agency responsible for its administration and implementation is entitled to great weight if it is neither irrational or unreasonable. (Lumpkin v. Dept. of Social Services, 45 NY2d 351; Bernstein v. Toia, 43 NY2d 437; Thomas v. Bethlehem Steel Corp., 95 AD2d 118). The term "investigate" as used in the sections of the Constitution and statutes herein quoted do not require any specific form of inquiry into the complaint. A review of the complaint by the Commission, as attested to by the letters sent to petitioner, meets the Constitutional and statutory mandate.

The term "investigate" as used in the constitution and statute has been correctly interpreted by the Commission to include those aspects of its proceedings which the Respondent-Commission has designated and defined as its "Initial review and inquiry." While the initial review and inquiry apparently serves different purposes from its subsequent examination they are each integral parts of the Respondent-Commission's investigatory task, and the performance of each is an investigation, as that term is used in the constitution and statutes herein referred to. Such an interpretation is in accord with the spirit and general purposes of the constitution. To the extent that petitioner contends that the Commission wrongfully determined that her particular complaints lack facial merit and declined to take further action thereon, the issue is not before the court.

Furthermore, Art. VI, §22(c) provides in relevant part: "The commission on judicial conduct may establish its own rules and procedures not inconsistent with law." Judiciary Law §42(5) provides in relevant part that the Commission shall have the power to "adopt, promulgate, amend and rescind rules not inconsistent with law, necessary to carry out the provisions and purposes of this article." The Legislature has given the Commission broad discretion in exercising its powers and carrying out its duties. (See, New York State Commission on Judicial Conduct v. Doe, 61 NY2d 557). Petitioner has pointed to nothing in the Commission's rules or interpretation of its constitutional and statutory mandate that is irrational or contravenes or conflicts with the Constitution or statute. (Howard v. Wyman, 28 NY2d 434; Conde Nast Publications, Inc. v. State Tax Commission, 51 AD2d 17).

As to the petitioner's argument that the respondent improperly served a motion to dismiss, instead of an answer, such procedure is expressly permitted by CPLR §7804(f). The court may resolve an Article 78 proceeding without an answer where only questions of law are presented which are dispositive and there is no challenge to the agency's acts based on substantial evidence. (Davila v. New York City Housing Authority, 190 AD2d 511; Bayswater Health Related Facility v. New York State Dept. of Health, 57 AD2d 996, Jahn v. Town of Patterson, 23 AD2d 688).

Accordingly, respondent's motion to dismiss the petition is granted.

That part of the petition seeking to declare 22 NYCRR §7000.3 unconstitutional is dismissed for the reasons indicated above. Similarly, that part of the petition seeking to annul respondent's dismissal of petitioner's complaints for failure to investigate is dismissed.

That part of the petition seeking an order from the court requesting the Governor to

appoint a special prosecutor is dismissed as not within the court's authority. To the extent that the court, as any citizen, may request the appointment of a special prosecutor, the court declines to do so.

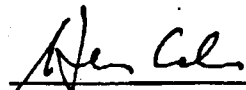
That part of the petition seeking an order of the court referring respondent, its members and staff to the Attorney General, U.S. Attorney, and District Attorney for criminal and disciplinary investigation is dismissed as not within the court's power. To the extent that the court may have the authority to request such referral, the court declines to do so.

That part of the petition seeking the imposition of a \$250.00 fine upon respondent pursuant to Public Officers Law §79 is dismissed. Petitioner has failed to adequately allege that respondent refused or neglected to perform a public duty. In any event the imposition of a fine pursuant to POL §79 is discretionary and the court declines to impose such fine.

The clerk is directed to enter judgment of dismissal.

This constitutes the decision and judgment of the court.

Dated: July 13, 1995

  
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J.S.C.