

To Be Argued By:
CONSTANTINE A. SPERES
Time Requested
10 Minutes

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

-----X
MICHAEL MANTELL, :

Petitioner-Appellant, :

-against- :

Sup. Ct., N.Y. Co.
Index No.: 108655/99

NEW YORK STATE COMMISSION
ON JUDICIAL CONDUCT, :

Respondent-Respondent. :

-----X

BRIEF FOR RESPONDENT

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Dated: September 6, 2000

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BRIEF FOR RESPONDENT

Preliminary Statement

Petitioner-appellant Michael Mantell ("petitioner") appeals from a September 30, 1999 order of the Supreme Court, New York County (Lehner J.), entered November 15, 1999, denying his petition under CPLR article 78 for a writ of mandamus, and granting the cross-motion of respondent Commission on Judicial Conduct of the State of New York ("Commission") to dismiss the petition. The petition sought an order compelling the Commission to conduct an investigation of the Honorable Donna G. Recant, Judge of the Criminal Court of the City of New York ("Judge Recant"), based on a complaint petitioner filed with the Commission on September 28, 1999 concerning Judge Recant.

Counterstatement of Questions Presented

1. Whether a writ of mandamus is available to compel the Commission to conduct an investigation of a judge based upon the complaint of an attorney, where the Commission has the discretion under the governing law to dismiss the complaint without investigation?

The Supreme Court concluded that a writ of mandamus does not lie and dismissed the petition.

2. Whether petitioner had standing to challenge the Commission's determination to dismiss the complaint, where petitioner is neither within the zone of interest of, nor injured by, the Commission's determination?

The Supreme Court did not reach this question.

Statement of the Case

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 Unified Court System. 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. Judiciary Law § 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 (a) and (b), which were promulgated pursuant to the Commission's powers and duties as set forth in Article VI § 22(c) of the New York State Constitution and 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), follow the language of Judiciary Law § 44(1) and state, in pertinent part, that:

(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.

B. Proceedings Before the Commission

On September 28, 1999, petitioner filed a complaint with the Commission against Judge Recant.¹ R. 15, 20-24. The complaint

¹All page references to the Record on Appeal filed by petitioner-appellant are preceded by "R.".

alleged that Judge 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. R. 16, 20-24.

By letter dated January 4, 1999, the Commission advised petitioner that it had dismissed his complaint. R. 17, 49. The Commission concluded "that there was no indication of judicial misconduct upon which to base an investigation." R. 49.

C. The Article 78 Petition And Order Of Dismissal

By Notice of Petition and Verified Amended Petition, dated June 15, 1999, filed in Supreme Court, New York County, petitioner sought a writ of mandamus directing the Commission "to conduct an investigation of Judge Recant, pursuant to Article 2(A) of the Judiciary Law of the State of New York, § 44(1)." R. 13, 17. Petitioner alleged 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. R. 17.

On June 23, 1999, the Commission cross-moved to dismiss the amended petition for failure to state a claim upon which relief

can be granted. R. 50.

On September 30, 1999, the Supreme Court (Lehner J.) issued an order denying the petition and granting the cross-motion to dismiss. R. 4-12. In the decision, the Supreme Court concluded that: (1) mandamus does not lie because the Commission had discretion under the relevant statute to dismiss a complaint without conducting an investigation; and (2) the decision not to investigate is not subject to judicial review. R. 6, 7, 10, 12.

By Notice of Appeal dated November 5, 2000, petitioner appealed to this Court from the September 30, 1999 Order of Supreme Court dismissing the article 78 petition. R. 3.

ARGUMENT

POINT I

MANDAMUS DOES NOT LIE TO COMPEL THE COMMISSION TO INVESTIGATE AN ATTORNEY'S COMPLAINT

The court below properly dismissed the petition because "the Judicial Commission's actions at issue here were within its authority." R. 6. Specifically, the court correctly found that the decision whether to investigate a complaint following initial review rests in the exclusive discretion of the Commission and thus is not subject to mandamus to compel. R. 7.

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); Matter of Hampton Hosp. and Medical Center, Inc. v. Moore, 52 N.Y.2d 88, 96 (1981).

Here, an examination of the relevant constitutional, statutory and regulatory authority makes clear that the Commission's decision whether to investigate a complaint is an entirely discretionary duty.

Judiciary Law § 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). While petitioner argues that the Commission must investigate if the complaint does not lack merit on its face, he ignores the fact that the statute specifically leaves that determination to the Commission. Once the Commission "determines" that the complaint lacks merit, its only mandatory duty is fulfilled. The correctness of that determination is not subject to judicial review. If the statute were not intended to leave the determination of whether an investigation is called for to the sole discretion of the Commission, the "if it determines" language of Judiciary Law § 44(1) would be superfluous.

This broad discretion is also manifested in the relevant

regulations, which place no constraints on the Commission's authority to determine whether an investigation is appropriate. The Commission promulgated these regulations in accordance with the New York State Constitution Article VI § 22 (c) and Judiciary Law § 42 (5) to carry out its purpose. 22 NYCRR § 7000.3 (a), states, "[w]hen a complaint is received or when the administrator's complaint is filed, an initial review and inquiry may be undertaken (emphasis added). 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).

"Where 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 Commission's determination to dismiss petitioner's complaint is consistent with its constitutional mandate because there is no requirement that

action be taken. Petitioner has failed to demonstrate that the Commission's interpretation of the statutes and regulations is incorrect.

Thus, the language of the Judiciary Law and the Commission's regulations makes plain that the Commission is vested with discretion to determine whether to investigate or dismiss a written complaint and therefore cannot be compelled to investigate by mandamus. R. 6. As the court below correctly stated, while the "filing of a complaint . . . triggers the commission's authority to commence an investigation into the alleged improprieties," it does not require or compel the Commission to conduct an investigation merely because a complaint is filed alleging judicial misconduct. R-6 (citations omitted).

The court below relied on Doe v. Commission on Judicial Conduct, 124 A.D.2d 1067 (4th Dep't 1986), which involved an administrator's complaint pursuant to Judiciary Law § 44.2 (i.e., a complaint initiated by the Commission itself), to support its conclusion that the governing laws do not require the Commission to conduct an investigation following the filing of a complaint. In Doe, the Appellate Division held that the "Judiciary Law does not require that any action be taken regarding an administrator's complaint" and that the Commission may dismiss it at any time. R.

6, 7 (citing Doe, 124 A.D.2d at 1067-68). Even though Doe involved an administrator's complaint and not an attorney's complaint, the court below correctly observed that "the language granting the Judicial Commission the wide latitude to decide whether or not to investigate a charge does not distinguish between the two delineated types of complaints." Therefore, an investigation is not mandated no matter what the source of the complaint. R. 7.

This same conclusion was reached by the court in Sassower v. Commission on Judicial Conduct, Index No. 109141/95 (Sup. Ct. N.Y. Co. 1995). There, the court (Cahn J.) held that no duty to investigate exists because "[a] review of the complaint by the Commission . . . meets the Constitutional and statutory mandate." Sassower at 4 (emphasis added). The court relied upon the enabling statutes and the regulations in concluding that the "Legislature has given the Commission broad discretion in exercising its powers and carrying out its duties." Id. at 7. Specifically, the court concluded that 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" and that an "initial review and inquiry" is part of the Commission's investigatory task. Id. at 4. See also Sassower v. Commission on Judicial Conduct, Index No. 108551/99 (Sup. Ct. N.Y. Co. 1999) (appeal pending) (mandamus unavailable to require Commission to investigate

particular complaint, adopting decision in Mantell).

Clearly, the Commission's actions in this case were in accordance with the New York State Constitution and its enabling statutes, which provide the Commission with the discretion to determine whether a complaint lacks merit after an initial review. In dismissing petitioner's complaint after "careful consideration," the Commission performed its functions as required by law.

Petitioner's reliance on Matter of Nicholson v. State Commission on Judicial Conduct, 50 N.Y.2d 597 (1980) is misplaced. Contrary to petitioner's contentions, Petitioner's Brief at 3-4, Matter of Nicholson does not stand for the proposition that the Commission is required to investigate following the receipt of a complaint. First, Nicholson did not involve a decision by the Commission not to investigate a complaint. Rather, Nicholson involved an effort to enjoin an ongoing investigation by the Commission. In addition to being factually distinguishable from the instant case, Nicholson, did not suggest that a court may review and overrule the Commission's determination that a complaint lacks merit and thus should not be investigated. Rather, the Court reaffirmed the proposition that the Commission has the discretion to determine whether a complaint is "facially inadequate." 50 N.Y.2d at 610-11. Such was the case here.

Further, the court below properly analogized the role of the Commission to that of a prosecutor. Because the Commission's

functions are in many respects similar to those of a public prosecutor, they are not appropriately subject to judicial review. R. 4 (citing Wayte v. United States, 470 U.S. 598 (1985)); R. 8, 9 (citing 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) (court is without authority to substitute its judgment for that of district attorney, therefore, petition to compel prosecution prohibited)).

Finally, "the conclusion that the Judicial Commission's decision to dismiss the instant complaint without investigation is not vulnerable to a writ of mandamus is also supported by a review of comparable challenges to the decisions of attorney disciplinary committees," which are exempt from judicial review. R-7 citing Clouden v. Lieberman, 1992 WL 54370 (E.D.N.Y. 1992) and Schachter v. Departmental Disciplinary Committee, 212 A.D.2d 378 (1st Dep't), appeal dismissed, 86 N.Y.2d 836 (1995).

Accordingly, the Supreme Court correctly determined that petitioner was not entitled to a writ of mandamus.

POINT II

PETITIONER LACKS STANDING TO SUE

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

§44.1(b) and 22 NYCRR §7000.3.

In order to establish standing to challenge the Commission's 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 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 petitioner would like, would unnecessarily and unduly burden the Commission 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. at 94. See also Gardner v. Constantine, 155 A.D.2d 823, 825 (3d Dep't 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 him.

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.

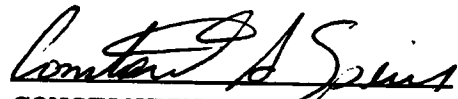
CONCLUSION

For the foregoing reasons, the Order below should be affirmed.

Dated: New York, New York
September 6, 2000

Respectfully submitted,

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