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SUPREME COURT OF NEW JERSEY
ADVISORY COMMITTEE ON
JUDICIAL CONDUCT

DOCKET NO.: ACJC 2009-116

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| IN THE MATTER OF<br><br>GERALD J. COUNCIL,<br>JUDGE OF THE SUPERIOR COURT | **PRESENTMENT** |

The Advisory Committee on Judicial Conduct ("Committee" or "ACJC") hereby presents to the Supreme Court its Findings and Recommendation in this matter in accordance with Rule 2:15-15(a) of the New Jersey Court Rules. The Committee's Findings demonstrate that the charges set forth in the Formal Complaint against Gerald J. Council, Judge of the Superior Court ("Respondent"), have been proven by clear and convincing evidence. The Committee recommends that the Respondent be publicly reprimanded.

On August 5, 2009, the Committee issued a Formal Complaint in this matter, which accused Respondent of engaging in a conflict of interest by releasing a criminal defendant on her own recognizance even though Respondent recognized the defendant to be his second-cousin. The Complaint alleged that this conduct violated Canons 1, 2A and 3C(1) of the Code of Judicial

Conduct and Rule 2:15-8(a)(6) of the New Jersey Court Rules. The Respondent filed an Answer to the Complaint on October 1, 2009 in which he admitted certain of the factual allegations of the Formal Complaint and denied others.

On December 17, 2009, the Committee convened a formal hearing in this matter. Exhibits were offered by the Presenter (P-1 through P-3), which were accepted into evidence. Respondent testified on his own behalf.

After carefully reviewing all of the evidence, the Committee made factual determinations, supported by clear and convincing evidence, which form the basis for its Findings and Recommendation.

## I. FINDINGS

### A. Factual and Procedural Background

Respondent is a member of the Bar of the State of New Jersey, having been admitted to the practice of law in 1983. At all times relevant to this matter, Respondent held the position of Presiding Judge of the Criminal Division of the Superior Court of New Jersey, Mercer Vicinage, a position he continues to hold.

On December 29, 2008, Respondent, while serving as the emergent judge for bail hearings, presided over a bail hearing in State v. Jones, Docket No. 08-4519 (the "Jones Matter"). The defendant, Celeste Jones, appeared in court from the Mercer

County Correctional Center via video conference. She was represented by Deputy Public Defender Christopher Garrenger, who was present in the courtroom with Respondent, as was Assistant Prosecutor William Haumann of the Mercer County Prosecutor's Office.

At the beginning of the bail hearing, upon hearing Ms. Jones give her appearance, Respondent noted, on the record, his recognition of Ms. Jones, stating, "She's related to me." P-1 (Transcript of December 29, 2008 Bail Hearing in the matter of State v. Jones, Docket No. 08-4519) at T2-8 to 9. Ms. Jones likewise indicated that she knew Respondent. Id. at T2-9 to 10. Respondent then informed Ms. Jones that her hearing was going to be deferred until the following day due to their familial relationship. Id. at T2-11 to 14.

Subsequently, the Assistant Prosecutor informed the Deputy Public Defender that Ms. Jones's matter had been downgraded to a disorderly persons offense. According to Respondent, the decision by a county prosecutor's office to downgrade a wrongdoing to a disorderly persons offense typically involves the transfer of the case to municipal court and the defendant's immediate release from incarceration on his/her own recognizance. See P-3 at ACJC 011 and Rule 7:4-1 of the New Jersey Court Rules. At that point in the proceedings, Respondent stated, "Hold it. Celeste, come back." Id. at T2-

15. Respondent then told Mr. Haumann and Mr. Garrenger that although he was taking no position on the matter, he would release Ms. Jones on her own recognizance, in light of the Assistant Prosecutor's recommendation to downgrade her offense, so long as neither attorney had any objections. Id. at T3-8 to 20. Upon hearing that there were no objections, Respondent proceeded to release Ms. Jones on her own recognizance, although he expressed his reluctance to do so. Id. at T3-18 to 20.

In his Answer and at the hearing before the Committee, Respondent admitted releasing his cousin on her own recognizance, admitted that, in doing so, he acted in the face of a clear conflict of interest, and admitted that he should have remained recused from Ms. Jones's matter. See Respondent's Answer to Formal Complaint at ¶¶ 6-8; Transcript of December 17, 2009 ACJC Hearing ("Hearing Tr.") at T15-8 to 21. According to Respondent, however, his decision to release Ms. Jones was motivated by his concern that she would have remained unfairly incarcerated if he had not reinserted himself into the case. Respondent's Answer at ¶7. At the hearing before the Committee, Respondent testified that he was sitting as the sole emergent judge in a closed courtroom and a closed courthouse due to the court's holiday recess on the day of Ms. Jones's bail hearing. Hearing Tr. at T16-5 to 11. Respondent further testified that there was no procedure in place whereby he could have called

another judge to hear Ms. Jones's matter on the day in question. Id. at T18-10 to 19-3. Accordingly, Respondent indicted that had he not reinserted himself back the case and released Ms. Jones from incarceration, she would have remained unfairly incarcerated for several more days. Id. at T21-15 to 23; T9-11 to 10-1.

It is Respondent's position that it was the ministerial nature of the order to release Ms. Jones on her own recognizance, given the Assistant Prosecutor's recommendation to downgrade her offense, coupled with his great concern for the unfairness of having Ms. Jones remain unnecessarily incarcerated, which led him to take the action he did. Id. at T8-9 to 16. Respondent admits that, in retrospect, he should have remained recused from the matter. Id. at T15-14 to 17.

**B. Analysis**

The Formal Complaint in this matter charged Respondent with violating Canons 1, 2A and 3C(1) of the Code of Judicial Conduct and Rule 2:15-8(a)(6) of the New Jersey Court Rules as a result of his decision to release a criminal defendant on her own recognizance despite his recognition of the conflict of interest created by his familial relationship with the defendant. We find that the charges in question are supported by clear and convincing evidence, and, consequently, that Respondent's

conduct violated the cited Canons of the Code of Judicial Conduct as well as Rule 2:15-8(a)(6).

Canon 1 requires judges to maintain high standards of conduct so that the integrity and independence of the Judiciary are preserved. Canon 2A directs that judges conduct themselves in a manner that promotes public confidence in the integrity and impartiality of the Judiciary. The commentary to Canon 2 of the Code of Judicial Conduct provides that judges "must avoid all impropriety and appearance of impropriety and must expect to be the subject of constant public scrutiny." Canon 3C(1) generally requires judges to disqualify themselves from any proceeding in which the judge's impartiality might reasonably be questioned, while Canon 3C(1)(d) specifies that a judge must recuse himself when the judge, his/her spouse, or "a person within the third degree of relationship to either of them" is a party to a proceeding over which the judge is presiding. Rule 2:15-8(a)(6) prohibits judicial conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

In this case, there is no question that a familial relationship exists between Respondent and Ms. Jones. Respondent admits that Ms. Jones is his second cousin. Respondent's Answer at ¶4. Although Respondent indicated that he was not certain of the degree of relationship between himself and Ms. Jones on the day of her bail hearing, both caution and

Canon 3C(1), which demands recusal whenever a judge's impartiality might reasonably be questioned, required his immediate recusal from the case due to his familial relationship with the defendant.

We underscore, however, that Respondent himself clearly recognized the immediate need for his recusal both on the day of the bail hearing and subsequently in these ACJC proceedings. As the record from the December 29, 2008 hearing reveals, Respondent asked Ms. Jones if she knew who he was and told her that they were "related." He then notified counsel and Ms. Jones that he was recusing himself from the matter. It was only later in the proceeding that he reinjected himself into the case. Moreover, during the hearing in this matter, Respondent testified that, "...[T]here's no question that that recusal should have remained in place." Hearing Tr. at T15-14 to 15.

Accordingly, in light of the unambiguous familial relationship shared by Respondent and Ms. Jones as well as Respondent's own admission that recusal was appropriate, it is indisputable that Respondent should have remained recused from Ms. Jones's hearing. Because he did not, by knowingly reinserting himself into Ms. Jones's hearing, Respondent violated Canon 3C(1) of the Code of Judicial Conduct. As recently recognized by the Supreme Court in DeNike v. Cupo, 196 N.J. 502, 506 (2008), "The Judiciary derives its authority from

the State Constitution but earns that public's confidence through acts of unquestioned integrity. When that trust is shaken - even slightly - our system of justice falters." The Court in DeNike continued to recognize that the failure to disqualify in the face of an actual or apparent conflict of interest is inappropriate and a prime example of conduct that will undermine the public's confidence in the Judiciary's integrity and impartiality. Id. at 516-17. In this case, we know for certain that Respondent's impartiality was, in fact, questioned by virtue of the Grievant in this matter, Ms. Takisha Whitaker, who filed the Complaint against Respondent once she learned of Respondent's relationship with Ms. Jones. See P-2.

We both appreciate and give weight to Respondent's testimony that his motivation in releasing Ms. Jones from custody was rooted solely in fundamental notions of fairness and justice and his desire to avert Ms. Jones's unnecessary incarceration. We question the soundness of the policy of the Mercer Vicinage whereby emergent or back-up judges are not typically available to be called in situations where the sitting judge has a conflict and the defendant is an appropriate candidate to be released on his/her own recognizance. See Hearing Tr. at T19-20 to T20-10. We believe that such procedure, or lack thereof, placed Respondent in a difficult and tenuous position.

Unfortunately, the fact remains that Respondent knowingly engaged in a conflict of interest. While we acknowledge Respondent's perception of his conduct as ministerial in nature given the Assistant Prosecutor's decision to downgrade Ms. Jones's offense to a disorderly persons, the nature of the judicial act as non-discretionary is of no consequence to our analysis. As the ACJC recognized in its Presentment in In re Newman, ACJC 2004-186, adopted by the Supreme Court in its Order dated December 4, 2006, "[T]he fact that a proceeding may involve ministerial, rather than discretionary, action is irrelevant to the issue of conflict. The reasonable observer sees only the conflict, the exercise of judicial office by one who lacks, or appears to lack, impartiality."

By virtue of the fact that Respondent's conduct violated Canon 3C(1) of the Code of Judicial Conduct, we find that his conduct also violated Canons 1 and 2A of the Code of Judicial Conduct as well as Rule 2:15-8(a)(6) of the New Jersey Court Rules. Respondent's knowing engagement in a conflict of interest caused the impartiality and integrity of our judicial system to be questioned and failed to promote public confidence in that impartiality and integrity.

## II. RECOMMENDATION

The Committee recommends that Respondent be publicly reprimanded. This recommendation is strongly influenced by the

December 4, 2006 Order of the Supreme Court in In re Newman, 189 N.J. 477 (2006), whereby the Court specifically recognized that future judicial acts taken in the face of "a clear conflict of interest within the scope of Canon 3C(1) of the Code of Judicial Conduct" would lead to the imposition of discipline greater than that imposed in the Newman case, i.e. a public admonition. While we find that Respondent's decision to release Ms. Jones in this case was caused both by his desire to be fair and the difficult situation with which he was confronted, the irrefutable fact remains that Respondent knowingly engaged in a conflict of interest. That decision, in light of binding case law, requires public discipline.

For all of these reasons, the Committee respectfully recommends that Respondent be publicly reprimanded for the conduct at issue in this matter.

Respectfully submitted,

**ADVISORY COMMITTEE ON JUDICIAL CONDUCT**

March 31, 2010 By: Alan B. Handler /jmn
Alan B. Handler, Chair