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COURT OF APPEALS

STATE OF NEW YORK

HON. RICHARD H. MILLER, II,

Appellant,

-against-

No. 61

STATE OF NEW YORK COMMISSION ON
JUDICIAL CONDUCT,

Respondent.

20 Eagle Street
Albany, New York
September 9, 2020

Before:

ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Sharona Shapiro
Official Court Transcriber



1 JUDGE STEIN: The next case on the calendar is
2 case number 61, Matter of Honorable Richard H. Miller.

3 (Pause)

4 MR. DEROHANNESIAN: May it please the court. May
5 I reserve two minutes for rebuttal?

6 JUDGE STEIN: Two minutes? Yes, you may.

7 MR. DEROHANNESIAN: Thank you. The Commission
8 and its counsel are asking this court to ignore, alter, and
9 reject significant credibility findings made by a referee
10 after a six-day hearing made by a preponderance of the
11 evidence.

12 JUDGE STEIN: Are we bound by the referee's
13 findings, and is the Commission bound by the referee's
14 findings?

15 MR. DEROHANNESIAN: You are not. You have
16 exclusive fact-finding power. There's no question about
17 that.

18 JUDGE FEINMAN: One of those rare instances,
19 right?

20 MR. DEROHANNESIAN: That and death penalty cases,
21 which tells you how important judicial matters are when it
22 comes to finding facts. But if you look at the history of
23 this court's decision, such as in Berenhaus, the tremendous
24 deference that is given to referees who have the ability to
25 make determinations of motive and intent based on



1 observations that what this court calls a lifeless record
2 would not do. And that's why the language of the referee
3 is so powerful when he talks about rehearsed and
4 coordinated testimony of deceitful and lying individuals
5 that, quote, "defy reason". And the one word - - -

6 JUDGE FEINMAN: Well - - -

7 MR. DEROHANNESIAN: - - - that I would take from
8 the referee is this: troubling, because that's what
9 Justice Miller of the Appellate Division, who sits on the
10 Commission, said in argument, he says it in his dissent,
11 this is troubling when you look at the unfounded
12 allegations and the pall that it casts over - - -

13 JUDGE FEINMAN: Well, since you bring that up,
14 don't you think it's rather unusual that character
15 witnesses, as to the Commission's witnesses, were
16 essentially allowed to be called - - - I mean, you know, if
17 we start looking at that, and if that were to happen in - -
18 - in most trials, that would be most unusual. You're just
19 going to end up in these collateral mini-trials about the
20 credibility of the witnesses with all sorts of witnesses
21 called. I found that quite astounding myself that the
22 referee allowed that.

23 MR. DEROHANNESIAN: It was very important, not
24 just for the Commission witnesses, but for Judge Miller.
25 The character testimony addressed several factors. One was



1 truthfulness. Individuals were testifying. Judge Miller -
2 - -

3 JUDGE FEINMAN: But what's the authority to allow
4 that kind of evidence even?

5 MR. DEROHANNESIAN: The general authority for
6 character testimony in proceedings in this - - - in this
7 State. I - - -

8 JUDGE FEINMAN: But the character witnesses that
9 we typically allow and reputation witnesses that we
10 typically allow aren't usually allowed for fact witnesses
11 as to what happened, whether it's in a criminal trial or a
12 civil trial or a - - - I mean, it just - - - that would
13 spin out of control.

14 MR. DEROHANNESIAN: But no, in criminal trials
15 like Pavao, this court said that the history and reputation
16 of an accuser, for example, that reputation for
17 truthfulness is extreme - - -

18 JUDGE FEINMAN: This almost - - - to me, you're
19 almost - - - what that's saying is, you know, we can't
20 allow things like the rape shield law. I just - - - it's
21 not really a point that I think is necessary to the
22 decision here. And - - - and I would ask you to perhaps
23 move on to what is an appropriate sanction here and why.

24 MR. DEROHANNESIAN: One thing that the - - - the
25 witnesses and the record established - - - when I say



1 witness, the character was not just truthfulness but also,
2 here's a judge from 1994, about twenty-three years when the
3 hearing was held. In the past twenty-six years, what is
4 his record of making comments like this? Is there any
5 history of this, or are these isolated and aberrational
6 comments?

7 JUDGE STEIN: Okay. But there are things other
8 than - - - I assume you're referring to the sexual
9 comments, but - - -

10 MR. DEROHANNESIAN: Or - - -

11 JUDGE STEIN: - - - if that was all that was on
12 this record, hm, we might have a different question before
13 us. But as I see the question before us is whether - - -
14 whether - - - even just limiting it to the facts, as found
15 by the referee, many of which the judge conceded had
16 occurred, and - - - and if we look at them in the
17 aggregate, does that warrant the remedy of - - - of
18 removal?

19 MR. DEROHANNESIAN: It does not because there are
20 two that the referee found with respect to one clerk, and
21 another time that he told a clerk to hurry up. That's what
22 the referee found. He specifically did not find what's in
23 the determination. There are many conclusions there that
24 are not the referee's finding.

25 JUDGE STEIN: But is there not support in the



1 record for the Commission's conclusions in those regards?

2 MR. DEROHANNESIAN: I respectfully submit that's
3 why the referee is so important. When he heard the - - -

4 JUDGE STEIN: But the referee - - - I think we
5 can all agree that the referee's important. I mean,
6 there's a reason why the referee takes the testimony in the
7 first place. There's no question about that. But you seem
8 to be suggesting that neither the Commission nor any court
9 can go - - - can vary at all from what the referee decides.

10 MR. DEROHANNESIAN: I am not suggesting that. I
11 am suggesting not only that deference is ordinarily due,
12 particularly on credibility, but when you look at the
13 record, why is there - - - why all of a sudden, in 2017, in
14 a three-month period, does this behavior and conduct occur?
15 Not once does the Commission bring proof in or question any
16 of the character witnesses about some incident that
17 happened since 1994, while this man has been a judge at the
18 local court level.

19 JUDGE STEIN: But again, counsel, we're not
20 looking at this in isolation; we're looking at this in the
21 context of a former censure. We're looking at in the
22 context of some financial - - - serious financial
23 irregularities. And we're looking at this in the context
24 of the use of court staff to do personal legal - - - not
25 personal but extrajudicial business.



1 MR. DEROHANNESIAN: Okay.

2 JUDGE STEIN: It - - - to me, it's that
3 combination that we have to be looking at. Sure, if you -
4 - - if you take each and every individual allegation
5 separately, would any one of them warrant removal? I don't
6 know. But that's not what we're looking at.

7 MR. DEROHANNESIAN: And there's a lot to unpack
8 in your question, Judge Stein, but let me address the
9 financials, because the other major flaw and damning thing
10 that the Commission does to this innocent person, when it
11 comes to the financials, is he goes to his accountant,
12 after April 15, to identify a problem. There's not one
13 case in the history of this state, at the Commission level
14 or at the Court of Appeals level, where a judge is
15 sanctioned when he comes forward voluntarily to make those
16 corrections.

17 And this isn't just his testimony; it was
18 supported by an accountant. And you don't read a word
19 about that in the determination. The referee said this is
20 very important when you look at sanction, which is your
21 question, Judge, is the timing and how he behaved. This is
22 long before there's any type of inquiry, and it's also
23 after they take his papers. They take his papers and then
24 expect him to be able to do this promptly. It's amazing he
25 got his papers and returns in by August 2. This is



1 unrebutted by the accountant, and I think that's extremely
2 important when you look at the history of financial
3 disclosures. There's cases like Russel. Thirteen times
4 they send a notice. This judge never got one notice, but
5 he was taking action on his own, and I think that's one of
6 the most, to me, concerning things about how the Commission
7 wrote that decision is not recognizing a key fact that is
8 not only found by the referee but supported by the
9 accountant's testimony.

10 JUDGE STEIN: Okay. Thank you.

11 MR. DEROHANNESIAN: Thank you.

12 JUDGE STEIN: You have your remaining time in
13 rebuttal.

14 Counselor?

15 MR. TEMBECKJIAN: Thank you, Your Honor. May it
16 please the court. The petitioner here committed various
17 repeated acts of serious misconduct, some of which involved
18 sexual innuendo. There were financial improprieties. And
19 there was an issue of dishonesty in terms of the letter
20 that his court secretary wrote in the name of someone else,
21 which the petitioner knew and had her do.

22 Putting all of these acts together with the fact
23 that he has been previously censured, and which the
24 Commission found he did not accept responsibility, even to
25 the end of the proceeding, when he was appearing in person



1 before the full Commission, he had different explanations
2 and different answers on various occasions that he was put
3 to the test.

4 He made several unwelcome sexually charged
5 comments to one subordinate, Ms. Singer. He unreasonably
6 screamed at and demeaned another. And then he retaliated
7 against her, when she complained about him, and he put the
8 onus of stopping his misbehavior on them. He said all they
9 had to do was tell me they were offended and I would have
10 stopped, which is really putting the cart before the horse.
11 In this day and age, a judge should not be told not to
12 engage in this kind of behavior.

13 And in fact, in the matter of Collazo, this court
14 said specifically that a ribald remark or an indelicate
15 suggestion to a judge's subordinate, even if meant in jest,
16 is demeaning, inappropriate, and deserving of some
17 sanction. Collazo was removed because there was
18 aggravation and there was an additional misconduct.

19 Here there is aggravation. He's not owning up to
20 his responsibility, he's denying some of the statements
21 that were made, and there is plenty of other additional
22 misconduct. With regard to the - - -

23 JUDGE STEIN: Do you agree that deference is owed
24 to the referee's findings?

25 MR. TEMBECKJIAN: Deference is owed to the



1 referee's credibility findings. We vigorously contested
2 those before the referee. He found two witnesses,
3 primarily, not credible because he found that, because they
4 were suing the court system, they had a particular motive
5 to exaggerate. In our presentation to the Commission, the
6 Commission counsel did not rely on facts pertaining to
7 those two witnesses. Even though we disagreed with the
8 referee's findings, we based our argument that the record
9 before you and the determination before you should be
10 sustained, and removal should be the appropriate result
11 because all of that - - -

12 JUDGE FEINMAN: Well, even the dissent here - - -

13 MR. TEMBECKJIAN: - - - was supported by
14 extrinsic evidence.

15 JUDGE FEINMAN: I'm sorry. Even the dissent here
16 is not disputing the existence of misconduct.

17 MR. TEMBECKJIAN: That's correct.

18 JUDGE FEINMAN: So what we're really here about
19 is sanctions.

20 MR. TEMBECKJIAN: Yes, the decision begins - - -

21 JUDGE FEINMAN: And - - -

22 MR. TEMBECKJIAN: - - - by adopting the facts.

23 JUDGE FEINMAN: - - - to the extent that it's
24 aggravated by what I actually find very serious, these
25 financial reporting violations, and/or tax - - - you know,



1 the Appellate Division is constantly disciplining lawyers
2 for, you know, misleading tax returns or failure to file
3 tax returns and - - - and so on and so forth.

4 MR. TEMBECKJIAN: As this court has.

5 JUDGE FEINMAN: And my question is, what is your
6 view of your adversary's argument about the timing versus
7 what was actually found about the timing.

8 MR. TEMBECKJIAN: If we were looking at any
9 single omission, one might be able to credibly make the
10 argument that there was inadvertence here. Even if that's
11 the case, in Alexandro you found that even the inadvertent
12 failure to report accurately on the financial disclosure
13 forms is serious misconduct that deserves public
14 discipline. Here we have a collection, in a relatively
15 limited period of time, which suggests that he was
16 knowingly omitting. For example, he had notice in April of
17 2016 that he had to report extrajudicial income to the
18 clerk of this court. He didn't do it until 2019 after the
19 investigation was over and while the Commission hearing
20 against him was taking place.

21 In July of 2017, he knew that the Commission had
22 his financial and tax records and that he was being
23 investigated, not only by us but by the inspector general
24 of the court system. He amended his tax returns in 2017,
25 but it wasn't until November of 2017 that he admitted that



1 he amended one of his financial disclosure forms, which
2 still isn't accurate, by the way, twelve days before his
3 scheduled testimony before the Commission.

4 One, maybe two, maybe even three could be
5 explained as an inadvertence or a coincidence, but put them
6 all together with the failure to report 67,000 dollars'
7 worth of extrajudicial income, from his law practice and
8 from rental properties, on two tax returns, on two
9 financial disclosure statements, and failing, all together,
10 to report three years to the clerk, it's hard to come to
11 any other conclusion that there was a willful omission, but
12 you don't even need to - - -

13 JUDGE STEIN: Would you respond to the other - -
14 -

15 MR. TEMBECKJIAN: - - - need to find that it was
16 willful.

17 JUDGE STEIN: Would you respond to the argument
18 that the transgressions here were unrelated to the 2002
19 censure?

20 MR. TEMBECKJIAN: It - - - well, it shouldn't
21 matter, Your Honor, because, as you said, in Doyle and in
22 O'Connor, a prior censure is serious misconduct even if it
23 is unrelated. But there is one thread which links them to
24 this. The 2002 misconduct involved an intermingling of the
25 respondent's legal obligations, because he was a part-time



1 judge practicing law, and his judicial responsibilities.
2 Here the failure to disclose on public documents led to a
3 situation which this court has previously criticized or
4 noted as significant, which is to say that a lawyer or a
5 litigant trying to determine if the judge has a
6 disqualifying interest, and should be the subject of a
7 recusal motion, is denied the information they need because
8 the finances are not properly reported which means that his
9 extrajudicial income, including from the practice of law,
10 is not there for litigants and attorneys to see and
11 determine this might be a conflict that I want to make the
12 subject of a recusal motion. They're denied that - - -
13 that opportunity.

14 And if you look at his explanations for them,
15 they are the basis of what the Commission found as
16 baseless, nonsensical; they just didn't make sense. He
17 didn't report extrajudicial income from his law practice in
18 2015 because he thought he cashed the checks in 2016. But
19 then he didn't report them in 2016 either.

20 Rental income that was not reported on his
21 federal and state tax returns, but as to which he claimed
22 deductions, clearly suggests that he had in mind these
23 rental properties when he was filing his taxes and doing
24 his responsibility as a citizen, and yet he failed to
25 disclose to the federal government and the state tax



1 authorities that this money was out there. And when he did
2 finally amend, it increased his tax liability, at the same
3 time that he's not reporting it on his financial disclosure
4 statements and at the same time that he's not filing any
5 claims or notices of extra judicial compensation at all to
6 the clerk of this court despite ample notice to do so,
7 added to his use of the secretary to type a letter which,
8 admittedly, in and of itself, would likely not bring us
9 here, except for the dishonesty.

10 And having her sign someone else's name, the name
11 of a secretary at the law firm where he used to work, he
12 engaged in an act of dishonesty that is inimical to the
13 role of a judge, and his participation in this wasn't hands
14 off. He had gone to the law firm at which, theoretically,
15 or so he says, he had no more business, collected the mail,
16 brought it back to the courthouse, opened the letter that
17 was not addressed to him, or was addressed to a lawyer at
18 that firm, found the checks that were unsigned, had his
19 secretary write a letter. Admittedly, he was entitled to
20 the money that was reflected in those checks which were not
21 signed.

22 JUDGE FEINMAN: And hopefully if he got them he
23 would report them on the appropriate taxes and financial
24 disclosure forms.

25 MR. TEMBECKJIAN: Well, he should, but he didn't.



1 And in any event, he should not have had his secretary sign
2 someone else's name to it. It's a deception that no judge
3 should participate in. And then, by the way, he walked the
4 letter back to the law firm so that it could be mailed from
5 there to the individual who was going to provide,
6 essentially, money in his pocket. Even though he was
7 entitled to that money, he was not entitled to have his
8 court secretary lie about who she was on a document that
9 she prepared and that he had delivered.

10 When all of this is considered, in totality,
11 there is - - - there is no alternative, as the Commission
12 found, and as I pray that this court will find, that a
13 removal is the appropriate result.

14 JUDGE STEIN: Thank you, counsel.

15 MR. TEMBECKJIAN: Thank you very much.

16 MR. DEROHANNESIAN: I want to go back again to
17 the timing on the financial matters. Judge Miller did what
18 every citizen in the United States should do, check with
19 your accountant, should I file a return now and amend it,
20 or should I wait. He followed the advice - - -

21 JUDGE FEINMAN: Do you think every citizen takes
22 deductions without reporting the income that they're taking
23 the deductions for?

24 MR. DEROHANNESIAN: He knew that he had a
25 problem, in April 2017, concerning not only the income from



1 the practice but also his properties. This was part of the
2 carelessness that the accountant described in how Judge
3 Miller produced his returns. It was her opinion to go
4 forward even though he didn't have all of the information.
5 There's nothing illegal or wrong about doing that and doing
6 the best you can at that time with the advice of an
7 accountant. This is not a man that operated on his own and
8 held back, I'm not going to do anything about this until
9 someone brings it to my attention or catches me.

10 And this is what's so fundamental, because that's
11 omitted from the argument, not only today, but in the
12 determination, that it was unrebutted that he made that
13 effort and followed the advice. He listed all of these
14 properties on the original financial disclosure forms.
15 Yes, he knows he has properties, he knows he has expenses.
16 And to call it 67,000 dollars is totally misleading. There
17 was 27,000 that resulted in income that had to be taxed,
18 and he paid taxes for one year on that. The other should
19 be identified on the return, but there was never any income
20 paid or there was no net income from that. And we talk
21 about what the instructions indicate for that.

22 So I think, as I said, we still didn't hear one
23 case where a judge has been sanctioned, at any level, for
24 voluntarily trying to correct his returns and doing so,
25 that just hasn't happened before. And he never even had a



1 warning on that.

2 And I go back to the aberrational nature. Even
3 2002 is not connected. It is attenuated from the conduct
4 in this case, it took place around 2000 - - - 1998, 2000,
5 and you have to look at an entire career. We're dealing
6 with twenty-six years, and I think that's where the
7 testimony of witnesses who saw him all around, that could
8 have cross-examined him about some other incident. It just
9 seems so unusual that, all of a sudden, in this three-month
10 period that these acts took place. And I point out that
11 one of the acts which the Commission claims happened could
12 not have happened on that June 5th day when the witness who
13 claims it happened wasn't even working that day.

14 JUDGE STEIN: Thank you, counsel.

15 MR. DEROHANNESIAN: Thank you.

16 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Richard H. Miller, II, v. New York State Commission on Judicial Conduct, No. 61, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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