

NO. 31797

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

IN THE MATTER OF: WILLIAM TOM TOLER
MAGISTRATE FOR WAYNE COUNTY

COMPLAINT NO. 122-2004

BRIEF OF THE JUDICIAL INVESTIGATION COMMISSION

SEPTEMBER 30, 2005

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I.

STATEMENT OF THE CASE

On July 8, 2004, the Acting Administrator of the Courts filed a complaint against William Tom Toler, Magistrate for Wayne County, with the Judicial Investigation Commission alleging among other things that he had been charged with commission of serious criminal offenses which would constitute a violation of the Code of Judicial Conduct. The complaint had attached to it a letter from the Chief Judge of the Twenty-fourth Judicial Circuit to the Chief Justice of the Supreme Court of Appeals, stating that on July 7, 2004, the Wayne County grand jury indicted Magistrate William Tom Toler on eight felony counts of sexual abuse, a count of demanding a bribe and a misdemeanor count of indecent exposure.

On July 16, 2004, the report of judicial disciplinary counsel was filed with the Chief Justice of the Supreme Court of Appeals. This report stated that Magistrate Toler had been charged in a nine-count indictment returned on July 7, 2004. On July 16, 2004, an order was entered by the Supreme Court of Appeals which stated that the Court was of the opinion that there was probable cause to believe that Magistrate Toler engaged or was engaging in a serious violation of the Code of Judicial Conduct. Magistrate Toler was suspended without pay and prohibited from hearing any further civil or criminal matters or performing any other judicial functions pending the resolution of the matter. The order remanded the complaint back to the Judicial Investigation Commission for the filing of formal charges. It was further ordered that formal charges, once filed, be held in abeyance pending the outcome of the criminal charges against Magistrate Toler.

A supplemental report was filed with the Supreme Court of Appeals stating that another

indictment had been returned against Magistrate Toler which set forth two more counts alleging criminal activity on his part. The Court ordered that he be suspended without pay upon taking the Oath of Office after being reelected to the Office of Magistrate in November 2004.

Formal charges against Magistrate Toler were filed with the Judicial Hearing Board on August 5, 2004. The formal charges alleged a violation of Canon 1A, Canon 2A and 2B and Canon 3A and 3B(2) of the Code of Judicial Conduct. The formal charges were amended to include the two additional counts against Magistrate Toler which had been filed in a superceding indictment. On February 24, 2005, Magistrate Toler was acquitted of all the criminal charges in the Circuit Court of Wayne County.

On March 4, 2005, Magistrate Toler filed a motion with this Court to reinstate him with back pay. In a decision issued on June 1, 2005, the Court held the motion to reinstate with back pay in abeyance pending the full development of the record in this complaint through the judicial investigation process. The Court directed an expedited scheduling of a hearing if the Commission determined to proceed further.

The case was heard before the West Virginia Judicial Hearing Board on July 13 and 14, 2005. The Board filed its Recommend Findings of Fact, Conclusions of Law and Proposed Disposition with this Court on August 22, 2005.

Under the provisions of Article VIII, Section 8 of the Constitution of West Virginia, and Rules 4.10 and 4.11 of the Rules of Judicial Disciplinary Procedure, this Court is vested with jurisdiction to decide this matter. ~~See Matter of Browning, 192 W.Va. 231, 452 S.E.2d 34 (1994); Matter of Hey, 188 W.Va. 545, 425 S.E.2d 221 (1992); Matter of Crislip, 182 W.Va. 637, 391 S.E.2d 84 (1990); West Virginia Judicial Inquiry Commission v. Dostert, 165 W.Va.~~

233, 171 S.E.2d 427 (1980).

Pursuant to the Rules of Judicial Disciplinary Procedure and under the holdings of this Court the Supreme Court of Appeals will make an independent evaluation of the record and of the recommendations of the West Virginia Judicial Hearing Board. Matter of Browning, *supra*; Matter of Means, 192 W.Va. 380, 452 S.E.2d 696 (1994); In Re: Pauley, 173 W.Va. 228, 314 S.E. 2d 391 (1983); West Virginia Judicial Inquiry Commission v. Dostert, *supra*.

In its Recommend Findings of Fact, Conclusions of Law and Proposed Disposition, the Judicial Hearing Board found among other things that Magistrate Toler had inappropriate sexual contact with four different women on four separate occasions, while performing official duties as a magistrate. It recommended among other things that Magistrate Toler be censured, that he be suspended for one year without pay and that he be fined \$5000. It recommended that he pay the costs of the proceedings before the Judicial Hearing Board. The Board further stated that if it had lawful authority it would recommend that the sanctions be imposed for each of the four violations Respondent committed against the four female victims and that the violations be consecutive for each of the two Canons violated. It further stated that if it had lawful authority the Board would recommend the removal of Magistrate Toler from Office of Magistrate of Wayne County, since he had violated the public trust in the actions he committed and by his actions had acted to diminish the public's confidence in the integrity of the judiciary.

II.

STATEMENT OF FACTS

Prior to the criminal trial accusing Magistrate Toler of sexual assault and other charges, none of the four witnesses knew each other and none had discussed any of the allegations

between and/or among themselves. T38

The Commission called four witnesses during its presentation of the case. The first witness was Dixie Elkins. At the time of the incident with Magistrate Toler she was a correction officer in Wayne County. T9 Part of her duties as a correction officer were to take inmates to the magistrate court. Sometime around the end of June she took an inmate from the jail to the office of Magistrate Toler. The inmate was taken there to be arraigned. T10 After she arrived at the Magistrate's office the father of the inmate wanted to talk to his son. She and Magistrate Toler went into another office. T11

The secretary's office was separate from the Magistrate's office. There was a wall separating them. T11 While Ms. Elkins and Magistrate Toler were in the office he got into the face of Ms. Elkins and put his hand and his finger on her breasts and asked her if he could go downtown on her and asked if she had anybody to do that. He said he could do that for her. While he was doing this, she was backing up from him. She understood going downtown to mean oral sex. The magistrate touched both of her breasts over her clothing while this encounter occurred. Ms. Elkins backed up and turned around and said it was time for her to take the prisoner back downstairs. She did not know how to feel about the situation because she felt that Magistrate Toler was like a boss in the case, being a judge and because he was a judge she was really nervous. T12

She reported the incident to the chief jail administrator. Based on this report he stated that no female, including the other female correction officer who worked in the jail, was to go back up in front of Magistrate Toler. Ms. Elkins did not have occasion to go back into his office. T13.

Jack Frye was a witness who was called on behalf of Magistrate Toler. He was present during the time Dixie Elkins brought Mr. Frye's son to the office of the magistrate. T71 At one point he asked to be alone with his son for a minute or two. They were alone for a couple of minutes so that Mr. Frye could advise him or talk to him about what he should do. T72

The witness admitted that during this period of time he was concentrating on talking to his son. T74 He was concentrating on talking to his son and not what was going on in the other office where Magistrate Toler and Dixie Elkins had gone. T75 He admitted that there were a couple of minutes at least during which Magistrate Toler and Dixie Elkins were out in the separate office by themselves away from him and his son. T75 During that period of time Magistrate Toler and Dixie Elkins were out of his sight and his hearing. There could have been things going on in that office that he could not see or hear. T76

The Commission's second witness Cathy Perry testified that on Friday evening on March 2, 2001, her husband, Charles Sturgill, beat her up and she went to her sister's house. The next morning she called the sheriff's office and was told that Magistrate Toler was on duty. T24 She was instructed by the sheriff's office to go to Magistrate Court. She called the magistrate court and was told to go there that morning. She wanted to file a domestic violence petition and went to the magistrate court at about 11:00 A.M. that morning. She and her sister waited outside for about a half hour on Magistrate Toler. T25 They had been waiting outside the courthouse and the magistrate's secretary opened the door and let her and her sister in. They went upstairs to his office on the third floor. She and her sister waited in the secretary's office for Magistrate Toler.

T26

While she was in the office she was assisted in filling out a domestic violence petition by the magistrate assistant. Magistrate Toler came in with Charles Sturgill. It took approximately 15 to 20 minutes to complete the paperwork. The magistrate awarded the martial home to Ms. Perry's husband and gave her four hours to remove her belongings from the house. T27

After making the decision and giving Ms. Perry instructions he told her husband to leave and Ms. Perry was sitting there in Magistrate Toler's office with him. He was sitting across the desk in his chair and she was sitting opposite him. He had asked her sister to step out, stating that she needed to sign more papers. As she left the office her sister closed the door. T28 The magistrate told her that he could help her if she would help him. She did not understand what he meant. He said he would help her get a lawyer and would see to it that Mr. Sturgill paid dearly. At this time he was approaching her as she was seated. She started to stand up and when she stood up he grabbed her blouse and pulled her blouse up causing her bra to come up with it and exposing her breasts. He put his hands on her breasts and then he took a hand off and grabbed her crotch. T29 He was telling her he wanted to have sex with her and wanted to f— her. T30

When he pulled her blouse up and her bra was jerked up he took both hands and grabbed both breasts and started touching the nipples and then took one hand off and put it on her crotch. The witness stated that she did not know how long this lasted but it seemed like forever. She screamed and thought she was going to pass out and started to run for the door. When she got to the door, he put a card with his number and home number down in her pocketbook and said he would be calling her. T30

She did not file any complaints because she was scared of what might happen to her. She was going through a messy, contentious divorce and she actually thought she would be put in jail

for something or would be raped. She also had the domestic violence matter pending. T31

Magistrate Toler testified that he got a phone call on a Saturday morning from the 911 center asking him to go to his office for an individual to file a domestic violence petition. He arrived at the courthouse and saw Charles Sturgill, who he had known for 25 or 27 years. He testified that Charles Sturgill asked to file a domestic violence petition. T219 He got a second phone call from the 911 center saying that a woman wanted to file a domestic violence petition. He said that he and his assistant assisted the preparation of the paperwork and the petitions and the orders were signed. He denied that Ms. Perry ever went into his office. T220

Carol Cyrus has been married to her husband, Everett, for 41 years. He was a retired steel worker of 34 years and was driving a truck at the time of the hearing. Through the end of August to the beginning of September 2001 she had occasion to be in the magistrate court of Tommy Toler. She had gone to the magistrate court to see any magistrate. She had sought to check the status of a complaint which she had filed against an individual in July and had never heard anything back from the court. She arrived at the magistrate court sometime after 1:00 P.M. but everyone was on lunch break until around 1:30. T40-41 She had left the courthouse and was going back to her car; she thought she would come back at another time to check on the case. She saw Magistrate Toler talking to two gentlemen and went across the street to speak to him. She told him why she had come to the magistrate court and he suggested that they go up to his office. T42

~~She and Magistrate Toler went into his office together. She stood in his office, standing~~
behind the door about two or three feet. T43 She had asked about the case she had filed against another individual named Shelly Porter. He knew nothing about the case. She and Magistrate

Toler just made small talk for a few minutes. T44 He then told her that he could cure her problems. Ms. Cyrus did not know what he meant. He said he could cure her problems and said men only want one thing; Ms. Cyrus just looked at him. She asked him if he were kidding and he said that men just wanted one thing. As he made these comments, he was slowly walking toward her. The door to his office was closed. He had closed the door.

As he reached her, he grabbed her breasts. T45 He reached up with both hands and grabbed her breasts. Ms. Cyrus became very angry and told him to get his damn hands off of her. He just laughed and sat down on the corner of his desk. She told Magistrate Toler that she was a married woman and had two grown sons and four grandchildren. He tried to grab her a second time but she stopped him and told him she was angry and to leave her alone as she was going out the door. He was trying to put his arm around her. She told him plainly that she was leaving and he again said men just want one thing. T46

She did not tell anyone because she has two grandsons and a husband and she did not know how they were going to take it and it was embarrassing and humiliating to her. T47

Kimberly Thompson testified that she worked part-time at an elementary school and was a student at Huntington Junior College, training to become a dental assistant. T54 In May 2004 she went to the Magistrate Court of Tommy Toler to complete a domestic violence petition. She had a fight with her boyfriend. The sheriff's department had been called and she had to go to the hospital. A deputy told her she could go to the magistrate court at the Wayne County Courthouse. Her grandfather took her there and went with her and her children. They sat in the car and waited until the magistrate came. T55 Eventually Magistrate Toler arrived at the courthouse, introduced himself and they went into his office. T56 They entered the office at

about 9:45 p.m. on Sunday evening. Only she and Magistrate Toler were in the office. She signed the domestic violence petition and other papers that were given to her. T57

After she signed the papers, they needed to go to another office to make copies. She and Magistrate Toler proceeded to that office. As they were going to the office, he asked her if she liked sex. T57 He asked her if she was any good at giving head. She became scared at this point. She understood the term to have some sexual connotation. They then returned to the Magistrate's office and she finished filling out paperwork. T58

After she had finished, Magistrate Toler was going to walk her back to her grandfather's car. They went to the elevator. She and Magistrate Toler got into the elevator and the elevator door was closed. He then kissed her on the mouth. T58 He then grabbed her hands and told her he wanted to show her something and he put her hands on his crotch. He asked her when her hand was on his crotch if she liked it. He asked if she liked that cock. She pulled away and he walked her to the car. T59

Before she testified at the criminal trial, she did not know any of the other women who made allegations of sexual impropriety against Magistrate Toler. She had not had any meeting with them or talked to them prior to that trial. T59-60

During Magistrate Toler's testimony he described the day that Ms. Thompson came to his office. He stated that he received a call from 911 which said that there was a lady who needed to file a domestic violence petition. He went to the courthouse where her three children and another man were with her; the man was introduced as her grandfather. T216 He took the woman upstairs to his office where she filled out the complaint which he signed and then went down to the clerk's office and made six copies. He gave her a copy and took her back

downstairs out of the courthouse where her grandfather and children were. They took the elevator to the office and when they finished they got back on the elevator and went to the ground floor. T217

Magistrate Toler denied any wrongdoing during the presentation of his case. He did place three of the four women, Dixie Elkins, Cathy Perry and Kim Thompson, in his courtroom during the times they had described in their testimony. The circumstances surrounding their arrival to the courtroom and the activities that took place while they were there were generally consistent with the testimony the three women had given. However, Magistrate Toler was adamant in denying that any wrongdoing occurred during any of the three court appearances described by the women during their testimony.

III

ISSUES

Whether the record contains clear and convincing evidence that Magistrate Tommy Toler violated Canon 1 and Canon 2A of the Code of Judicial Conduct.

Whether the recommended sanctions should be applied consecutively.

IV

ARGUMENT

Rule 4.5 of the Rules of Judicial Disciplinary Procedure states that, "In order to recommend the imposition of discipline on any judge, the allegations of the formal charge must be proved by clear and convincing evidence." The standard of proof that allegations of the complaint in a Judicial Disciplinary Proceeding, "must be proved by clear and convincing evidence," remains unchanged from the former Rules governing Judicial Disciplinary Procedure. Matter of Hey, 192 W.Va. 221, 452 S.E.2d 24 (1994); In Re. Pauley, *supra*.

1. Standard of Review.

Discussing its role in the review of Judicial Disciplinary cases, this Court has stated that, “[I]t is this Court’s responsibility to review the record in [such cases] de novo and determine if there is clear and convincing evidence to prove the allegations in the complaint.” Matter of Browning, supra. In West Virginia Judicial Inquiry Commission v. Dostert, supra, this Court held that “the Supreme Court of Appeals will make an independent evaluation of the record and the recommendations of the Judicial [Hearing] Board in disciplinary proceedings.”

In Matter of Crislip, supra, this Court stated:

Our traditional role in judicial disciplinary matters is to make an independent evaluation of the record and to consider whether the sanction recommended by the Board is appropriate. See, West Virginia Rules of Procedure for the Handling of Complaint against Justices, Judges, Magistrates, Family Law Judges, Rule III(C)(13); Rule III(B). This principle has been encapsulated in the syllabus of Matter of Gorby, 176 W.Va. 113, 339 S.E.2d 697 (1985):

“[T]he Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial [Hearing] Board and disciplinary proceeding. Syllabus West Virginia Judicial Inquiry Commission v. Dostert, 271 S.E.2d 427 (1980).” 182 W.Va. 638.

This principle has been upheld most recently in Matter of Troisi, 202 W. Va. 390, 504 S.E.2d 625 (1998). In that decision this Court reiterated its holding in West Virginia Judicial Inquiry Commission v. Dostert, supra. However, in this opinion and in Matter of Baughman, 182 W.Va. 55, 385 S.E.2d 910 (1989), this Court, while reserving the prerogative to make an independent factual inquiry, did state that it would give substantial deference and respectful consideration to factual findings made before judicial and lawyer disciplinary tribunals.

In lawyer disciplinary proceedings heard before the Committee on Legal Ethics, the Court will give substantial deference to the Committee’s findings of fact unless such findings are

not supported by reliable probative and substantial evidence on the whole record. Matter of Troisi, supra. Syllabus 1. In cases arising under the judicial disciplinary procedures, the Court will in general defer to the findings below (Judicial Hearing Board) unless there is some apparent irregularity in the proceedings or the charge of misconduct is especially serious. Matter of Baughman, supra. Syllabus 1.

The Court's statement of its authority to make an independent evaluation of the record while giving deference to the findings of fact of the administrative entities established to hear disciplinary matters serves the interest of justice well. The Judicial Hearing Board and Committee on Legal Ethics appointed to hear disciplinary matters serve as finders of fact in such cases. They are in a position to hear testimony, evaluate evidence and judge the credibility of witnesses first hand.

2. There is clear and convincing evidence in the record that violations of Canon 1 and Canon 2A of the Code of Judicial Conduct have occurred.

In its Recommended Findings of Fact, Conclusions of Law and Proposed Disposition, the Judicial Hearing Board concluded as a matter of law that Magistrate Toler, by his actions had violated Canon 1 and Canon 2A of the Code of Judicial Conduct. These Canons state:

Canon 1. A judge shall uphold the integrity and independence of the judiciary.

A. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

Canon 2. A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

A. A judge shall respect and comply with the law, shall avoid impropriety and the appearance of impropriety in all of the judge's activities, and shall act at all

times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Canon 1 requires the judge to uphold the integrity and independence of the judiciary. A judge shall participate in establishing, maintaining and enforcing high standards of conduct and shall personally observe those standards. The provisions of the Code of Judicial Conduct are to be construed and applied to further the objective that by observing high standards of conduct a judge protects the integrity and independence of the judiciary.

The vital importance to societal order which the conduct required of a judge as set forth in Canon 1 seeks is the respect and obedience to court orders and decrees which are dependent upon a perception and belief that the court is independent and honorable in its conduct. This sentiment is set forth in the commentary to Canon 1 which states:

Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

Canon 2 requires the judge to avoid impropriety and the appearance of impropriety in all of the judge's activities. Likewise the commentary to Canon 2 stresses the importance of judges avoiding actual inappropriate behavior and even the appearance of inappropriate conduct. The underlying nature of the behavior required of judges by Canon 2 both when conducting court business and when engaging in personal matters is stated in the commentary.

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must

therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, including rules or other specific provisions of this Code. Errors in finding facts or in interpreting or applying law are not violations of this Canon unless such judicial determinations involve bad faith or are done willfully and deliberately. The test of appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.

This Court discussed Canon 2 in Matter of Gorby, supra. In that decision the Court cited the language of Canon 2 under the previous Judicial Code of Ethics, which is basically the same as the language in the current Code of Judicial Conduct.

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and the appearance of impropriety. He must expect to be the subject of constant public scrutiny. He must, therefore, accept restrictions on misconduct which might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. 339 S.E.2d 700

Further, in the decision the Court stated:

Accordingly, as the Court noted in Syllabus point 7 of In Re: Bennett, 304 Mich. 78, 176 N.W.2d 914 (1978) “[A] judge whether on or off the bench, is bound to strive toward creating and preserving the image of the justice system as an independent, impartial source of reasoned actions and decision.”

“Achievement of this goal demands that a judge, in a sense, behave as though he is always on the bench.” Similarly in In Re: Haggerty, 257 La. 1, 29, 241 So.2d 469, 478 (1970), Quoting, Stanley v. Jones, 201 La. 549, 562-63, 9 So.2d 678, 683 (1942), the Court stated: “[T]he office of judge is one in which the general public has a deep and vital interest, and because that is true, the official conduct of judges, as well as their private conduct, is closely observed. When a judge, whether in his official capacity or as a private citizen, is guilty of such conduct as to cause others to question his character and morals, the people not only lose respect for him as a man but lose respect for the court over which he presides as

339 S.E.2d 700.

This Court further commented on the provisions of Canon 2 and the commentary to that Canon in Matter of Neely, 178 W.Va. 722, 364 S.E.2d 250 (1987).

In this Canon, the drafters recognized that the public expects the judge to be a model of integrity and a paragon of 'conduct.' It is imperative to our system of justice that this model be untarnished by even the appearance of impropriety. The loss of confidence in the judiciary can only lead to the diminished respect for the law. 364 S.E.2d 254.

The Hearing Board had to decide this case primarily based on the credibility of the witnesses. The four women presented by the Commission testified clearly and concisely about the sexual abuse they experienced when going to the magistrate court for various legal reasons. Their testimony was direct and specific. Magistrate Toler denied that any of the allegations had taken place. While denying any wrongdoing, the testimony of Magistrate Toler and at least one of his witnesses did place Dixie Elkins, Cathy Perry and Kim Thompson in the office of Magistrate Toler at the same time each had testified about. This testimony also generally described the reasons each woman was in the court and defined generally how they got to the court, the activities that occurred while they were there (with the exception of the inappropriate sexual contact that occurred).

The Judicial Hearing Board was able to literally sit across the table from each witness and listen to their testimony, observe their demeanor and see their reaction to cross-examination. Each member could then question a witness if that member felt additional information needed to be ascertained. For this case the Hearing Board was comprised of three circuit judges, a family court judge, a mental hygiene commissioner and two lay members. After listening to two days of testimony from many witnesses the Hearing Board filed its recommended findings of fact.

The members of the Hearing Board serving as fact finders were in the position to observe each witness, listen to each witness, question each witness and then determine the credibility of the testimony presented by each witness.

3. The recommended sanctions filed by the Judicial Hearing Board should be applied to the Respondent consecutively

In the complaint filed against the Respondent there were four separate acts of sexual misconduct committed against four different individuals at four different times. All of the misconduct occurred while the women, who were the victims of the sexual misconduct, had gone to the magistrate court to seek help from the court. On each of the four different occasions not only did the Respondent engage in improper touching of the women or forcing them to touch him, he engaged in inappropriate talk about sex or sexual conduct. The Judicial Hearing Board has found that the Respondent engaged in four separate occasions of misconduct against four separate individuals; in fact on each occasion there were multiple acts of misconduct against each person. On each occasion the Board found that the Respondent subjected each individual to inappropriate sexual conduct while he was performing his official duties as a magistrate.

In Matter of Gainer, 185 W.Va. 8, 404 S.E.2d 251 (1991), this Court reviewed a judicial disciplinary case in which the magistrate was charged with touching the breasts of a summer courthouse employee. In that decision after reviewing the record, the Court concluded that by his inexcusable misconduct Magistrate Gainer had violated Canons 1 and 2A of the Judicial Code of Ethics [the predecessor of the Code of Judicial Conduct]. The Court concluded that if the magistrate had not retired from his position it would have imposed a one year suspension as a sanction.

Clearly the actions of the Respondent in this case warrant the sanctions which have been

recommended by the Judicial Hearing Board. Also, it is clear that if the four individuals who were assaulted by the Respondent had brought four separate complaints the Judicial Hearing Board could have recommended the imposition of the sanctions in each of the four complaints.

In Matter of Troisi, supra, this Court stated in Syllabus Point 4 that “Pursuant to Article VIII, Section 8 of the West Virginia Constitution, this Court has the inherent and express authority to ‘prescribe, adopt, promulgate and amend rules proscribing a judicial code of ethics and a code of regulations and standards of conduct and performance for justices, judges, and magistrates, along with sanctions and penalties for any violation thereof.’” In fulfilling its responsibility under that section of the Constitution, this Court has promulgated the Rules of Judicial Disciplinary Procedure. Rule 4.12 of those Rules states in relevant part that

The Judicial Hearing Board may recommend or the Supreme Court of Appeals may impose any one or more of the following sanctions for a violation of the Code of Judicial Conduct: . . .(4) suspension without pay for up to one year; (5) a fine of up to \$5,000; (emphasis supplied).

These sanctions are permissible for one (1) violation of the Code of Judicial Conduct. In this case there are four separate violations which occurred to four different individuals on four different occasions. On each of the four separate occasions there were multiple violations committed by the Respondent. Based upon the constitutional authority given to this Court and the Rule enacted by it, it is clear that this Court may impose the most severe sanction one year suspension without pay and a fine of up to \$5,000 for each of the four violations contained within this complaint.

No recommendation made to this Court by the Judicial Hearing Board in the last 23-years has been more empathic than the one filed in this case. That is for good reason. The actions committed by the Respondent while he was performing his official duties as a magistrate are

some of the most egregious ever presented to the Judicial Hearing Board or to this Court in the disciplinary process. The actions call for this Court to impose the harshest sanctions available to it. The four women who were the victims of these actions and who have suffered the emotion and trauma that go with this kind of conduct have been steadfast in their search for justice in this case. They have been courageous to have appeared in public forums to restate matters that were painful and emotional for them to say. They went to a West Virginia court to seek assistance and instead were subjected to a verbal and physical sexual assault by a judicial officer. They are most certainly entitled to finally have justice in this matter.

Just as important, and maybe more so, the public confidence in the judiciary which has been eroded by this conduct and the publicity attendant to it, must be restored. It is simply implausible and unacceptable to have a judicial officer serving in this state who has been adjudged by his fellow judges and other members of the Judicial Hearing Board of subjecting four individuals to inappropriate sexual conduct while in the performance of his judicial duties. Only this Court can take the action needed to provide justice to the victims of this wrongdoing and to restore the public confidence in the judiciary.

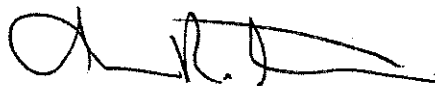
V

CONCLUSION

For these reasons it is respectfully asserted that the recommended decision of the Judicial Hearing Board should be fully implemented and that those sanctions recommended should be imposed consecutively.

JUDICIAL INVESTIGATION COMMISSION

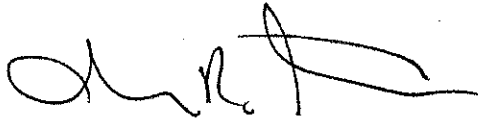
By counsel

A handwritten signature in black ink, appearing to read 'C. R. Garten', written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Charles R. Garten, do hereby certify that I served copies of the Brief of the Judicial Investigation Commission by mailing a copy via United States mail to Donald R. Jarrell, Esquire, 218 North Court Street, Wayne, West Virginia 25570, counsel for Magistrate William Tom Toler, on this the 30th day of September 2005.



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