STATE OF MICHIGAN

BEFORE THE JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

Referee David G. Myers
Sanillac County Friend Of The Court
60 W. Sanillac Road
PO Box 187
Sandusky, MI 48471
_____/

FORMAL COMPLAINT NO. 86

DECISION AND RECOMMENDATION OF DISCIPLINE

At a session of the Michigan Judicial Tenure Commission held on October 11, 2010, in the City of Detroit

PRESENT:

Hon. Kathleen J. McCann, Chairperson
Thomas J. Ryan, Esq., Vice-Chairperson
Hon. Nanci J. Grant, Secretary
Hon. Jeanne Stempien
Nancy J. Diehl, Esq.
Marja M. Winters
Hon. Eugene Arthur Moore
Richard W. Long
Hon. David H. Sawyer

I. Introduction

The Judicial Tenure Commission of the State of Michigan ("Commission") files this recommendation for discipline against David G. Myers ("Respondent"), who at all material times was a referee serving in the Sanilac County Friend Of

The Court. As a referee, Respondent is subject to all duties and responsibilities imposed upon him by the Michigan Supreme Court, and is subject to the standards for discipline set forth in MCR 9.104 and MCR 9.205. This action is taken pursuant to the authority of the Commission under Article 6, § 30 of the Michigan Constitution of 1963, as amended, and MCR 9.203.

On June 15, 2010, the Commission issued Formal Complaint No. 86 against Respondent. On June 24, 2010, Respondent filed his answer to the formal complaint. In his answer, Respondent admitted all of the underlying factual assertions, as reflected in paragraphs 1 through 18 of the formal complaint. Respondent further admitted that his actions violated Michigan Code of Judicial Conduct Canons 2A and 2B, and MCR 9.104(A)(2), in his answer to subparagraphs d (in part), e, f, and g, of the closing paragraph of the formal complaint.

On July 16, 2010, the Commission issued an order for the Examiner to withdraw the Petition for Appointment of a Master, as Respondent's admissions relieved the Examiner from presenting evidence to support the charges. The parties were directed to submit briefs addressing sanctions and the remaining disputed non-factual assertions in the complaint. Oral argument was held before the Commission on September 13, 2010. Based on Respondent's admissions, the Commission concludes that Respondent engaged in misconduct contrary to the

Michigan Code of Judicial Conduct. The Commission recommends that the Supreme Court publicly censure Respondent and suspend him from serving as a referee for a period of ninety (90) days without pay.

II. Findings of Fact

Respondent has admitted to the following allegations: Between 6:30 p.m. on September 22, 2009, and approximately 12:30 a.m. on September 23, 2009, Respondent consumed two 12-ounce beers at home, then shared three pitchers of beer with one other person, consumed two additional 12-ounce beers, and drank two shots of Jim Beam whiskey at Brentwood Lanes Bowling Alley in Caro, Michigan. At approximately 12:45 a.m. on September 23, 2009, Respondent left Brentwood Lanes driving his automobile, to go to his home in Caro, Michigan. While driving as he was proceeding west on State Street and approaching West Bush Street in Caro, Respondent travelled on the wrong side of the road for a period of time. After he drove past West Bush Street, Respondent pulled to the curb, stopped his car, and then backed into the intersection. A Caro police officer stopped Respondent's vehicle at approximately 12:50 a.m.

During the police stop, the police officer asked for Respondent's operator's license, registration, and proof of insurance, but Respondent only produced an operator's license. A strong odor of alcohol emanated from Respondent while the officer questioned him. The officer then conducted several field sobriety tests on

Respondent, including alphabet recital, counting backwards, walking heel-to-toe, and balancing on one leg. The results of the field sobriety tests reflected that Respondent was intoxicated. The officer then administered a preliminary breath test, resulting in a blood alcohol reading of .21%. Based on the field sobriety tests and preliminary breath test, the officer arrested Respondent for operating a vehicle while intoxicated, in violation of MCL 257.625(1). While Respondent was detained, the police officer administered two DataMaster breath tests on him. The tests, conducted at 1:30 a.m. and 1:33 a.m. on September 23, 2009, each registered a blood alcohol content of .20 grams of alcohol per 210 liters of breath.

A misdemeanor complaint was ultimately issued against Respondent in the 71-B District Court, in *People v David G. Myers*, Case No. 2009-1198-SD, charging Respondent with operating a motor vehicle while intoxicated, pursuant to MCL 257.625(1). On January 29, 2010, in relation to that case, Respondent pleaded guilty to a charge of operating a motor vehicle while intoxicated, pursuant to MCL 257.625(1). On January 29, 2010, Judge John T. Connolly sentenced Respondent to pay costs and fines, attend Alcoholics Anonymous, and serve probation for three months, in relation to the offense.

III. Standard of Proof

The standard of proof applicable in judicial disciplinary matters is the preponderance of the evidence standard. *In re Ferrara*, 458 Mich 350, 360; 582

NW2d 817 (1998). The standard of proof is not of critical importance in this case because Respondent's admissions have conclusively established the relevant facts.

IV. Conclusions of Law

The facts asserted in the formal complaint and established by Respondent's admissions in this matter show, by a preponderance of the evidence, that Respondent breached the standards of judicial conduct and is responsible for all of the following, as alleged in the formal complaint:

- Irresponsible conduct which erodes public confidence in the judiciary, in violation of MCJC, Cannon 2A;
- Failure to respect and observe the law and so conduct himself at all times in a manner which would enhance the public's confidence in the integrity and impartiality of the judiciary contrary to MCJC, Canon 2B;
- Conduct that exposes the legal profession or courts to obloquy, contempt, censure or reproach, contrary to MCR 9.104(A)(2).

Respondent has pleaded guilty to the commission of a misdemeanor designed to promote public safety. The commission of a misdemeanor by a judicial officer erodes public confidence in the judiciary, which is prejudicial to the administration of justice.

V. Disciplinary Analysis

Considering the circumstances of this case, the Commission recommends that Respondent be publicly censured and suspended, without pay, for ninety (90) days. In reaching this conclusion, we note that this Commission has discretion to

tailor its recommendation to fit the unique facts of each case before us. While all cases of operating while intoxicated are serious, not all cases of operating while intoxicated are precisely the same. Therefore, we are not bound to make the same recommendation for every case involving operating while intoxicated. Here, Respondent has admitted to driving on the wrong side of the road with a blood alcohol content more than twice the legal limit. Accordingly, in our discretion and in consideration of the *Brown* factors and proportionality, we recommend a public censure and ninety (90) day suspension without pay.

A. The *Brown* Factors

The Michigan Supreme Court set forth the criteria for assessing proposed discipline in *In re Brown*, 461 Mich 1291, 1292-1293; 625 NW2d 744 (1999). The factors are as follows:

(1) *Misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct.*

Respondent appears to have no previous convictions for operating while intoxicated. Accordingly, this is an isolated incident.

(2) *Misconduct on the bench is usually more serious than the same misconduct off the bench.*

This misconduct did not occur on the bench.

(3) ***Misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety.***

The commission of a crime by a judicial officer erodes public confidence in the judiciary, which is prejudicial to the administration of justice. This factor favors more substantial discipline.

(4) ***Misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does.***

Because Respondent's misconduct was actually prejudicial to the administration of justice, as noted above, this factor is duplicative of factor (3).

(5) ***Misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated.***

Respondent's decision to drink to excess and his decision to drive after drinking to excess were deliberate acts. This factor favors more substantial discipline.

(6) ***Misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery.***

The facts do not reveal evidence of injury to the justice system's ability to discover the truth in a legal controversy or reach a just result in a case.

(7) ***Misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.***

The facts reveal no evidence of conduct involving the unequal application of justice on the basis of a class of citizenship.

In sum, there are two *Brown* factors which counsel the imposition of more substantial measures of discipline.

B. Proportionality

In determining an appropriate discipline in this matter, the Commission is mindful of the Michigan Supreme Court's call for "proportionality" based on comparable conduct. Based on the stipulated facts, the Commission, in its collective judgment, believes that a public censure and suspension without pay from his work as a referee for a period of ninety (90) days would be an appropriate and proportional discipline for Respondent's judicial misconduct.

VI. Respondent's Dual Status

At oral argument, Respondent asserted to the Commission that he is a full-time court employee who functions both as a referee and as a Friend of the Court advocate. It is only Respondent's role as a referee that is subject to the jurisdiction of the Commission. See MCR 9.201(B)(2). Accordingly, it is only with respect to Respondent's role as a referee that the Commission can recommend a suspension

without pay. If Respondent continues to serve the Court in his other capacity, his funding source will have to determine what adjustment to Respondent's pay is necessary and appropriate to reflect the fact that his suspension from service as a referee is to be without pay.

VII. Recommendation

The Commission concludes that Respondent committed judicial misconduct. Based on the nature of the misconduct, the Commission recommends that the Michigan Supreme Court publicly censure Respondent and suspend him from serving as a referee for a period of ninety (90) days without pay.

JUDICIAL TENURE COMMISSION

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