

STATE OF CALIFORNIA
BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

Inquiry Concerning
Former Judge Vincent J. McGraw, No. 169

**DECISION AND ORDER IMPOSING
PUBLIC CENSURE AND BARRING
JUDGE MCGRAW FROM RECEIVING
ASSIGNMENTS**

This is a disciplinary matter concerning Judge Vincent J. McGraw, a judge of the Fresno Municipal Court from October 5, 1989 to June 30, 1998, and a judge of the Fresno County Unified Superior Court from July 1, 1998 to September 20, 2002. Formal proceedings having been instituted, this matter came before the Commission on Judicial Performance pursuant to rule 127 of the Rules of the Commission on Judicial Performance.

The commission concludes, based on Judge McGraw's stipulation, that Judge McGraw during his 2002 campaign for reelection made false and misleading statements in response to questions posed by a television reporter, threatened to bring a legal action in an attempt to dissuade the publication of facts concerning him that he knew to be true, and engaged in improper campaign activities in and around the courthouse. The commission hereby publicly censures Judge McGraw and bars him from receiving an assignment, appointment, or reference of work from any California state court.

APPEARANCES

Judge McGraw is representing himself. Trial Counsel for the Commission on Judicial Performance is Jack Coyle.

PROCEDURAL HISTORY

A Notice of Formal Proceedings was filed on September 17, 2002, charging Judge McGraw with three counts of unethical conduct. Pursuant to rule 121 of the Rules of the Commission on Judicial Performance, the commission requested the appointment of three special masters. The Supreme Court appointed Justice Consuelo Maria Callahan, presiding, of the Court of Appeal, Third Appellate District; Judge Roger M. Beauchesne of the Superior Court of Stanislaus County; and Judge Donald Cole Byrd of the Superior Court of Glenn County.

Judge McGraw resigned from the bench effective September 20, 2002 and subsequently moved out of California.

On January 29, 2002, Judge McGraw and Trial Counsel submitted a Stipulation for Discipline by Consent pursuant to rule 127 of the Rules of the Commission on Judicial Performance.¹

THE STIPULATION FOR DISCIPLINE BY CONSENT

A. Judge McGraw's Agreement to Discipline

Judge McGraw and Trial Counsel propose that the commission dispose of this matter by issuing a censure and bar from receiving an assignment, appointment, or reference of work from any California state court. Judge McGraw understands that if the commission accepts the proposal, the commission may articulate the reasons for its decision, and he agrees to accept any such explanatory language.

Judge McGraw has signed and submitted an affidavit consenting to the sanction of a censure and bar from any assignments, stating that his consent is freely and voluntarily given, admitting to the truth of the charges as set forth in the Notice of Formal Proceedings, and waiving review by the Supreme Court.

B. Findings of Fact and Conclusions of Law

The Stipulation for Discipline by Consent sets forth findings of fact and conclusions of law tracking the allegations set forth in the Notice of Formal Proceedings.

COUNT ONE

On January 12, 1999, the commission issued to Judge McGraw a notice of intended private admonishment. The private admonishment went into effect on January 26, 1999, when Judge McGraw informed the commission in writing that he would not contest the private admonishment. (Commission Rules 113, 114.) The "statement of facts and reasons" in the private admonishment included the following:

In January 1998, the judges in the Fresno courts were given access to the Internet through the county's computer system. The policies of Fresno County and the Fresno courts specifically prohibited the use of county computers or the Internet in connection with sexually oriented, sexually explicit, or pornographic material. Judge McGraw was furnished with these policies when he was given Internet access. Beginning in January 1998, and continuing through August 1998, Judge McGraw frequently used the county computer in his chambers to access Internet sites containing sexually explicit materials. The judge's use of the computer for this purpose occurred on weekdays –

¹ With the issuance of this decision accepting the Stipulation for Discipline by Consent, the stipulation is filed and is available to the public.

before, during and after regular court business hours – and on weekends. Records of the judge’s Internet use maintained by Fresno County for the months of April 1998 through August 1998, indicate that the computer was logged on to these Internet sites, on average, approximately fifteen hours per month. Approximately eleven hours per month of this log on time occurred on weekdays between 8:00 a.m. and 5:00 p.m. The county did not maintain records of the judge’s Internet use prior to April 1998. The judge’s use of the computer violated the policies of Fresno County and the Fresno courts.

On Friday, September 4, 1998, Judge McGraw was confronted about his inappropriate use of the computer by the presiding and assistant presiding judges of the Fresno courts. Judge McGraw was told that an investigation was underway concerning this matter and was given a copy of the county’s records reflecting his Internet use in August. Judge McGraw admitted that he was the person accessing the sites reflected in the records. Judge McGraw also admitted that he was aware that his conduct violated the court and county policies prohibiting the use of the computer in connection with sexually explicit materials. During a second meeting that day with the presiding and assistant presiding judges, Judge McGraw admitted that he had been using the computer to access the Internet in the same manner and with the same frequency since January 1998, when the court obtained access to the Internet.

[¶] . . . [¶]

When asked about these matters by the commission, Judge McGraw admitted that his conduct breached county computer protocol and was without excuse.

Judge McGraw ran (unsuccessfully) as the incumbent Fresno County Superior Court judge in a contested race in the March 5, 2002 judicial election. On February 25 and 26, 2002, Judge McGraw participated in two interviews with a reporter for Fresno television station KMPH concerning the 1998 misuse of his court computer, which had become an issue in the campaign. The interviews were conducted in a television studio and were tape-recorded for possible future broadcast. During the interviews, Judge McGraw made the following false and misleading statements in response to questions posed by the reporter:

A. On February 25, 2002, in response to the question whether allegations that he had accessed pornographic sites on his courthouse computer were true, Judge McGraw stated, “I don’t have any information of what you’re talking

about,” “I don’t have any information whatsoever.” When asked whether his statement was a denial, Judge McGraw stated, “[t]hat’s a denial.”

B. On February 26, 2002 (all subsequent statements through “K” were on February 26), Judge McGraw denied reports that in 1998 he had used his court computer to “surf the Internet for pornographic material,” stating, “[n]o, that is not true. I categorically deny that.”

C. Judge McGraw denied that he surfed the Internet for pornographic material on his work computer at the county courthouse in 1998 or at any other time, stating, “[t]hat did not take place.”

D. Judge McGraw denied that he ever admitted to his then presiding judge that he had surfed the Internet for any kind of pornographic material, stating, “Not true. That did not happen.... In any way, shape or form.”

E. Judge McGraw denied ever talking to his then presiding judge about “any of this,” stating, “[n]o. I really don’t know what you’re talking about.”

F. Judge McGraw denied that he ever admitted to his then presiding judge that he had misused his computer “in any way, shape or form, either in 1998 or since then,” stating, “[n]o sir.... No. And, the questions you’re asking me are very troubling because this is something that would have been the subject of judicial discipline and I have not been disciplined for these things that you are talking about.”

G. Judge McGraw denied that he was disciplined by the Commission on Judicial Performance for improper use of his court computer, stating, “I have not been disciplined for these things that you are talking about.”

H. Judge McGraw denied that he was ever privately disciplined by the Commission on Judicial Performance for improper use of his court computer or for any other reason “in any way, shape or form,” stating, “[n]o ... [not] in any way.”

I. Judge McGraw denied that he ever misused his court computer at any time throughout his career, stating, “[n]ot at any time ... throughout my career.”

J. Judge McGraw stated that he initiated a discussion that day with the court executive officer to find out whether the court’s computer system is serviced by in-house court technical personnel or by outside personnel provided by the county, and that he was informed by the court executive officer that the computers are serviced by in-house technical personnel. (In fact, Judge McGraw asked the court executive officer who had discovered that he had accessed pornographic Internet sites on his court computer.) Judge McGraw stated to the reporter that “the reason why that was important for me to know is because if our court

personnel had discovered this, most likely I would have been told about it, and that has not happened. That simply is not true.”

K. Judge McGraw stated that his own campaign had “spent almost all day today trying to uncover some substantiation for this story and we have not been able to substantiate the story. The story is not true.” Judge McGraw further stated, “[t]he story is not true. It is false.”

On March 1, 2002, portions of the interviews with Judge McGraw, including his false statements described in paragraphs A, B, C, D, E, F and G, were broadcast by KMPH in Fresno as part of a news story concerning the upcoming judicial election. Judge McGraw appeared on the program live and read a statement on-air. In that statement he recited a retraction of the pre-recorded denials. He expressed regret for having made them. He stated that he should have responded with “no comment.”²

Honesty is a “minimum qualification” expected of every judge. (*Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 865.) Judge McGraw’s conduct violated the Code of Judicial Ethics, canons 1 (failing to observe high standards of conduct so that the integrity and independence of the judiciary will be preserved), 2A (failing to act in manner that promoted public confidence in integrity of judiciary), 4A(2) (conducting extrajudicial activities that demean the judicial office) and 5B(2) (knowingly misrepresenting qualifications or any other fact concerning himself as candidate for judicial office).

The conduct constitutes prejudicial misconduct, which is generally defined as conduct which would appear to an objective observer to be not only unjudicial conduct, but conduct prejudicial to the public esteem for the judicial office. (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1104, citing *Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294 at p. 312.)

Under these facts, prejudicial misconduct is also established by willful misconduct out of office, i.e., unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity. (*Doan v. Commission, supra*, 11 Cal.4th at p. 312, quoting *Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 284, fn. 11.) In this context, bad faith means a culpable mental state beyond mere negligence and consisting of either knowing or not caring that the conduct being undertaken is unjudicial and prejudicial to public esteem. (*Broadman v. Commission, supra*, 18 Cal.4th at p. 1093.)

² The commission notes that this statement was both ambiguous and misleading. Although the commission, its members and its staff are prohibited (with only a few exceptions) from disclosing any private discipline, there is no prohibition against a judge revealing that he or she had been privately disciplined.

COUNT TWO

Toward the end of the February 26, 2002 KMPH interview, Judge McGraw threatened legal action against “the station” if it published the allegations that he had denied. Judge McGraw stated, “I’m concerned if these allegations are on your newscast that my reputation, my career, twelve years on the bench, a sitting judge, is going to be damaged.” Judge McGraw further stated, “I’ve heard of no evidence so far to substantiate the allegations. And it sounds to me like this is reckless,” and that “it troubles me that if this is the subject of media coverage, that my reputation will be injured. And I’m seriously considering whether or not I shouldn’t be seeking counsel and considering a lawsuit.” Judge McGraw also stated that he had considered “filing a lawsuit in order to protect my reputation against a reckless story. I have been provided with no basis for the story and I know the story is not true.” Judge McGraw then re-asserted his denial of the allegations, stating, “I don’t know what you’re talking about. I know that the allegations are not true.” Judge McGraw again denied that he ever misused a county computer, stating, “[a]t no time.” Judge McGraw again denied surfing the Web for pornographic sites, stating, “[t]hat’s not true.”

Judge McGraw’s threat to bring legal action and his reiteration that the allegations were not true and that the news story lacked factual basis were made for the purpose of attempting to dissuade the publication of facts concerning him that were true and known by him to be true prior to the March 5, 2002 election.

Judge McGraw’s conduct violated the Code of Judicial Ethics, canons 1, 2A, 4A(2) and 5B(2), and constitutes prejudicial misconduct for the same reasons as the conduct covered by Count One.

COUNT THREE

Prior to the March 5, 2002 election, Judge McGraw engaged in, or involved court employees in, improper campaign activities in and around the courthouse, as follows:

A. In October 2001, Judge McGraw distributed to several hundred court and county employees copies of a Petition in Lieu of Filing Fees and a request that the recipients support his candidacy for judicial office by collecting signatures on a petition. Judge McGraw provided a stamped envelope addressed to himself at his home address for the return of signed petitions to him. Judge McGraw’s requests did not include a caution against the solicitation of signatures by court or county employees during working hours in court facilities. When this omission was brought to Judge McGraw’s attention, he agreed with court administration’s suggestion that the court should send a cautionary E-mail message to all affected court and county employees. Judge McGraw also agreed not to use any petitions circulated in this manner to county or court employees.

Although the requests for support were created using Judge McGraw's own private resources, he utilized court resources in the form of the court's interoffice mail system to distribute some or all of his requests for support.

Some court and/or county employees responded to Judge McGraw's request by soliciting signatures during working hours and/or in public facilities, activities which were prohibited by county ordinance. (Fresno County Ordinance Code, § 3.08.110(A)(1) and (2).) Some of [the] persons from whom Judge McGraw requested support were court employees subordinate to him.

B. Judge McGraw distributed a campaign brochure containing a photograph of himself and members of his judicial staff, who are employees of the Fresno county courts. Judge McGraw did not obtain the permission or consent of the staff members prior to including their photograph in his campaign brochure; some members of the staff complained about the unauthorized use of their photograph. (*Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 880-881; prejudicial misconduct found where judge used photograph of court staff in reelection campaign without permission.) When this complaint was brought to the attention of Judge McGraw by court administration, Judge McGraw discontinued distribution of the campaign brochure and re-printed the campaign literature, omitting the photograph of judicial staff.

C. Judge McGraw engaged court employees and staff in conversations about his election campaign during working hours, including asking employees to obtain signatures on a petition in lieu of filing fees and asking employees for other assistance with his campaign.

D. On February 20, 2002, after finishing the 8:30 a.m. calendar, Judge McGraw failed to give precedence to his judicial duties when he left the courthouse to attend to campaign-related activities prior to the call of the 10:00 a.m. small claims calendar. Judge McGraw returned to the courthouse that morning, but not on time for the 10:00 a.m. calendar, which required some participants in calendared matters to return after lunch.

Judge McGraw's conduct violated the Code of Judicial Ethics, canons 1, 2A, 2B(2) (lending prestige of judicial office to advance his pecuniary or personal interests), 3A (failing to give judicial duties precedence over all other activities) and 5 (engaging in political activity that creates the appearance of impropriety), and constitutes prejudicial misconduct, i.e., conduct which would appear to an objective observer to be not only unjudicial conduct, but conduct prejudicial to the public esteem for the judicial office.

C. The Commission's Adoption of the Findings and Conclusions

The Commission adopts these findings of fact and conclusions of law as its findings and conclusions.

DISCIPLINE

The Supreme Court has indicated that the purpose of a disciplinary proceeding is “the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system.”³ These goals support the issuance of a public censure and bar to assignment, even though Judge McGraw was defeated in his bid for re-election.

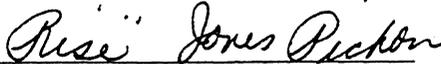
This decision is the only public determination that Judge McGraw (1) was privately admonished in 1999 for using the computer in his chambers to access Internet sites containing sexually explicit materials, (2) falsely denied, during his 2002 campaign for reelection, that he had been disciplined for accessing Internet sites containing sexually explicit material, (3) threatened legal action in an attempt to dissuade the publication of facts concerning him that he knew were true, and (4) engaged in improper campaign activities in and around the courthouse. This decision reassures the public that such misconduct will be investigated and disciplined even after a judge leaves office.

The censure and bar to assignments is the maximum sanction the commission may levy against a former judge and the appropriate sanction in this instance. In *Inquiry Concerning Judge Patrick Couwenberg* (2001), the commission found, inter alia, that the judge had deliberately and materially misrepresented his qualifications to facilitate his appointment to the bench. The commission removed Judge Couwenberg from the bench.⁴ Here, Judge McGraw engaged in a similar dishonest course of conduct by knowingly uttering falsehoods to a television reporter, during his campaign for reelection, in an effort to keep information from the public.

On the basis of these findings and conclusions, the commission orders, as authorized by article VI, section 18(d) of the California Constitution, that Judge McGraw be publicly censured and barred from receiving an assignment, appointment, or reference of work from any California state court. This decision shall constitute the order of public censure and bar.

Commission members Judge Risë Jones Pichon, Justice Vance W. Raye, Ms. Lara Bergthold, Judge Madeleine I. Flier, Mr. Marshall B. Grossman, Mrs. Crystal Lui, Mrs. Penny Perez, Ms. Ramona Ripston and Ms. Barbara Schraeger voted to impose this public censure and bar from receiving assignments. Mr. Michael A. Kahn and Dr. Betty L. Wyman did not participate in this matter.

Dated: April 3, 2003



 Honorable Risë Jones Pichon
 Chairperson

³ *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1111-1112, citing *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912.

⁴ Petition for review denied by California Supreme Court on January 16, 2002.