

SUPREME COURT : NEW YORK COUNTY

SPECIAL TERM : PART I

CITY CLERK FROM JUSTICE
-X- DISPT

JAMES J. LEFF,

OCT 9 1980

Petitioner,

MINUTE BOOK SPECIAL TERM N.Y. LAW JOURNAL PART I

- against -

Index No. 18586/80

Mot. # 182 9/30/80

STATE COMMISSION ON JUDICIAL CONDUCT OF THE STATE OF NEW YORK, MRS. GENE ROBB, CHAIRWOMAN, and HON. FRITZ W. ALEXANDER, II, DAVID BROMBERG, HON. RICHARD J. CARDAMONE, DOLORES DEL BELLO, MICHAEL M. KIRSCH, VICTOR A. KOVNER, WILLIAM V. MAGGIPINTO, HON. ISAAC RUBIN, HON. FELICE K. SHEA and CARROLL L. WAINWRIGHT, JR., Individually and as Members of the STATE COMMISSION ON JUDICIAL CONDUCT and GERALD STERN, Individually and as Administrator of the STATE COMMISSION ON JUDICIAL CONDUCT,

Respondents:

MEMO

SUTTON, J.:

This is an application pursuant to Article 78 of the CPLR to direct respondent State Commission of Judicial Conduct to hold in public all proceedings in which testimony is taken or evidence received in connection with an investigation of petitioner James J. Leff by respondents.

Petitioner Leff is a Justice of the Supreme Court of the State of New York. On September 19, 1980, the respondent commission sent a letter to petitioner requesting that he appear at the New York City Office of the Commissioner to testify and give

Exhib. V "1"

(54)

evidence concerning an investigation into allegations that petitioner had engaged in judicial misconduct. Petitioner, through counsel, indicated his willingness to appear on condition that his appearance be open to the public. Such request for a public proceeding was refused by the Commission.

The present proceeding challenges that refusal on grounds of freedom of speech and freedom of press guaranteed by the First Amendment of the U.S. Constitution and Article 1, Section 8 of the New York State Constitution. It is also argued by petitioner that public access to Commission proceedings is required to assure public confidence in the administration of justice in this State. Such arguments are supported by intervenors the Village Voice, David Schneiderman, Nat Hentoff, Jack Newfield and Eve Ottenberg.

It is clear that the operation of the State Commission on Judicial Conduct regarding the conduct of judges is a matter of legitimate public concern. Judiciary Law §§44 (3) and 45 make provision for the confidentiality of records. Such restrictions serve the dual purpose of protecting the confidentiality of witnesses and complainants who might otherwise be intimidated from giving information as well as protecting the judge under investigation from the exposure to unjustified complaints (Landmark Communications v. Virginia, 435 U.S. 829). In this case, however, the subject of the investigation is essentially concerned with making his own testimony public. §45 of the Judiciary Law seems to clearly protect his right in this regard. It provides that

"if the judge who is the subject of the complaint so requests in writing, copies of the complaint, the transcripts of the hearing by the Commission thereon, if any, and the dispositive action of the Commission with respect to the complaint, such copies with any reference to the identity of any person who did not participate at any such hearing suitably deleted therefrom, except the subject judge or complainant, shall be made available for inspection and copying to the public, or to any person, agency or body designated by such judge."

Furthermore under §44 (4) of the Judiciary Law, the judge who is being investigated is also entitled to copies of all documents and written statements used, all without cost.

It seems clear from the legislative language that the judge is free to make public his own statements before the investigating body. The protection of the confidentiality of his statements is to safeguard his good name, reputation and office. If he acquiesces or indeed wishes to waive this protection he may do so under the language of §45 quoted above.

It seems clear that under §44 (7) that after the entire hearing the commission may at some point publish its findings and conclusions "and the record of its proceeding shall be made public and shall be made available for public inspection." Obviously this latter provision applies to the situation where the judge has not requested the dissemination of the information.

However, while the judge may waive confidentiality for himself "that power is not unlimited on the preliminary stages of the investigation. At that point the commission's interest in

encouraging the filing of complaints and witness participation is entitled to protection against premature disclosure." (Nicholson v. Judicial Commission, 50 NY 2d 597, 611-612).

Petitioner contends that, in the present case, the state has no real interest in maintaining confidentiality because the letter of complaint against the petitioner was made by the Chief Administrative Judge and the sole person presently scheduled to be interrogated is the petitioner himself. However, it is apparent that the subject investigation is in a very preliminary stage. It is entirely possible even from a cursory reading of the papers that others, such as court officers, may be called upon to give information. The court cannot determine the course that the ongoing investigation will take or the manner in which it will proceed. Certainly it would be premature to rule at this time no legitimate state interest is involved in protecting the confidentiality of portions of the investigation.

The court cannot take it upon itself to selectively apply the statute to those cases where it feels that a legitimate state interest is involved in protection confidentiality. However, so far as the subject himself is concerned, the language of the statute is clear in protecting him. His rights may even transcend those of the statute and may be based upon a constitutional right under the First Amendment. Furthermore, the Judiciary Law does not impose any limits upon petitioner's rights to convey to the press or the public the nature of the allegations against him or his response to such allegations.

Moreover, the subject statute does not restrict freedom of the press or the dissemination of confidential information by anyone other than the commission or its staff. This is far different than the facts in *Landmark Communications Inc. v. Virginia*, supra, in which the Supreme Court held that a state could not constitutionally punish a newspaper for publishing confidential information concerning a judicial disciplinary investigation. The Court, in that case, clearly recognized the general principle that confidentiality in the investigatory process is a legitimate state interest that does aid in insuring the ultimate effectiveness of a commission investigating judicial misconduct. (Id at p. 834-835).

Further, the right of the public and press to attend a criminal trial (see *Richmond Newspaper, Inc. v. Virginia*, 100 S. Ct. 2814) cannot be equated to the present facts in which a preliminary investigation has begun and no formal charges, criminal or otherwise, have been filed.

We are now at the preliminary investigative stage.

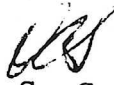
In conclusion, it is clear that the investigation herein should be permitted to continue pursuant to the Judiciary Law §45. While the rights of the petitioner to have his own testimony made public and to be uninhibited in disclosing and commenting upon what is taking place may not be curtailed, the court is constrained to direct that otherwise the investigation be conducted in private so as to protect the sources, if any, of other persons who might wish to appear and testify as to misconduct.

Within this framework the rights of the petitioner, the public, the press and the complainants, are protected within the framework provided by statute and constitution.

Accordingly, the application is denied and the petition dismiss.

Settle judgment.

Dated: October 8, 1980


J. S. C.