BEFORE THE COMMISSION ON JUDICIAL CONDUCT
OF THE STATE OF WASHINGTON

In Re the Matter of:	)	
	)	
Honorable Robert D. Moilanen	)	CJC No. 91-1182-F-29
Judge, Clark County	)	
District Court	)	**CONCURRING AND DISSENTING**
	)	**OPINION**
	)	

I respectfully dissent from the commission's Finding of Fact No. 4 and to its related Conclusion of Law No. 3. I dissent because the statement of charges served upon Judge Moilanen did not allege that the conduct described in Finding of Fact No. 4 was a violation of the Canons of Judicial Conduct. Indeed, the commission's attorney never argued, orally or in his written brief, that any of the conduct described in that finding was judicial misconduct. In my judgment, fundamentals of due process are violated by the commission's raising of this allegation, sua sponte. Judge Moilanen, at the very least, was entitled to notice that it was alleged that he committed an act of misconduct when he asked certain questions of Cindy Lindberg during his interview of her in 1988. In addition, he was entitled to an opportunity to respond to such an allegation. The judge received neither notice nor an opportunity to respond.

I recognize that there is a principle that pleadings may be amended to conform to the proof. Pleadings should not, however, be amended to conform to the evidence, absent a motion to amend. Here, no such motion was made.

My concern that Judge Moilanen was not afforded due process is not merely a technical concern about a failure to observe the niceties of pleading. Argument and a submission of authorities on this issue would have been most helpful to the commission because it was not at all clear that the conduct described in Finding No. 4 violates RCW 49.60.180. If it is not violative of that statute then, in my opinion, it is not judicial misconduct. The commission concluded that the conduct described in that finding violated RCW 49.60.180, but it did so without ever having the benefit of argument by counsel for the commission or Judge Moilanen. Such a procedure defies common sense as well as traditional notions of fair play.

I also dissent from the commission's Conclusion of Law No. 6, to the effect that conduct described in Finding of Fact No. 11 is judicial misconduct. Although I recognize that the conduct described in Finding of Fact No. 11 was clearly unacceptable behavior when it occurred, the incident occurred so far in the past that it does not provide a basis for current discipline. As near as we can tell from the record, the incident occurred somewhere between 11 and 13 years before the statement of charges was served on Judge Moilanen. Thus, the incident may have occurred before

November 4, 1980, the date the 71st amendment to the Washington Constitution was adopted. While incidents occurring before the adoption of the 71st amendment may have some probative value on the issue of whether misconduct on the part of Judge Moilanen is isolated or part of a pattern, see RCW 2.64.057, I do not believe that incidents that occurred before the adoption of the amendment provide an independent basis for discipline. Even if we were to assume, however, that the incident described in Finding of Fact No. 11 occurred after November 4, 1980, it is, in my opinion, too stale to form an independent basis for discipline.

In addition, the incident described in Finding of Fact No. 11 was not alleged to be misconduct in the statement of charges served on Judge Moilanen. Consequently, I reiterate the comments I set forth above with regard to Finding of Fact No. 4 and Conclusion of Law No. 3.

I also dissent from the commission's Conclusion of Law No. 10(f) that Judge Moilanen "did not appear contrite before the Commission." I think it is difficult, if not impossible, to judge a person's degree of contrition from his or her appearance at a hearing or in court. In listening to Judge Moilanen's testimony, I formed an impression that he is not one who wears his emotions on his sleeve. If that is the case, it is unfair for the commission to hold his apparent lack of contrition against him in this proceeding.

More importantly, I do not think the commission should hold a

person's lack of contrition against him or her, in any case. While I can cite no case in Washington where this issue has been considered in the disciplining of a judge, there is at least one case, In re Walgren, 104 Wn.2d 557, 708 P.2d 380 (1985), wherein the Supreme Court considered the degree to which a disbarred attorney's lack of remorse or repentance had a bearing on an application for reinstatement to the Bar. In Walgren the court appeared to reject a requirement that a person must show contrition and regret for past actions as a condition precedent to obtaining reinstatement. The court recognized that it is far better to judge a person on what they have done rather than what they say about what they have done. This common sense principle, I would suggest, should be applied in the disciplining of judges.

I also dissent from the commission's Conclusion of Law No. 11, to the degree that it holds that Judge Moilanen's conduct undermines public confidence in the administration of justice. This conclusion, which is more in the nature of a finding of fact, contradicts the commission's other finding that all of the misconduct occurred outside of the courtroom. In addition, there was no finding, much less evidence, that the public, as opposed to employees of the court, lacked confidence in Judge Moilanen. Indeed, the evidence showed that Judge Moilanen had submitted himself to the voters of Clark County on four occasions and on each of those occasions he has received their support by election to the position he presently occupies.

Finally, I dissent from the commission's Conclusion of Law No. 12 that an appropriate sanction is a thirty day suspension. While I agree with the commission's conclusion that Judge Moilanen should be censured and that he should be required to take certain corrective actions, I do not believe that a thirty day suspension is appropriate. My reasons for so concluding I have set forth hereafter.

The commission found that Judge Moilanen committed acts of misconduct in, roughly, two areas. First, it found that Judge Moilanen used court staff time, equipment and supplies for his personal gain. Second, it found that he directed inappropriate comments and gestures to some members of the staff of the Clark County District Court.

Findings of Fact Nos. 16 and 17 summarize Judge Moilanen's personal use of staff time and equipment. The Commission concluded that the conduct described in Finding of Fact No. 16 violated Canons 1 and 3(B)(1) and that the conduct described in Finding of Fact No. 17 violated Canons 1, 2(A) and 3(B)(1). I agree with those conclusions, however, I feel constrained to indicate that what is described in those findings are isolated incidents. Furthermore, the incidents are rather trifling. Certainly, one cannot justify using employees to pick up a Halloween pumpkin, to check on T-Bill rates, to arrange for personal travel or to make arrangements to attend a horse race. However, each of these incidents only occurred once. In view of the fact that Judge

Moilanen has served on the bench for 14 years, it cannot be said that any pattern of misusing public employees is evidenced by those incidents.

Neither can it be said that any serious pattern of misusing county employees and property is evidenced by the fact that Judge Moilanen had personal correspondence typed by county employees on a few occasions. My examination of each of the typed documents that were introduced into evidence convinces me that only seven are of a personal nature. Again, considering his long term on the court, this does not justify suspension.

The wrongful use of Clark County's telephone is, on the surface, more serious. It is not as serious, however, as a cold reading of finding No. 17 might lead one to believe. The record reveals that most of the long distance phone calls that Judge Moilanen placed from the Clark County courthouse were to his wife's office in Portland. Judge Moilanen testified that when he first went on the bench, telephone calls to Portland were toll free from the courthouse in Vancouver. This testimony was supported by the testimony of other witnesses, including that of Kathy Taylor, the telecommunications coordinator for Clark County. At some point the situation changed and Clark County began to be charged for calls that were made from the courthouse to Portland numbers. Judge Moilanen testified that he was unaware that this change occurred. I found that his testimony, which was consistent with that of other witnesses, believable.

The most serious misconduct by Judge Moilanen is what has been described as his demeaning, insensitive and derogatory comments to court personnel. The record is replete with testimony of witnesses who have described language that was used by Judge Moilanen in the work place. Many of his comments were offensive and were clearly inappropriate in the workplace. There was also testimony which showed that, on occasion, Judge Moilanen was insensitive to the personal problems and personality traits of those who worked under him. The commission has concluded that much of this conduct, which is summarized in findings No. 5, 6, 7, 8, 9, 10, 12, 13 and 14, violates Canons 1, 2A and 3(B)(1). As much as I am offended by the conduct of Judge Moilanen that is described in the aforementioned findings, I have doubts as to whether the conduct violates Canons 1 and 2A. Those canons appear to be directed toward inhibiting conduct of a judge which would adversely affect the public's confidence in the judiciary. I do not believe that what Judge Moilanen did adversely affected the public's view of the judiciary. All of the inappropriate comments that Judge Moilanen made were directed to court employees and they took place in the non-public areas of the court. There is no indication that the public, in general, was aware of Judge Moilanen's offensive behavior.

I conclude that the conduct described in findings No. 5, 6, 7, 8, 9, 10, 12, 13 and 14 is a basis for discipline, however, because I do believe that it violates Canon 3(B)(1). That canon provides that judges should diligently discharge their administrative

responsibilities. Judge Moilanen's conduct, as set forth in the findings, was of such a nature that it disrupted the efficient administration of the court on which Judge Moilanen sat. Therefore, I believe discipline is appropriate. Having said that, though, I would add that I am not convinced that Judge Moilanen's behavior toward his employees resulted from any venal motives. In my judgment, his conduct resulted from his misguided effort to be humorous or a feeling that he wanted to treat his employees, in his words, "like one of the guys." The plain fact is that the comments set forth in the findings were not funny and much of his conduct showed a startling lack of sensitivity to his fellow court employees.

I do not believe, though, that Judge Moilanen is a lost cause. He did indicate at the hearing that he was aware that much of his behavior was unacceptable. The following colloquy between Judge Moilanen and his counsel evidences a recognition by Judge Moilanen that he must alter his conduct:

> Q. How do you think--when this proceeding is over, do you believe that your behavior will be different towards your staff?
> A. Oh, yes.
> Q. Has it changed since this proceedings--
> A. Yes, it has.
> Q. How has it changed?
> A. It's changed in the sense that I'm more careful with my language.
> Q. Why are you more careful?
> A. I think that I'm more aware of the things you can do and can't do.
> Q. What do you mean things you can do and can't do?
> A. And shouldn't do. I think that my language usage was improper. I don't think you can get away with

the fact that someone else uses this language, therefore you can.

Q. Do you feel that you were acting improperly when you used the language before?

A. No, I didn't, really. But I think that that's--I think events have taken place that you can't do that anymore.

Q. What kind of events are those?

A. There's been a change in society, I think President Bush found that out.

Q. What do you mean a change in society?

A. Things have changed, there's been--in recent years there's a change, this talk of sexual harassment, there's--what was acceptable a year ago or two years ago isn't acceptable anymore. And I began to--I'm more tuned in with it frankly.

Q. On a personal philosophical basis, do you disagree with the change?

A. No, I guess not. I think I've been late coming to it. I think that personally and philosophically it hits every one of us at different times, but this is a change in society and I've done some research into it as far as reading some of the tracks [sic] on it. I've read the cases on it. It's a fact you can't talk the way that I talked. And you can't do it in front of women. And we treat women--I've never felt that I treated any of these women with disrespect, but you can't treat them any way--I always kind of had the feeling you treated them like one of [the] guys, I think that's what Jan Anderson said, but you can't. They can treat you like one of the guys, but we have to in this society now treat women with respect and without any sexism or swearing or any of that nature. And there's another thing, too, that's come to my realization her, and I kind of hate to confess this, but I guess I'm not 35 anymore, or 38 or whatever it was when I started. I'm 54, and I'm an old man now, not to me, not maybe to some of these Commission members, but to some of these younger clerks, you know, I'm just--I've changed. I haven't changed, but society's changed.

Q. It's a different time?

A. different time, different era.

In conclusion, while I think it is appropriate for Judge Moilanen to be censured and required to fulfill the requirements outlined in the commission's order, I do not believe that he should be suspended from office. Judge Moilanen has served as a judge of

the Clark County District Court for 14 years. No witness testified that he was inefficient in the performance of his duties or that he was less than judicious on the bench. All of the misconduct occurred outside of the courtroom and he has expressed a willingness to change his behavior. In my judgment, the censure, subject to conditions, is sufficient to guarantee that the misconduct will not reoccur and, at the same time, assure the public that the misconduct has been dealt with appropriately.

Dated this 5th day of February, 1993.

COMMISSION ON JUDICIAL CONDUCT

Gerry L. Alexander

Hon. Gerry L. Alexander