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2 **BEFORE THE COMMISSION ON JUDICIAL CONDUCT**
3 **OF THE STATE OF WASHINGTON**
4

5
6 In re the Matter of
7 RICHARD B. SANDERS,
8 Justice, Washington Supreme Court

No. 4072-F-109

DISSENT

9
10 We agree with the Findings of Fact set forth in the Majority Opinion.

11 However, the majority overlooks and does not set forth certain other facts that are of
12 great importance in arriving at a decision in this matter.

13 Justice Richard Sanders is charged with having improper *ex parte* contacts
14 with residents at Washington's Special Commitment Center (SCC) and creating an
15 appearance of impropriety by doing so.

16
17 It is important to keep in mind that the burden is placed upon the Commission
18 on Judicial Conduct to prove a violation of the Code of Judicial Conduct by "clear,
19 cogent and convincing" evidence. The record here falls far short of this standard.
20 On the contrary, the evidence shows that Justice Sanders appropriately addressed
21 all issues of *ex parte* contact as they arose.

22 In response to the Commission Decision, we consider the following facts:

23
24 On January 23, 2003 Justice Sanders wrote the superintendent of SCC a
25 letter (Exhibit 215) (see Commission Decision page 4) setting forth the "ground rule"
26 regarding any discussions with residents of the facility.

1 Prior to the tour, concerns were raised by members of the Supreme Court
2 about Justice Sanders going on the tour. Chief Justice Alexander, in a conversation
3 with Justice Sanders, testified:

4 I indicated to him that I did not intend to go personally. . . . And then I
5 indicated to him that I felt that there were elements in the legal
6 profession and in the law enforcement community that were not kindly
7 disposed to Justice Sanders, and I felt that his activities would be more
8 closely scrutinized than other justices, and I thought I should let him
know that I had that belief, but that ultimately, it was his decision.
(Testimony page 203)

9 Disciplinary counsel, in cross-examination of Justice Sanders, asked:

10 Chief Justice Alexander testified that he spoke to you and he warned
11 you that going on this tour would be problematic for you specifically.
12 And do you recall him saying that to you, that this would be
problematic for you, Justice Sanders?

13 Justice Sanders replied:

14 I think that Justice Alexander said, 'People are gunning for you, Justice
15 Sanders.' That's the reason it would be problematic for me rather than
16 other justices.

17 This question then followed: "And forgive me, but what was your reaction to
that?" Justice Sanders answered:

18 You know, I can't let others determine when I go on or don't go on a
19 tour, . . . I have to be responsible for my own conduct and if some want
20 to go after me, I simply can't live in a life of fear. I have to do what I
think is right. (Testimony page 1064)

21 Alan McLaughlin, a staff member at SCC, accompanied the visitors on the
22 tour and later made notes of what occurred during the tour. He testified:

23 Justice Sanders introduced himself. He indicated that he was here to
24 tour and to hear about the facility, he was interested in hearing their
25 reactions to living in the facility. He prefaced that he would like to hear
26 a little bit about what got them to the facility and where they were
within the treatment process at the facility and their thoughts about it.

1 Mr. McLaughlin was then asked whether Justice Sanders gave any warnings
2 at the beginning. Mr. McLaughlin responded:

3 Yeah, actually, and then as he went on, he indicated that he wouldn't
4 go into their personal lives and personal issues as there is a possibility
5 that if he did and had [gone] into that too far for information, that he
6 may have to recuse himself from their cases if their cases ever came
7 before him. . . . That was really right at the beginning. . . . Actually, he
8 said that a number of times throughout the course of those meetings of
9 the residents in the classroom. (Testimony pages 405-406)

10 Sometime before the tour, Mr. McLaughlin had a conversation with Tim Lang,
11 of the Attorney General's Office, and with David Hackett, of the King County
12 Prosecuting Attorney's Office. During those conversations it was suggested that Mr.
13 McLaughlin take notes, or reduce his observations to writing.

14 In e-mail messages prior to the tour, Mr. Hackett received this question from
15 one Ms. Sappington: "What's wrong with someone from defense and prosecution
16 going?" Mr. Hackett replied:

17 If we send attorneys with Sanders, then it is no longer an *ex parte* tour
18 of questionable purpose but a legitimized tour where the attorneys
19 were present. I think it also smacks of interference and looks like we
20 are keeping an eye (on) him. He's already paranoid. Why make it
21 worse? I'd send him around with some slick media guy and serve him
22 lunch in the inmate kitchen. (Testimony pages 829-830)

23 It is also interesting to note that, upon cross-examination of Justice Sanders,
24 disciplinary counsel elicited from him that Bernie Friedman, a state attorney, had
25 signed up for the tour, and in a subsequent conversation Mr. Friedman told Justice
26 Sanders that "his superiors had waived him off." (Although this was later objected to
by disciplinary counsel, and sustained by the chair, it is a matter opened up by the
commission on cross-examination.) (Testimony pages 1110-1111)

1 With regard to the materials that were handed to Justice Sanders by unknown
2 residents—he took them to his chambers, glanced at one of them, and placed them
3 in a file. They had nothing to do with any matter before the court.

4 Subsequent to the tour, a complaint was filed with the Commission on Judicial
5 Conduct by the King County Prosecuting Attorney, and a motion to recuse was filed
6 by the Snohomish County Prosecuting Attorney. Justice Sanders did, in fact, recuse
7 himself from a matter that was then pending in the Supreme Court.
8

9 It should be noted that Justice Sanders did not know any of the residents of
10 SCC, any of their names, or that any of those he visited with had matters before the
11 Supreme Court.

12 The Commission, in its decision, is critical of Justice Sanders's "refusal to
13 acknowledge the perceptions of lawyers who practice before the Supreme Court on
14 this issue and his belief that there is a political agenda underlying their concerns"
15 because he does not believe he violated the Code of Judicial Conduct. We cannot
16 find fault with his so called refusal.
17

18 Judges are encouraged to visit state institutions to become educated about
19 the legal system and to seek improvements to that system, as well as to improve
20 themselves, and they are given continuing judicial credit for such tours.
21

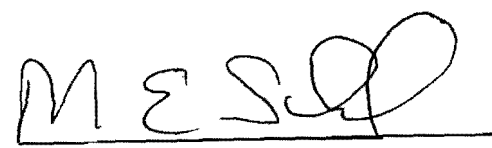
22 In light of the Commission Decision, any judicial officer who hereafter visits a
23 state institution does so at his or her peril and, in fact, may be violating the
24 provisions of the Code of Judicial Conduct.
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1 Justice Sanders did not violate any provision of the Code, and it is
2 unfortunate that he has been subjected to the ordeal of being placed "on trial" for
3 performing a proper judicial function.

4 We would dismiss the complaint, upon finding no violation of the Code of
5 Judicial Conduct.

6 Dated this 11th day of MARCH, 2005.

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11  John A. Schultheis

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Mike Sotelo