Grievance Administrator,

Petitioner/Appellant,

v

Richard M. Maher, P 16985

Respondent/Appellee

ADB No. 92-225-GA

Decided: October 31, 1996

BOARD OPINION

The four count formal complaint charges respondent with committing various acts of misconduct while he served as a Judge of the Michigan Court of Appeals. Following a lengthy hearing, the hearing panel dismissed the formal complaint on the basis that the allegations of misconduct "went unproven by a preponderance of the evidence." The Commission filed a petition for review and argues that the panel erred in dismissing count I and in excluding certain evidence regarding the credibility of a witness as to some of the allegations in Count II. We affirm the decision of the hearing panel.

Count I of the formal complaint alleges that respondent accepted certain items of value from attorney Albert Lopatin without reporting receipt of the items "as required by the Michigan Code of Judicial Conduct, Canon 5," even though "Mr. Lopatin's interests and/or those of his clients were likely to come before [respondent] in Respondent's capacity as a Court of Appeals Judge." See Code of Judicial Conduct, 5C(4)(c).

The Commission argues that the panel erred in the following respects: finding that respondent did not receive items of value; failing to address the legal issue as to whether receipt of these gifts constituted misconduct; finding that respondent failed to report receiving items of value; and, correspondingly, failing to address the legal issue as to whether such failure to report

constitutes misconduct.

This case involved many of the same witnesses, facts, and arguments presented in Grievance Administrator v Albert Lopatin, 92-225-GA (ADB 1996). With respect to most of the allegations that he received items of value, respondent argues that the panel's report is consistent with Board's analysis in Lopatin, and that affirmance is appropriate for the reasons set forth in that opinion. We agree. However, this does not dispose of the charge regarding use of the Florida condominium.

Respondent argues that there is adequate evidentiary support in the record for the panel's finding that respondent did not receive items of value when he used Lopatin's condominium and reimbursed Lopatin at the rate of $40 and $50 per night. Additionally, respondent contends that any value he realized amounted to no more than the "ordinary social hospitality" a judge is permitted to accept.

The Code of Judicial Conduct, Canon 5C, provides in pertinent part:

> (4) Neither a judge nor a family member residing in the judge's household should accept a gift, bequest, favor, or loan from anyone except as follows:
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> * * *
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> (b) A judge or a family member residing in the judge's household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants.
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> (c) A judge or a family member residing in the judge's household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before the judge, and, if its value exceeds $100, the judge reports it in the same manner as compensation is reported in Canon 6C.

The record in this case establishes that: respondent used the condominium only when it was not otherwise in demand; the rate

charged for business use of the condominium was $150 to $200 per night (the going rate for neighboring hotels or resorts); the rate charged when it was rented for "social purposes" was $1,000 per month in season (the family of Lopatin's partner was charged this rate); Lopatin also allowed friends to use the condominium without charge; Lopatin would have allowed respondent to use the condo free of charge, but respondent insisted upon paying the government rate of $40 per night -- until the rate was increased to $50 per night, at which time respondent correspondingly increased his payment for use of the condominium. It is undisputed that respondent and Lopatin met in or about 1957 and were close friends throughout respondent's tenure on the Court of Appeals.

The panel's finding that "there is insufficient proof that [respondent] accepted . . . lodging . . . without reasonable remuneration and account therefor" has adequate evidentiary support. Grievance Administrator v August, 438 Mich 296, 304; 475 NW2d 256 (1991). The record before this panel establishes that respondent would have been able to stay at the condominium free of charge under ordinary circumstances because of his friendship with Lopatin. Further, the evidence supports the conclusion that respondent would have qualified for the "social" rate of $1,000 per month ($33 per day). Accordingly, respondent was treated no differently than the third parties to whom he bore the most resemblance -- friends or social guests.

We recognize that in Lopatin we sustained a panel's finding that "use of the condominiums . . . amounted to a gift from [Lopatin] equal to the amount by which the third party rate exceeded the government rate." Lopatin, supra, p 4.[1] Perhaps there the panel did not perceive or credit the testimony as to the various rates depending upon one's relationship to Lopatin in the same manner as this panel. Or perhaps there is another reason for the differing findings. There is no guarantee that two factfinders

[1] Lopatin was found to have violated DR 7-110(A), which provided: "A lawyer shall not give or lend anything of value to a judge, official or employee of a tribunal." As we noted in that case, "DR 7-110(A) has no exact counterpart in the Rules of Professional Conduct which have been in effect in Michigan since October 1, 1988."

hearing the same or similar evidence will arrive at the same result. And the applicable standard of review does not demand such consistency; it is possible for there to be "proper" or "adequate" evidentiary support for conflicting findings.

Even if the use of the condominium at the rate paid by respondent resulted in the acceptance of "items of value" by respondent, we conclude that any such gift, favor, or transfer of value would fall within the exception for "ordinary social hospitality." Canon 5C(4)(b), Code of Judicial Conduct.

It would be inappropriate for a judge to accept, for example, a "discount" not available to others in the ordinary course of business from a merchant whose interests have come or are likely to come before the judge. However, that is not this case.

The record contains testimony that when attorneys from Lopatin's firm conducted depositions in Florida, they would often stay at his condominium. According to Lopatin's bookkeeper, these attorneys were charged $150-200 per night, which roughly approximated the cost of lodging in an area hotel during the tourist season.

We cannot conclude that payment of anything less is a windfall. Many variables (e.g., amenities, location, etc.) are not addressed in the record and thus frustrate comparison. However, it is commonly known that a commercial resort or hotel pays for promotion, salaries, as well as other expenses. And, by definition these commercial enterprises are geared toward generating a profit. The rate offered to government employees does not build in all of the hospitality industry's profit margin and expenses. Respondent's payment of the government rate thus may be viewed not only as an attempt to abide by the Code of Judicial Conduct, but also as an effort to avoid taking advantage of -- or overcompensating -- a friend. It is consistent with the testimony regarding attempts to keep things even between Lopatin and respondent.

The evidence supports the panel's factual finding that reasonable remuneration was made for the use of the condominium. It also supports our alternative conclusion of law that any shortfall or differential between what respondent paid and what he

"should have paid" constitutes ordinary social hospitality.

We find instructive the following definition of "ordinary social hospitality":

> "Ordinary social hospitality" is not a self-defining concept. It is not, however, completely opaque. We believe that ordinary social hospitality consists of those routine amenities, favors, and courtesies which are normally exchanged between friends and acquaintances, and which would not create an appearance of impropriety to a reasonable, objective observer. The test is objective, rather than subjective, and the touchstone is a careful consideration of social custom. While we cannot draw any bright lines, we believe that the following factors should be taken into account: (1) the monetary value of the gift, (2) the relationship, if any, between the judge and the donor/lender lawyer, (3) the social practices and customs associated with such gifts and loans, and (4) the particular circumstances surrounding the gifts and loans. [In Re Corboy, 124 Ill 2d 29; 528 NE2d 694, 700 (1988).]

Applying these factors we conclude that the favor here constitutes ordinary social hospitality: (1) the value of the favor, as noted above, is not easily or precisely to be determined; (2) the lengthy and close personal relationship has also been addressed; (3) as to social practices and customs, we conclude that it is not unheard of for one to offer his or her otherwise unused vacation home to a close friend for the cost of "overhead" or no charge at all; and, (4) with regard to the particular circumstances surrounding the use of the condominium, we deem the extensive uncontroverted evidence of a bona fide friendship, together with the absence of proof of an intent to influence respondent, to be significant.

We hasten to add that the intent to influence a judge need not be shown to prove a claim that a judge improperly accepted a gift or favor. Such a requirement would frustrate Canon 5(C)'s important prophylactic function: to prohibit gifts and favors to judges in order to preserve impartiality, and equally as important, the accurate public perception that the judicial branch of

government is fair.

This opinion should not be understood as an expansion of the term "ordinary social hospitality." Nor do we create a precedent whereby exchanges between lawyers and judges may be immunized by both parties testifying that they were good friends. Rather, we have reached a fact-specific holding in this case. Under the circumstances, we conclude that the payments for use of the condominium were reasonable attempts to avoid any real or perceived transfer of value to respondent beyond what would be considered ordinary social hospitality.

We reject the Commission's argument that respondent's failure to report his condominium stays violated Canon 6C of the Code of Judicial Conduct. From the wording of Canon 5C(4), it is evident that the duty to report applies only to the "other gift[s]" described in Canon 5C(4)(c). Thus, ordinary social hospitality is not subject to the reporting requirement. See Wolfram, Modern Legal Ethics, §17.5.2, p 984.

As to the exclusion of evidence regarding Count II, allegedly shedding light on the credibility of a witness, we find no error in the panel's ruling. Moreover, we would find no error requiring reversal in any event for the reasons advanced by respondent.

We are not persuaded that petitioner's other claims of error require reversal. Affirmed.

Board Members George E. Bushnell, Jr., C. H. Dudley, M.D., Elaine Fieldman, Barbara B. Gattorn, Miles A. Hurwitz, Michael R. Kramer, and Kenneth L. Lewis concur in this decision.

Board Members Marie Farrell-Donaldson and Albert L. Holtz were absent and did not participate.