STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to

MICHAEL F. MULLEN,

DETERMINATION

a Judge of the Court of Claims and an Acting Justice of the Supreme Court, Suffolk County.

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THE COMMISSION:

Honorable Eugene W. Salisbury, Chair
Henry T. Berger, Esq.
Jeremy Ann Brown, C.A.S.A.C.
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Frederick M. Marshall
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Gerald Stern (Robert H. Tembeckjian, Of Counsel) for the Commission

Joseph W. Ryan, Jr. for Respondent

The respondent, Michael F. Mullen, a judge of the Court of Claims and an acting justice of the Supreme Court, Suffolk County, was served with a Formal Written Complaint dated January 10, 2000, containing one charge. Respondent filed an answer

dated March 1, 2000.

By motion dated March 1, 2000, respondent moved to dismiss the complaint. The administrator of the Commission cross moved, by motion dated March 22, 2000, for summary determination and a finding that respondent had engaged in judicial misconduct. Respondent replied to the cross motion in papers dated March 27, 2000. By decision and order dated April 6, 2000, the Commission denied respondent's motion and the cross motion in all respects.

By order dated April 11, 2000, the Commission designated Hon. Bertram Harnett as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on June 5, 2000, in New York City. The referee filed his report with the Commission on September 7, 2000.

The parties filed briefs and replies with respect to the referee's report. On December 14, 2000, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a judge of the Court of Claims and an Acting Justice of the Supreme Court since 1987.

2. In 1996 respondent decided to seek election as a Supreme Court justice. On June 5, 1996, respondent wrote a letter to the Chief Administrative Judge

stating that respondent was seeking to obtain the nomination for Supreme Court justice in the November 1996 election.

3. In July 1996, with respondent's authorization and consent, a group of respondent's friends formed a committee under the name "Friends of Judge Michael F. Mullen" (hereinafter "the Committee"), in support of respondent's candidacy for Supreme Court. A fund-raising reception for respondent was held in August 1996.

4. Respondent failed to get the nomination for Supreme Court at the Republican Party's judicial nominating convention in September 1996.

5. By late October 1996, the Committee had raised $24,182 from 276 donors, and an unexpended balance remained of $18,441. At a meeting at respondent's home attended by approximately 30 people, including donors and their spouses, the Committee's treasurer advised the group of the unexpended campaign funds. After discussion, it was decided that the funds should be held until the next year to be used for another effort by respondent to obtain the nomination for Supreme Court. Respondent authorized the Committee's treasurer to retain the funds for that purpose. No funds were returned to the donors.

6. At the time he authorized the Committee's treasurer to retain the unexpended campaign contributions, respondent was aware of numerous Advisory Opinions of the Advisory Committee on Judicial Ethics pertaining to the disposition of unexpended campaign funds. At no time did respondent request an Advisory Opinion as

to the disposition of the unexpended 1996 campaign contributions.

7. In January 1997 respondent's campaign treasurer filed with the Board of Elections a letter stating that the Committee had funds on hand which were a "carryover" from the 1996 effort to obtain the Supreme Court nomination, that respondent was again seeking nomination for Supreme Court in the 1997 general election and that the Committee would support that effort. The campaign treasurer had a telephone conversation with an unidentified individual at the Board of Elections regarding the continuing registration and filling out the reporting forms.

8. The Committee remained in existence and held funds into November 1999. There were no new contributions to the Committee after 1996. The Committee filed disclosure statements with the New York State Board of Elections from July 3, 1996, through January 14, 2000.

9. On March 5, 1997, respondent wrote a letter to the Chief Administrative Judge stating that respondent was continuing to seek the nomination for Supreme Court justice in the 1997 general election.

10. The Committee used 1996 contributions in respondent's 1997 campaign for Supreme Court. The Committee made political expenditures in furtherance of respondent's 1997 campaign as set forth in Schedule A, as well as incidental expenditures.

11. Respondent failed to get the nomination for Supreme Court at the

Republican Party's judicial nominating convention in 1997. At the end of 1997, over $15,000 remained on deposit with the Committee, and no funds were returned to the donors.

12. In 1998 and 1999, respondent told various people of his candidacy for the Supreme Court nomination, although he did not notify the Chief Administrative Judge that he was seeking the nomination. Respondent failed to get the nomination for Supreme Court in 1998 and 1999.

13. The Committee used 1996 contributions in respondent's 1998 and 1999 campaigns for Supreme Court. The Committee made political expenditures in furtherance of respondent's 1998 campaign as set forth in Schedule B, as well as incidental expenditures in 1998 and 1999.

14. In November 1999, the Commission wrote to respondent advising him that it was investigating a complaint that contributions to his 1996 campaign for Supreme Court were carried over to his campaigns in 1997, 1998 and 1999, rather than returned *pro rata* to his contributors or otherwise disposed of in a manner consistent with the ethical rules. On November 26, 1999, after respondent had received the Commission's letter, the Committee returned *pro rata* to the 276 contributors from 1996 the remaining unexpended contributions, totaling approximately $14,224.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2, 100.5(A)(1) and 100.5(A)(5) of the Rules Governing Judicial Conduct. Charge I of the Formal Written Complaint is sustained insofar as it is consistent with the findings herein, and respondent's misconduct is established. Paragraphs 6 and 7 of the Formal Written Complaint are dismissed.

The Rules Governing Judicial Conduct provide that a candidate for judicial office may solicit and accept campaign funds only during a "window period," beginning nine months before the pertinent judicial nominating convention and ending, if the candidate fails to be nominated, six months after the convention (22 NYCRR 100.0[Q], 100.5[A][5]). By authorizing funds that had been raised in 1996 to be carried over and used in his successive efforts to obtain the Supreme Court nomination over the next three years, respondent violated both the letter and spirit of the "window period" provisions. Respondent's actions in permitting his Committee to carry for three years a substantial "political pocketbook" (as aptly stated by the referee) gave him an unauthorized benefit and an unfair advantage over other judicial candidates who, under the rules, had a limited time span for raising funds to further their candidacy. As a result, respondent's Committee was able to finance his candidacy for Supreme Court in 1997, 1998 and 1999, despite receiving no contributions during those years.

Respondent has acknowledged that, in authorizing his Committee to retain

unexpended 1996 funds for use in his subsequent campaigns for Supreme Court, he was familiar with the ethical rules and with numerous Advisory Opinions of the Advisory Committee on Judicial Ethics pertaining to the disposition of unexpended campaign funds. The Advisory Opinions unequivocally hold that unexpended campaign funds may not be used in a subsequent campaign for office or for the candidate's private benefit, but must be returned to the donors on a *pro rata* basis or used to purchase such items as office equipment which become the property of the court system (Adv. Op. 87-02, 88-59, 88-89, 89-152, 90-6, 91-12, 91-87, 92-68, 92-94, 92-104, 93-04, 93-15). Here, the record indicates that a small percentage of the donors consented to the retention of funds by respondent's Committee, but even if all the donors had so consented, it would still be improper, in view of the "window period" provisions, to carry over the funds for use in subsequent campaigns (*see* Adv. Op. 91-12, 93-15). The ethical rules circumscribing campaign fund-raising by judicial candidates are clear and serve an important purpose. The consent of contributors does not permit a candidate to use unexpended campaign funds in a manner prohibited by the ethical standards.

As to respondent's claim that these Opinions apply only to a judicial candidate who successfully obtains the nomination and therefore were inapplicable to him or his circumstances, such a distinction is not only unsupported by the language of the Opinions (*e.g.*, Adv. Op. 90-6, 91-12, 92-68) but logically deficient. A judicial candidate who fails to obtain the nomination is subject to the same ethical standards as a successful

one. Also illogical is respondent's testimony that he did not consider seeking an Advisory Opinion because he was so certain that the existing Opinions did not apply to him. Had he sought an Opinion from the Advisory Committee, he faced a distinct likelihood of receiving the unwelcome response that he was obliged to return the funds.

By permitting his campaign funds to be used in a manner clearly inconsistent with the ethical rules, respondent was insensitive to the special ethical obligations of judges and judicial candidates.

By reason of the foregoing, the Commission determines that the appropriate sanction is admonition.

Judge Salisbury, Mr. Berger, Mr. Coffey, Mr. Goldman, Ms. Hernandez, Judge Marshall, Judge Peters, Mr. Pope and Judge Ruderman concur.

Judge Luciano did not participate.

Ms. Brown was not present.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: February 9, 2001

Hon. Eugene W. Salisbury, Chair
New York State
Commission on Judicial Conduct

SCHEDULE A

Expenditures in Respondent's 1997 Campaign for Nomination to Supreme Court

Date	Amount	Recipient
11/14/96	$100	Citizens Committee To Re-Elect Senator Ken LaValle
1/27/97	$125	Huntington Republican "Chairman's Club"
3/4/97	$500	Huntington Conservative Pre-Primary
3/4/97	$300	Huntington Republican Stalwarts
3/10/97	$200	Friends of Joan Raia for Town Clerk
4/3/97	$400	Suffolk County Republican Committee
6/14/97	$250	WJP Memorial Scholarship
8/26/97	$200	Suffolk County Conservative Pre-Primary
9/8/97	$400	Huntington Republican Campaign Supporters
9/25/97	$400	Suffolk County Republican Committee
10/17/97	$200	Friends of Frank Petrone

SCHEDULE B

Expenditures in Respondent's 1998 Campaign for Nomination to Supreme Court

Date	Amount	Recipient
3/18/98	$500	Huntington Republican "Chairman's Club"
8/20/98	$50	Citizens Committee To Re-Elect Senator Ken LaValle