

APPENDIX Z

Commonwealth of Massachusetts
Commission on Judicial Misconduct

No.: OE-143

IN RE PAUL M. SUSHCHYK

**HON. PAUL M. SUSHCHYK'S OBJECTIONS TO HEARING OFFICER'S
FINDINGS AND RECOMMENDATIONS**

The report of the Hearing Officer (the "Report") presents no facts which are both consistent with the evidence and which support the conclusion that Judge Sushchik's "unintentional nonconsensual touching of Ms. Deines has been proved by clear and convincing evidence." Based on the record, there is absolutely no probative evidence of Judge Sushchik's culpability much less any such evidence that has been proven, as the law requires, by clear and convincing evidence.

While it is notable that the Hearing Officer found the Complaining Witness, Ms. Deines, to be credible, (in her words "I believe her"), believing a witness who, as here, has made assertions based solely on speculation and supposition is not meaningful. The implicative Findings in the Report are either not supported by the evidence or are at conflict with the evidence and we object to them.

The Hearing Officer found as follows:

"As Judge Sushchik passed behind her stool, Ms. Deines felt the distinct sensation of a hand grabbing the left side of her buttocks and applying a full handed squeeze to it... She was aware at that moment that Judge Sushchik was the only one passing behind her."

While it is certainly the case that at some point that evening Judge Sushchuk walked behind where Ms. Deines was seated, there is absolutely no support in the record for the fact that Ms. Deines felt this distinct sensation as Judge Sushchuk passed behind her or that at the time of this incident Judge Sushchuk was “the only one passing behind her.”

As Ms. Deines readily admitted at the Hearing, she had no knowledge whatsoever of who or how many people were passing behind her or were otherwise behind her at the time of this incident. (Tr. 1, p. 158) At the moment of this incident she was sitting on a bar stool, looking directly ahead across the table, with her elbows on the table, leaning forward and talking with one of her colleagues who was sitting directly across from her. Tr. 1, pp. 135, 143. She could not recall turning around and looking behind her for at least several minutes prior to the incident (Tr. p. 144). As she acknowledged: “I cannot tell you what was going on behind my back. That is accurate.” Tr. 1, p. 145. What she could, and did, tell the Hearing Officer was that the area where she was seated and the area behind her was crowded with people (Tr. 1, p. 61 77, 126), and that the space directly behind her chair was a passageway for persons moving from and to the bar, which was approximately 6 to 7 feet from where she was seated, to her left and to the restaurant area to her right. Tr. 1, p. 146. The claim that Judge Sushchuk “was the only one passing behind her is a fabrication. It is uncontested that there were several persons crowded into the area directly behind Ms. Deines at the time of this incident. According to Judge Sushchuk, some of them were less than one foot from Ms. Deines. Any one of them could have and may have engaged in the incident which is the basis of these allegations. The finding that Judge Sushchuk was the person who did so is not based on any probative evidence.

Someone apparently grabbed her, but as Ms. Deines acknowledged, “if there were other people behind me any one of them could have grabbed me.” Tr. 1, p. 159. What the Hearing

Officer described as Ms. Deines giving a “cogent and credible” account of what occurred that evening” may be accurate in part, but not to the point of offering any evidence implicating Judge Sushchik. She may have credibly testified that someone came up behind and had physical contact with her but there is nothing which makes it more likely than not that this person was Judge Sushchik, and the straightforward testimony of Attorney Evelyn Patsos and Attorney Jocelyne Welsh, friends and colleagues of Ms. Deines, made it clear that the person who did this could not have been Judge Sushchik.

According to Ms. Deines’ sworn testimony, the person who did this to her slid his hand under her buttocks and lifted and grabbed her for a period of five to fifteen seconds. Obviously this could not be done by someone who was walking. Attorney Patsos and Attorney Welsh each testified that they saw Judge Sushchik walking towards the table and then through the area behind Ms. Deines and over to the area where Attorney Patsos was standing, next to and to the left of Ms. Deines. Each of them observed Judge Sushchik as he was walking and testified that he did not stop. Other than Judge Sushchik, Attorney Patsos and Attorney Welsh were the only percipient witnesses of what occurred and what did not occur, and they were percipient witnesses in the truest sense of that phrase.¹ They personally observed exactly what was happening and neither saw any indication of any incident involving Judge Sushchik.

While the Hearing Officer characterized Ms. Deines as a “percipient” witness it could only be in the sense that she claimed to perceive, without knowledge, that something was true. In the absence of observing what happened, as Ms. Deines did not, what one may have perceived

¹ The Hearing Officer asked Attorney Patsos: “And during this time that you saw Judge Sushchik behind Ms. Deines’ bar stool, did you observe any point which he was not in motion in other words, moving behind her bar stool. Attorney Patsos: “No. No.” Hearing Officer: “Did you observe him stop at any point in that location?” Attorney Patsos: “No.” (Tr. 2, p. 200) Attorney Welsh was asked: “And how long was he behind Emily Deines before he continued moving further along approaching the table?” Attorney Welsh: “I do not think there was any time element that I recall with the Judge stopping behind Emily.” (Tr. 2, p. 231). She later testified that the first time he stopped walking was to talk with Attorney Patsos.

is not probative of what actually occurred. Describing her as a “percipient witness with direct knowledge of the facts she related” (Report p. 14) is plainly wrong, and we object to it. While she obviously thinks that it was Judge Sushchuk who grabbed her, thinking that something is true does not make it true. There was no evidence which corroborates that speculation, and there was compelling impartial testimonial evidence from Attorney Patsos and Attorney Welsh which contradicts it.

The Hearing Officer’s finding that Ms. Deines’ perception of Judge Sushchuk culpability was corroborated by her text message to her sister later that evening is also baseless. That text message is, at the very best, simply another version of her speculation that the person who grabbed her was Judge Sushchuk. It does not state any fact implicating Judge Sushchuk. It simply documents her speculation, and exposes it.

While the Hearing Officer characterized this text message as “nearly immediate” after the incident, it was in fact approximately a half an hour later. It references no evidence to support the claim that it was more likely Judge Sushchuk who had contact with her than anyone else. If it adds any value to the examination of this incident, it is only as the first expression of what became an evolving narrative of what is claimed to have occurred. The Hearing Officer’s conclusion that Ms. Deines’ version of the incident “has remained essentially unchanged” is also inaccurate. The text message tellingly begins with the words “I think...” and expresses Ms. Deines’ suspicion that the incident may have occurred by someone falling, apparently on or behind her. To suggest that this corroborates her trial testimony that someone slid his hand under her left buttocks and pushed her upwards and grabbed or squeezed it for between 5 and 15 seconds is simply wrong.

Four days later, when she submitted her report to Judge Casey, her narrative changed. By then, as she described it, “[the grab] [had] lasted a few seconds” and then, for the first time, she made the false claim that Judge Sushchyk ‘was the only person directly behind me at the time of the grab and also that he was the one who had done so because “he had recently come over to the table where I was seated.”’ (emphasis added.)

Ms. Deines’ statement to Judge Casey was not spontaneous. It was a carefully prepared statement that the Commission’s counsel described in his direct examination as her “formal reporting.” Tr. 1, p. 104. It is blatantly inconsistent with the evidence and is plainly wrong, even in addition to the false claim that Judge Sushchyk was the only person directly behind her at the time of the grab. All of the witnesses who were present that evening, testified that Judge Sushchyk had not “recently come over to the table where I was seated.” When they first saw him he was walking towards the table, to talk with Ms. Patsos, and he had not been there previously.

To buttress conclusions based on speculation and disproven evidence, the Hearing Officer reported that Ms. Deines’ assertions of Judge Sushchyk’s culpability was “corroborated” by “Ms. Patsos’ confirmation of Ms. Deines’ attempt to signal her” at the bar table by “opening her eyes wide and indicating toward Judge Sushchyk”, claiming “that Ms. Patsos noticed and remembered her doing that exactly.” This is so seriously incorrect that it raises doubt about any integrity to the Report. Attorney Patsos did not testify that Ms. Deines did anything, by facial expression or otherwise, “indicating toward Judge Sushchyk.” In fact, she said that she had no idea why Ms. Deines was trying to get her attention. According to her, shortly before Ms. Deines left that evening to go home to care for her child, she gave what was described as a wide-eyed look for five seconds. (Tr. 2, p. 183-185)

Whether her facial expression was an indication that she was about to go home or otherwise is a matter of conjecture, but the Hearing Officer had no basis on which to conclude that this five second facial gesture had any relationship to someone having grabbed Ms. Deines' buttocks, much less anything to do with Judge Sushchyk. By the time that she made this facial gesture, by her own testimony and as well as that of Attorney Patsos, Judge Sushchyk had not only arrived at the table but had conversed with Attorney Patsos and others, had introduced himself, had offered to buy drinks for those present at the table, had gone to the bar to purchase the drinks, had returned with the drinks and was standing across the table from both Mr. Patsos and Ms. Deines (Tr. 2, p. 185). If her facial gesture was a spontaneous reaction to someone grabbing her butt, it confirms that the person who did so was someone other than Judge Sushchyk, since she made the gesture at least several minutes after Judge Sushchyk arrived at the table. In any event, it certainly does not corroborate any claim of wrongdoing by Judge Sushchyk.

However contact with Ms. Deines happened, whether it was by someone falling behind her as she suggested to her sister on April 25 or whether it was as she reported to Judge Casey four days later or whether it was by someone sliding his or her hand under her buttocks and lifting it for between 5 and 15 seconds as she described at the Hearing, it remains that there is not one bit of probative, much less clear and convincing evidence attributing this incident to Judge Sushchyk and it also remains, according to the testimony of Attorney Patsos and Attorney Welsh, that it could not have been him.

The Formal Charge alleges that “while in the area of the table, Judge Sushchyk removed a silver flask from his coat pocket

 (emphasis added). There is no such evidence. The Hearing Officer simply found that Judge Sushchyk “displayed” the flask to the employees at the

table, not that he removed it. The only evidence was that he lifted it an inch or so in his vest pocket, showing only the top part of it. According to all of the witnesses who were asked about it, including Ms. Deines, he did not remove it from his coat pocket.

Putting aside the question of whether there was anything improper about him having a flask with him, the Commission's allegation must be answered as it is stated. It was not proven.

The purpose of this Hearing was to determine whether it was proven that Judge Sushchuk improperly and intentionally had improper physical contact with Ms. Deines as she has described. The Hearing Officer's report supports Ms. Deines' belief but it does not present any facts which have any basis in the record and which support Judge Sushchuk's culpability. Assuming, arguendo, that someone did something along the lines of what has been described by Ms. Deines, there is no probative evidence whatsoever that Judge Sushchuk did it and there is compelling probative evidence that he did not. This is not about what Ms. Deines believes but about what has been proven to have occurred.

The Formal Charges issued by the Commission were issued after an extensive investigation. This alleged incident was first reported to Judge Casey and then to the Commission, in May 2019. The Formal Charges were issued in February, 2020, more than nine months thereafter. They did not accuse Judge Sushchuk of providing a false statement to Judge Casey or to anyone else. If that charge is made, it will be vigorously defended and will be proven to be false, but in the meantime any findings that Judge Sushchuk provided a false statement during the course of the investigation are misplaced as well as mistaken and we object to them.

The burden to prove its case by clear and convincing evidence is borne by the Commission. It is not Judge Sushchuk's burden to prove his innocence. Judge Sushchuk's

statement to Judge Casey is not evidence of what he is alleged. As the Hearing Officer pointed out, at issue here “was whether or not Judge Sushchyk had committed the acts that he is alleged to have committed to constitute the complaint against him.” Tr. 2, p. 76.

Judge Sushchyk preserves his objection to the Commission's requirement that the Hearing be conducted virtually and to the Hearing Officer's refusal to allow demonstrative evidence as was identified in his Offer of Proof.

The Hearing Officer’s recommended discipline is excessive by the standards of other cases, as reviewed below:

- A. Hon. Robert F. Murray, OE-117
<https://www.mass.gov/info-details/judges-alphabetically-by-last-name-m#the-honorable-robert-f.-murray-2>

On November 28, 2005, the Commission announced that it had imposed “a suspension for one year without pay and a \$50,000 fine” against Judge Murray due to “inappropriate conduct directed toward two female employees of the Juvenile Court in Brockton.” This announcement did not detail the misconduct but a contemporaneous newspaper article reported that it involved allegations of “inappropriate phone calls to [a] clerk and g[i]v[ing] an officer an unwanted kiss.” BOSTON GLOBE, November 29, 2005, at B5. Reportedly, the Commonwealth paid \$250,000.00 to settle related legal claims, and Judge Murray’s “punishment [wa] one of the stiffest handed out by the commission.”

After the period of suspension, Judge Murray continued presiding for more than a decade. He retired in 2014.

- B. Hon. Christine M. McEvoy, Complaint No. 2009-45
<https://www.mass.gov/news/superior-court-judge-reprimanded-by-commission-on-judicial-conduct>

² The URLs in this sub-section provide evidence of the assertions herein.

In June of 2006 Judge McEvoy admitted to sufficient facts to convict her of drunk driving. She had been arrested after drinking several glasses of wine and driving erratically on Interstate 95, one of the busiest highways in Massachusetts, creating the obvious risk of serious bodily harm to members of the public. Despite this, she remained on the bench. The only sanction was to be restricted to hearing only civil matters for a limited period.

C. Hon. Joseph A. Trainor, Complaint No. 2003-31
<https://www.mass.gov/news/appeals-court-judge-reprimanded-by-commission-on-judicial-conduct>

Judge Trainor admitted to drunk driving in 2004. The Commission imposed a reprimand, and instructed him not to participate in any appeals involving drunk driving for one year.

D. Hon. Shannon Frison
Commonwealth v. Frison, No. 1921CR930 (Marl. Dist. Ct.)

On August 8, 2019, Judge Frison was arrested and charged with assault and battery on a household member. The police narrative submitted in support of the application for a criminal complaint against Judge Frison states that Judge Frison's wife reported that, while in the presence of their minor daughter, the Judge had "grabbed the back of [the wife]'s hair with her hand and with a strong amount of force, ripped her head back by her hair." The arresting officer reported that Frison resisted him and that she stated "I'm a superior court judge, you can't arrest me, let me go."

On February 28, 2020, Judge Frison admitted to sufficient facts to support a guilty finding. Hon. Michael Fabri continued the matter for a year without a finding, placed Judge Frison on probation, and imposed conditions. While the Commission published formal charges against Judge Sushchik barely nine months after Ms. Deines's complaint to Chief Justice Casey, more than a year has elapsed since Judge Frison's arrest without any public action by the Commission.

E. Hon. Allen J. Jarasitis, Complaint No. 1996-4

Judge Jarasitis admitted that he had an improper *ex parte* communication with another Judge in a case involving his self-interest. The Commission imposed a private reprimand to be made public, a two-year suspension, and a mentor, as well as training.

F. Hon. Marie E. Lyons, Complaint Nos. 1997-140, 1997-143, 1998-4, 1998-66, 1999-100, 1999-103, 1999-153, and 2000-78

Judge Lyons's twenty-two incidents of charged misconduct involved uncontested instances of entering unlawful orders, refusing to hear litigants' arguments, and imprisoning a person for contempt without good cause. The Commission imposed a three-month leave of absence, a two-week educational training, and two years of monitoring by another judge.

G. Honorable Prudence M. McGregor, Complaint No. Unknown

Judge McGregor permitted and failed to report an *ex parte* communication from another Judge designed to influence him in a pending matter. The Commission imposed a six-week suspension without pay, a two-week educational program at Judge McGregor's expense during her vacation time, and the assignment of a mentor judge.

H. Hon. Richard A. Mori, Complaint No. Unknown

Judge Mori stated, in chambers, with reference to seven Cambodian defendants, "We ought to send them right back to the Killing Fields." The Commission imposed a private reprimand to be made public, the assignment of a mentor judge, and educational training.

I. Hon. Frederick L. Brown, SJC-07642
In re Brown, 427 Mass. 146 (1998)

While hearing oral argument, Justice Brown expressed strong animus against a litigant and accused a Union and its officers of general and persistent neglect of their obligations. Justice Brown stated that the Union "d[oes]n't represent anybody, as far as I can see. They just take the money and keep on stepping and buy more condos and have more expense accounts and have

fancy banquets.” *Brown*, 427 Mass. at 155. Consistent with the Commission’s recommendation, the Supreme Judicial Court publicly reprimanded Justice Brown, and ordered him recused from cases involving the Union, its President, or the President’s immediate family.

J. Hon. Paul H. King, SJC-04350
In re King, 409 Mass. 590 (1991)

Judge King made derogatory and obscene references to members of the bench and bar; frequently became intoxicated and urinated in public; lacked candor before the commission; imposed excessively high bail on four black defendants for the stated purpose of retaliating against the black community for its rejection of his brother as a gubernatorial candidate; and systematically confiscated bail money of defendants’ friends and family, without notice, to pay defendants’ court costs. *King*, 409 Mass. at 596. The Commission recommended public censure, a \$25,000 fine, a permanent injunction barring the Judge from either sitting in Dorchester District Court or hearing criminal and juvenile cases, a public apology, and the public release of its report and appendices. *Id.* at 595. The Supreme Judicial Court imposed only the public censure, the ban against Judge King sitting in Dorchester District Court, and the public release of the Commission’s report and appendices. *Id.* at 611.

Respectfully Submitted,

HON. PAUL M. SUSHCHYK,
By His Attorney,

/s/ Michael P. Angelini

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Date: September 8, 2020

CERTIFICATE OF SERVICE

I, Michael P. Angelini, hereby certify that I have served a copy of the foregoing on the following by electronic mail, this 8th day of September 2020, to:

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/s/ Michael P. Angelini

Michael P. Angelini