

COMMONWEALTH OF KENTUCKY
JUDICIAL CONDUCT COMMISSION

IN RE THE MATTER OF

GREGORY T. POPOVICH, DISTRICT COURT JUDGE
17TH JUDICIAL CIRCUIT

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

I.

STATEMENT OF CHARGES

The Judicial Conduct Commission (Commission) of the Commonwealth of Kentucky is vested with jurisdiction and authority to initiate, hear and decide charges of official misconduct by any judge of the Court of Justice or any lawyer while a candidate for judicial office. Upon a finding of official misconduct, the Commission may impose sanctions pursuant to SCR 4.020.

Pursuant to this authority, the Commission filed charges of judicial misconduct against Judge Gregory T. Popovich, District Court Judge, 17th Judicial Circuit, on February 19, 2015. A copy of the notice of formal proceedings and charges dated February 19, 2015 is attached hereto and incorporated by reference.

II.

BACKGROUND INFORMATION

A list of key figures in this disciplinary case is set forth below for the readers' convenience.

- Steve Franzen – Campbell County Attorney
- Cameron Blau – Chief Assistant Criminal Court Prosecutor
- John Fortner – Part-time Prosecutor for the Campbell County Attorney
- Tom Edge – Assistant Attorney for Campbell County Attorney

- Nick Summe – Counsel for DUI Defendant, Jessica Schatzman
- Brandon Voelker – An attorney who appears in Judge Popovich’s court with some regularity.

The charges against Judge Popovich arose out of a DUI case styled ***Commonwealth of Kentucky v. Jessica L. Schatzman***, Campbell District Court, Division 1, Case No. 14-T-03132. The Schatzman case was assigned to Judge Popovich.

Schatzman failed several field sobriety tests and refused a breathalyzer. Her license was apparently suspended pursuant to statute.

Schatzman hired Attorney Nick Summe to represent her in the DUI case assigned to Judge Popovich. John Fortner, a part-time Assistant County Attorney, was assigned to represent the Commonwealth in the Schatzman case.

Cameron Blau was a full time employee of the county attorney’s office and had been an employee of the previous county attorney as well. His title was Chief Assistant County Attorney or something akin to that. Blau rarely appeared in court but was heavily involved with the criminal docket, which included considerable legal research for the in-court attorneys. Sometime before the Schatzman case, Blau had announced his candidacy for the Popovich seat in the Campbell District Court. Later, Judge Popovich expressed his unhappiness with the Blau candidacy to County Attorney Franzen.

Returning to the Schatzman case, Summe felt the police stop was unconstitutional and any evidence obtained thereby should be suppressed. Feeling that he had a strong case, Summe called Blau to ask for his recommendation to dismiss the Schatzman case. Blau would not agree to recommend dismissal. Summe filed a motion to suppress.

The motion to suppress came on for hearing on July 10, 2014 in Judge Popovich's court. Judge Popovich was inclined to agree with Summe on the bad stop issue. But Judge Popovich gave Fortner's office until July 24, 2014 to file a brief. A status conference was set for August 5, 2014.

After the record was turned off at the Schatzman hearing on July 10, 2014, Summe made what could best be described as a taunting comment to Fortner that Summe would prevail in this case. He further indicated he had already discussed the case with Blau.

After talking with Fortner, Summe started to leave the courtroom. Meanwhile, Fortner went to the bench where Judge Popovich was readying himself for the next case. The record was off. Fortner, with considerable displeasure, told the Judge that Blau was helping Summe with his case. Judge Popovich expressed his surprise. Nothing else happened that day as far as Judge Popovich was concerned.

Some days later at a church picnic, Brandon Voelker, an attorney who appears regularly before Judge Popovich told Judge Popovich that he overheard the comments Summe made to Fortner and was concerned about them.

On July 23, 2014, the county attorney's office filed its response to Schatzman's motion to suppress. The brief was signed by Assistant County Attorney, Tom Edge. (Exhibit 3). (Any reference to numbered exhibits herein pertain to exhibits introduced at the JCC Popovich hearing.)

The matter came on for hearing on August 5, 2014. (The video of the entire August 5, 2014 hearing was played and is a part of the proceedings in Judge Popovich's hearing, Exhibit 8.) After identifying the attorneys and the parties present, Judge Popovich seemed to read from a prepared statement. However, at

the Judge's JCC hearing on May 28, 2015, he denied he was reading his comments. Nonetheless, whether reading or not, he recounted the conversation he had with Fortner concerning Summe's comments to Fortner following the July 10, 2014 hearing. He related that "at least two other attorneys overheard the comments." He did not name them. Judge Popovich also told of the "chance social encounter" with Voelker and what Voelker told him about the Summe comments to Fortner.

Judge Popovich opined that the Summe statements to Fortner placed the court in an extremely awkward position because it seemed the "alleged Chief Assistant" (Cameron Blau) was helping the defense and that he had undercut the other assistants in the past. Summe tried to explain for the record that he did not get assistance from Blau which helped his case.

Judge Popovich stated that the Schatzman case should be dismissed if in fact the chief prosecutor believed the stop was unconstitutional and had authority over the in-court prosecutor, Fortner. However, the Judge acknowledged that the Assistant County Attorney's brief filed on July 23, 2014 "adamantly" opposed Schatzman's motion to suppress.

Judge Popovich then wrote out an order in which he required the "actual" county attorney to tell him of the authority of Blau over other assistants and whether the county attorney wished to proceed with the prosecution. (Exhibit 4).

County Attorney Franzen responded to the August 5, 2014 order on August 13, 2014 in a letter to Judge Popovich. (Exhibit 5). In that four and a half line letter, Franzen informed the Judge, "that the County Attorney's office certainly wants to proceed with its prosecution as outlined very eloquently in its brief in

opposition to the defendant's motion." Franzen also told the judge that the internal operation of his office was not an issue in the Schatzman case.

On the same date of the Franzen letter, August 13, 2014, Judge Popovich responded to the Franzen letter. (Exhibit 5). In that letter, Judge Popovich acknowledged Franzen's desire to proceed with the prosecution of the case and made other conclusions about Franzen's letter that were quite strained. This will be discussed in part G below.

The August 5, 2014 hearing resulted in a complaint being filed with the Commission against Judge Popovich on September 8, 2014. The Commission sent notice to Judge Popovich on October 27, 2014 that a complaint had been filed.

On November 13, 2014, a decision was entered by Judge Popovich dismissing the Schatzman case because he believed the stop was improper.

III.

STATEMENT OF PROCEEDINGS

1. The Respondent, Gregory T. Popovich, is a Campbell County District Court Judge for the 17th Judicial Circuit.
2. The Commission authorized an investigation into the allegations set forth in the Notice of Formal Proceedings and Charges after receipt of a complaint on September 8, 2014.
3. The Respondent was informed of the investigation on October 27, 2014.
4. The Respondent responded to the Commission inquiry on November 20, 2014.

5. The Respondent appeared pro se before the Commission on January 9, 2015, and later provided additional information bearing on the Commission's investigation.

6. On January 13, 2015, the Respondent was provided the factual information in the custody of the Commission for examination pursuant to SCR 4.170(4) and he was afforded an opportunity to present any other information he had bearing on the investigation.

7. On January 27, 2015, Attorney Steve Ryan entered his appearance for the Respondent.

8. Notice of Formal Proceedings and Charges were filed against the Respondent on February 19, 2015, under SCR 4.180. Counsel for the Respondent replied to the charges on March 10, 2015.

9. An entry of appearance of additional counsel for the Respondent was filed by Attorney Mark Arnzen on April 20, 2015.

10. The matter was set for formal hearing on May 28, 2015. Notice of the time and date of hearing was provided to the Respondent and/or his counsel on April 28, 2015.

11. Counsel for the Respondent took the deposition of Brandon Voelker on May 21, 2015, and the deposition of Daniel T. Guidugli on May 21, 2015. Both depositions were admitted and played into evidence at the hearing on May 28, 2015. Counsel for the Commission, Luke Morgan, objected to the admissibility of the deposition of Mr. Guidugli.

12. The hearing was held on May 28, 2015, in Covington, Kentucky at the Kenton County Courthouse. The Respondent was represented by Attorneys Steve

Ryan and Mark Arnzen. The Commission was represented by Attorney Luke Morgan.

13. At the beginning of the hearing, counsel for the Commission requested that the rule for separation of witnesses be invoked. That motion was sustained.

14. The six voting members of the Commission in this case are as follows: Attorney and Acting Chair, J. David Boswell; Judge Janet Stumbo; Judge Eddie Coleman; Judge David Bowles; Diane E. Logsdon; and Joyce King Jennings. Also in attendance, but not voting, were Judge Laurance VanMeter and Judge Jeffrey Walson.

IV.

FINDINGS OF FACT

The Judicial Conduct Commission makes the following findings of fact, all of which have been established by clear and convincing evidence.

A. Findings regarding Judge Popovich's reaction to Blau's candidacy

County Attorney Franzen testified that Judge Popovich called him after Blau announced his candidacy. Judge Popovich asked Franzen if Franzen's office had a problem with Judge Popovich and whether Franzen was going to take part in Blau's campaign. Franzen informed Judge Popovich he did not have a problem with Judge Popovich; that Franzen was not going to take part in Blau's campaign; and that Franzen did not know in advance that Blau was going to run against Judge Popovich.

Judge Popovich told Franzen he did not want Blau in his courtroom. Franzen told Judge Popovich he had already reached the same decision and had informed Blau he was not to appear in Judge Popovich's court. Blau had no problem with

that directive. To be clear, Franzen, who made a very credible witness, said Blau was not to appear in Judge Popovich's courtroom, but Blau was not restrained from assisting other Assistant County Attorneys who were appearing in Judge Popovich's courtroom.

Clearly, Judge Popovich was upset that Blau was seeking the judicial position occupied by Judge Popovich and the Commission so finds.

B. Findings regarding the July 10, 2014 Schatzman hearing

As noted earlier, Attorney Summe had filed a motion to suppress the evidence from what he considered to be an unconstitutional stop of his client, Schatzman. At the July 10, 2014 hearing, Judge Popovich seemed to favor Summe's argument on the stop. Fortner, appearing for the County Attorney's Office, then argued that the arrest resulted from a consensual encounter between Schatzman and the police officer. Fortner was given until July 24, 2014, to brief the matter before the next status conference of August 5, 2014. Summe declined to file anything else. Judge Popovich testified at his hearing he was suspicious when Summe informed the court he did not want to file a reply brief to the County Attorney's opposition to Summe's motion to suppress. He reasoned this was further support for his suspicions that Blau was assisting the defense.

At the time Summe was a four year lawyer. Fortner was a family friend. Summe had just prevailed against Fortner in another case. Unbeknownst to Fortner, Summe had talked with Blau about the stop issue in the Schatzman case. At the Popovich Commission hearing, Summe explained that he called Blau to request dismissal because Summe thought the case against his client was weak. He said it was not unusual to do this, although Summe knew that the final decision on

a DUI dismissal would be with Franzen. Franzen confirmed in his testimony that there is frequent interaction among Blau, defense counsel, and police.

However, Blau rebuffed Summe's attempt for dismissal and instead sent Summe a recent U.S. Supreme Court case by e-mail. The title of the e-mail was "Re: Supreme Court case screwing you." There was a one sentence communication which read, "Look at this and tell me what you think!" Unfortunately, Blau did not inform Fortner of his conversation and e-mail with Summe. Summe testified that he was already aware of this case, but believed he could distinguish it. Consequently, he filed a motion to suppress the evidence because, in his opinion, the stop was "bad."

After the record was turned off at the July 10, 2014 hearing, Summe made cajoling comments to Fortner to the effect that Summe "had this one in the bag." Summe testified that Fortner replied that perhaps Blau could help Fortner find a case to help his cause. Summe testified that he said he had already talked with Blau who had sent him a case by e-mail. There was no consensus on the exact words of the conversation between Summe and Fortner. Judge Popovich did not overhear the exchange. Voelker's deposition was read at the Popovich hearing. Fortner and Voelker's testimony was somewhat different on the language of the conversation between Fortner and Summe.

In any event, after taunting Fortner, who was obviously a very competitive individual himself, Summe started to leave the courtroom. Fortner, still fuming, went to Judge Popovich at the bench and reported with some indignation what Summe had just told him concerning Blau helping Summe with his case. The conversation between Fortner and Judge Popovich was off the record by all

accounts. Judge Popovich was astonished by the revelation. Although Summe's exact whereabouts were not known at the time Fortner approached Judge Popovich, it is clear that he was not within earshot and was likely out of the courtroom altogether.

**C. Findings regarding the period between the
July 10, 2014 and August 5, 2014 hearings**

Fortner testified that he had no more conversations with Judge Popovich between the July and August hearings. Fortner felt that what occurred between him and Summe "was my business." "I needed to take care of it and I did." The significance of that statement should not be minimized. After the July 10, 2014 hearing, Fortner took the initiative and talked with Blau. Fortner told Blau that he needed to be kept informed where there were conversations with defense counsel about his cases. Blau apologized to Fortner for not doing so. Fortner concluded after talking with Blau that there was no impropriety in Blau's discussions with Summe and he was satisfied. Fortner confirmed that although he knew Blau was not to be in the courtroom, the prohibition did not apply to discussions with defense counsel out of the courtroom. Fortner only asked that he be kept informed.

In summary, Fortner testified that Blau was a good and ethical attorney. Fortner would not say that the Summe conversation with Blau was outside the chain of command. All Fortner asked was to be included. Fortner acknowledged there were no formal procedures in place in the County Attorney's Office concerning communications with defense counsel.

After talking with Blau and Edge, Fortner still felt he had a strong case that should be pursued against Schatzman. Edge prepared their opposition brief, but according to Fortner it was reviewed and altered somewhat by Fortner before it was

filed on July 23, 2014. Judge Popovich testified that Fortner told him he had not seen the Edge brief before it was filed. Fortner testified he never told Judge Popovich that he had not seen the Edge brief before it was filed. For some reason, Judge Popovich thought the fact that a different assistant, Edge, filed the brief was suspicious. The brief strongly opposed the motion to suppress.

Although Judge Popovich and his counsel clearly targeted Summe as the genesis of the current charges, and although Summe was willing to fall on his sword for his cajoling remarks to Fortner, if the off record discussion between Fortner and Judge Popovich had not occurred the “investigation” by Judge Popovich might not have followed. Fortner immediately resolved his issues with Blau on his own without the Court’s intervention.

Following the July 10, 2014 hearing, Judge Popovich had a “chance encounter” with Voelker at a church picnic. Voelker was the attorney waiting for the next hearing in the courtroom during the Schatzman hearing on July 10, 2014. He did not think Blau was qualified to be a judge and was an obvious Popovich supporter. At the church picnic, Voelker told Judge Popovich that he overheard the comments Summe made to Fortner. He expressed concern that the County Attorney’s Office, not Judge Popovich, may be favoring some attorneys. The exact language of the statements he attributed to Summe, i.e. that Blau helped write Summe’s brief, were not confirmed by any other witnesses, including Fortner or Summe. Voelker acknowledged that Summe was obviously ribbing Fortner. Judge Popovich replied to Voelker that he was “looking into it.” Judge Popovich testified that he did not think his conversations with Fortner or Voelker were violations of

the ex parte rule in the Kentucky Judicial Canons of Ethics principally because the discussions did not involve substantive issues of the Schatzman case.

Judge Popovich testified that after the July 10, 2014 hearing and his conversation with Voelker, he believed further inquiry was needed. However, he did not make further inquiry from July 10, 2014 through August 5, 2014 other than to ask his longtime attorney friend, Tim Schneider, how to proceed. Schneider advised him that any actions he took should be on the record, according to the testimony of Judge Popovich. The Commission finds that Judge Popovich undertook to resolve issues concerning the internal operation of the County Attorney's Office.

D. Findings regarding the August 5, 2014 hearing

At the August 5, 2014 hearing, Fortner and Edge were present. Summe and his client were there as was a bailiff and perhaps others. It was the last case on the docket.

Black's Law Dictionary defines a public hearing as open to anyone who wishes to observe and "is often characterized by the right to appear and present evidence in a case before an impartial tribunal." Before the August 5, 2014 hearing there was no notice to any of the participants of what was forthcoming. The parties thought the "status hearing" would involve the merits of the motion to suppress. Those in attendance were surprised by the subject of the hearing, that being the comments of Summe to Fortner. There was not a single question asked by the Court and no one else was invited to ask questions or produce witnesses concerning those comments. The merits of the Schatzman case were barely mentioned.

There was never any indication from any representative of the County Attorney's Office that they did not wish to proceed with the Schatzman prosecution.

The County Attorney's Office, over the signature of Edge, had just filed a nine page brief in support of its position. In its brief, the County Attorney did not abandon the argument that the stop of Schatzman was a constitutional stop. The brief relied principally on the U.S. Supreme Court case, **Naveritte**, which was the case supplied to Summe from Blau. Judge Popovich did not ask Attorney Edge anything about the brief he had just authored and filed. The fact that the County Attorney argued in its brief that the police stop was constitutional was certainly contrary to Judge Popovich's theory that Blau was working with Summe to sabotage the prosecution.

The August 5, 2014 hearing did not have the appearance of an investigation or an inquiry concerning Blau's alleged assistance of Summe. Instead, Judge Popovich, who appeared to be reading from a prepared script, used the hearing to embarrass Summe in front of his client and vilify Blau. Judge Popovich never asked Summe precisely what he said to Fortner. Instead, he started out in his comments to Summe with "I know the comments were made because they were made in front of other attorneys." When Summe asked to explain, Judge Popovich replied, "you can explain for the record if there is any possible explanation, unless you were just lying to Mr. Fortner." Summe tried to explain to the court that Blau had sent him a case by e-mail that said "Re the case that screws you." The case was favorable to the prosecution and unfavorable to the defense. The Judge did not ask to see the e-mail and at his Commission hearing he was asked why he did not request the e-mail. He ultimately responded that perhaps he should have.

At the August 5, 2014 hearing, Summe requested the Court to decide the case on the merits and not on any perceived problems in the County Attorney's Office. He assured the Court that it was not the position of the County Attorney's Office

that the case should be dismissed, to which the Judge replied in part, “you said what you said.”

D. (1) Findings regarding comments concerning Chief Assistant Blau at the August 5, 2014 hearing

During the August 5, 2014 hearing, Judge Popovich referred to Blau as the “alleged Chief Assistant” at least five times. When asked why he referred to Blau in that way, Judge Popovich would only say, “because he didn’t appear in court.” Of course, he was barred from appearing in Judge Popovich’s court because of his candidacy for district court. However, even if Blau never appeared in court, his title, as testified by Fortner, Summe, and Franzen, was in fact Chief Assistant or Chief Assistant Prosecutor. Even the Respondent’s witness, former Judge Daniel Guidugli, testified that he would not have used the term “alleged Assistant County Attorney.” Rather, he would have used Blau’s proper name. It was clear to the Commission that Judge Popovich was using the term in a demeaning way.

D. (2) Findings regarding the failure of Blau to file appellate briefs in other cases as referenced in the August 5, 2014 hearing

In his recitation during the August 5, 2014 hearing, Judge Popovich referred to two cases successfully prosecuted in his court but later appealed. One was a robbery case. He said that “particular person,” referring to Blau, decided not to file any briefs and “those people went free.” Judge Popovich said he thought at the time there was just neglect involved, but now he was not so sure that Blau was not “... taking it upon himself to decide to go against you guys because he didn’t like it, I don’t know.” The Commission finds that whether briefs were filed in other cases by Blau was not relevant to the Schatzman case and not even relevant to the “inquiry”

Judge Popovich was undertaking on August 5, 2014. This was simply another way to denigrate Blau because of Judge Popovich's displeasure with the Blau candidacy.

E. Findings regarding the post August 5, 2014 activities

At the August 5, 2014 hearing, Judge Popovich entered the Order depicted in Exhibit 4. In this docket order the County Attorney was to advise Judge Popovich of the authority of the Chief Prosecutor over other assistants and whether the County Attorney desired to proceed with the Schatzman case. No one from the county attorney's office had ever indicated it did not want to proceed.

County Attorney Franzen responded by letter of August 13, 2014, with a copy to Summe. (Exhibit 5). As noted earlier, Franzen pointed out that the prosecution had filed a brief which certainly indicated the County Attorney's Office wanted to proceed with the prosecution of the Schatzman case. As for the inner workings of the County Attorney's Office, Franzen said, "I do not believe same has any bearing on the merits of the case."

Judge Popovich replied by letter of August 13, 2014. (Exhibit 5). There was no copy to Summe or anyone else. Neither letter was filed of record by Judge Popovich. In his response to Franzen, Judge Popovich was seemingly chagrined that Franzen did not say what he wanted him to say. So, Judge Popovich said it for Franzen. He concluded that, "it is obvious from your letter that each prosecutor has the authority in criminal cases assigned to them and not Mr. Blau. I also assume that you have informed Mr. Blau not to assist with the defense in any cases your prosecutors are pursuing."

Franzen's testimony about the August 5, 2014 proceedings and subsequent exchange of letters was telling. He first learned of the issue after the August 5, 2014

docket sheet order was presented to him. By then, the matter had long since been resolved internally among the involved attorneys. Franzen was not even aware that Fortner was angry about not being in the chain of communication. He said Fortner was upset with Judge Popovich for politicizing the whole matter, but Fortner was not upset with Blau or with Summe. Franzen testified that he took no disciplinary action against Blau. In fact, he affirmed that the role of the prosecutor is to help other lawyers to seek justice, even defense counsel. When asked about Judge Popovich's response to Franzen's letter of August 13, 2014, Franzen thought such a response was neither logical nor warranted. The Commission agrees. The Commission believes this was a continuing effort by Judge Popovich to discredit his opponent, Blau.

The Commission finds that Judge Popovich's actions at the August 5, 2014 hearing were motivated by his personal animosity to Blau and his opposition to Blau's candidacy.

**F. Findings regarding the November 12, 2014
opinion of Judge Popovich in the Schatzman case**

Judge Popovich was informed on October 27, 2014 that a complaint with the Commission had been filed against him. On November 12, 2014 Judge Popovich issued an Opinion and Order dismissing the Schatzman case. The title of the document was called "Status of Case." (Exhibit 7). Judge Popovich concluded the police stop was unconstitutional and the defendant's contact with the police officer was not a "consensual encounter." Thus, Summe won despite the earlier criticism and suspicion he received from Judge Popovich and many of the witnesses for not filing an additional brief.

In his testimony before the Commission, Judge Popovich indicated that after August 13, 2014, the date of the letters between him and Franzen, he was convinced there were no ethical problems to be concerned about and he considered the matter closed. Nonetheless, on page one of his November 12, 2014 Order there is a lengthy footnote which outlines the entire issue that was the subject of his August 5, 2014 hearing, concluding that the whole matter was “troubling” and “unthinkable.” The full footnote is set out below:

Immediately after this hearing concluded defense counsel spoke to Mr. Fortner in a cajoling manner. This Court did not hear the words spoken and assumed merely humorous pleasantries. However, Mr. Fortner got a shocked look and approached the bench. Mr. Fortner indicated to the Court with some measure of disgust that defense counsel told him that Mr. Blau, who carries the title Chief Assistant County Attorney, had assisted him in the research and/or drafting of the defense’s motion and memorandum. It must be noted that Mr. Blau has never been a part of the rotation of prosecutors who actually appear in Court and handle cases. It should further be noted that for at least the last 25 plus years those ‘rotation’ prosecutors have had complete control over their cases subject only to the authority of the actual County Attorney.

The question which immediately arose was whether Mr. Blau had been given authority over the rotation prosecutors. If so, and Mr. Blau had decided that the prosecutors case had no merit, then their office could not in good faith proceed with the subject case.

This Court utilized the next hearing date to clarify the chain of authority in the county attorney’s office. In said hearing the Court required the actual County Attorney to notify the Court of his position. Correspondence ensued between the Court and the County Attorney. The County Attorney indicated that he wished to prosecute the subject case and implicitly indicated the ‘rotation’ prosecutors had control of their cases.

The whole matter is troubling. Can one even imagine an associate assisting prosecutor in a case where another

member of the same firm is representing the defendant. Unthinkable.

Judge Popovich, when confronted about the footnote at his hearing, testified that it was inserted to explain the delay. Nowhere in the body of the document or the footnote is there any clear and specific indication the footnote was placed there for that purpose. The Commission finds that it was not placed there for that purpose.

G. Findings regarding expert witnesses

The Respondent called two witnesses to give expert testimony. One was an attorney in Cincinnati, Ohio by the name of Mark A. Vanderlaan. Though Vanderlaan has much experience in Ohio ethical issues, he is not licensed to practice in Kentucky. He did not review the actual video of the August 5, 2014 hearing, but he did read a transcript of the hearing. He did not read the briefs filed by the parties in the Schatzman case. He did not review the November 12, 2014 opinion by Judge Popovich dismissing the Schatzman case. He was not aware of KRS 26A.080 which is cited under Canon 3D2. It was Attorney Vanderlaan's opinion that Judge Popovich did not violate any of the Judicial Canons, concluding that Judge Popovich was on a "proper, fact finding mission." The Commission disagrees.

The Respondent also called former Judge Daniel Guidugli as an expert to which counsel for the JCC objected. Judge Guidugli is a very likeable former Kentucky District Judge and former Kentucky Court of Appeals Judge. He is a lifelong friend of Judge Popovich. Like Mr. Vanderlaan, Judge Guidugli did not view the actual videotape of the August 5, 2014 hearing. He testified that as a judge he did not get involved with negotiations of the prosecutor and defense counsel. With regard to the way Judge Popovich proceeded, Judge Guidugli indicated that he was

not sure he would have proceeded in that way, but opined it was a proper way to do it. But, Judge Guidugli testified he would not have barred Blau from the courtroom based on his own personal experience in such matters. He also would not have referred to Blau as the “alleged” Chief Assistant County Attorney. He felt that it would have been better to have used his proper name. Judge Guidugli doubted that the conversation Judge Popovich had with Attorney Voelker would be considered ex parte, since in Judge Popovich’s opinion it did not concern substantive issues in the Schatzman case. With regard to the failure of Summe to file a brief following the Commonwealth’s filing, he termed it “unusual.” He obviously was not aware that Summe won the case before Judge Popovich and that his “unusual” strategy did not affect the outcome.

Judge Guidugli was asked if Fortner’s statement to Popovich following the July hearing was ex parte. Judge Guidugli artfully never answered it, instead saying Popovich could have called Summe back into the courtroom.

Like Attorney Vanderlaan, Judge Guidugli’s personal opinion, without research or data for support, is not ultimately persuasive to the Commission in this case on whether Judge Popovich acted properly in proceeding the way he did.

V.

CONCLUSIONS OF LAW

The Commission does not believe the integrity of the Popovich court or the court system as a whole was in jeopardy as a result of Summe’s comments to Fortner. There was no allegation the court was involved in any wrongdoing. Voelker said his concern was that the county attorney, not the court, was favoring some defense counsel. Judge Popovich had no reason to be concerned about

Voelker's comments. Judge Popovich was in control of the proceedings and the case could not be improperly dismissed without the court's signature. This was much ado about little, a tempest in a teapot. When the judge, on the record in a public hearing, attacked his political opponent there was far greater potential for damage to the integrity and independence of the court system than what was happening in the County Attorney's Office. Judge Popovich should not have interjected himself in the inner workings of the County Attorney's Office. If he sincerely felt the need to do so, a proper hearing should have been held with proper notice to the parties affected. Such inquiry, if any, should not have been comingled with the Schatzman case.

The August 5, 2014 event was not a proper hearing or even an "investigation" of the Summe comments. Rather, it was an opportunity for Judge Popovich to excoriate his personal and political enemy, Blau, who had no chance to defend himself. If Judge Popovich was concerned there was unethical conduct on the part of Summe or anyone in the County Attorney's Office, he was obliged under KRS 26.A080 to report any such unprofessional conduct immediately to the proper investigating and disciplinary authorities. (Exhibit 12) And, if in fact, Judge Popovich's "investigation" did delay the decision in the Schatzman case, that result falls squarely on his shoulders because the Commission finds the procedures that he took were unwarranted, improper and in violation of the Judicial Canons.

In light of the above findings of fact and conclusions of law, the Commission makes the following findings and conclusions with respect to the specific Canons of Judicial Conduct under which Judge Popovich was charged.

Canon 1

By a vote of 6-0, the Commission finds that the Respondent engaged in misconduct in office and failed to observe high standards of conduct in violation of Canon 1.

Canon 2A

By a vote of 5-1, the Commission finds that the Respondent violated Canon 2A, in that the Respondent failed to respect and comply with the law and failed to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Ms. Joyce King Jennings dissenting.

Canon 2D

By a vote of 6-0, the Commission finds that the Respondent violated Canon 2D, in that the Respondent allowed political interests to impair his objectivity and he lent the prestige of his office to advance his personal interests.

Canon 3A AND 3B(2)

By a vote of 6-0, the Commission finds that the Respondent violated Canon 3A and 3B(2), in that the Respondent allowed outside interests and activities to take precedence over his judicial duties. The standard set forth in 3B(2) requires a judge to be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or a fear of criticism.

Canon 3B(4)

By a vote of 6-0, the Commission finds that the Respondent violated Canon 3B(4), in that the Respondent was not patient, dignified, and courteous to defense counsel and an assistant county attorney.

Canon 3B(7)

There are four potential ex parte communications with attorneys in evidence. The first involved communications with John Fortner following the hearing in the Schatzman case on July 10, 2014. The second is the Respondent's conversation with Brandon Voelker at a church picnic following the Schatzman hearing on July 10, 2014. The third concerns a statement the Respondent attributed to Fortner in which he allegedly told the Respondent he had not reviewed the Tom Edge brief before it was filed for the Commonwealth in late July, 2014. (It should be noted that John Fortner testified he did not tell the Respondent this.) Last, was the Respondent's letter to Attorney Franzen dated August 13, 2014. The Respondent did not carbon copy anyone in this letter and did not file it or the letter to the Respondent from Attorney Franzen in the record.

However, the manner in which the charges were drawn indicate the ex parte statements on which the charges were based involved social gatherings outside of court. Because this would only seem to apply to the conversation with Brandon Voelker, the Commission by a vote of 6-0 finds that the charge pertaining to Canon 3B(7) was not proven by clear and convincing evidence. Therefore, the charge that Respondent violated Canon 3B(7) is dismissed.

Canon 3B(8)

By a vote of 6-0, the Commission finds that the charge pertaining to a violation of Canon 3B(8) was not proven by clear and convincing evidence. Therefore, the charge that Respondent violated Canon 3B(8) is dismissed.

SCR 4.020(1)(b)(i)

Finally, by a vote of 6-0, the Commission finds that the Respondent violated SCR 4.020(1)(b)(i), in that the actions of the Respondent set forth herein constituted misconduct in office for which the sanctions levied in the final order below are warranted.

VI.

FINAL ORDER

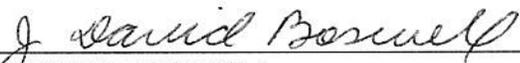
The Respondent has been found to be in violation of the Code of Judicial Conduct and to have engaged in misconduct as a result of the charges addressed above. It is of record that the Respondent had a private admonition in 1993 as a result of a campaign violation. It is also of record that the Respondent entered into an Agreed Order of Public Reprimand on December 2, 2011. (Exhibit 10). This public reprimand was issued because the Respondent did not utilize procedures which were adequate to assure that some defendants who appeared in his court understood and were able to exercise their procedural rights, including the right to counsel, trial by jury, and not to incriminate themselves. Further, the Respondent “addressed some parties and counsel in his court in language which was undignified and demeaning.”

In the present proceeding, counsel for Judge Popovich said the Judge made some mistakes, but the Commission notes that it cannot recall any testimony by the Judge where he admitted to any mistakes or wrongdoing. To the contrary, he aggressively defended his conduct to the very end. It is troubling that the Respondent cannot see how his actions were improper and reflect poorly on the judiciary and court system of this Commonwealth.

With all of the foregoing in mind, the Commission, by a vote of 6-0, concludes and finds that the Respondent shall be suspended from his judicial duties without pay for fifteen (15) days.

Rule 4.270 provides that the Commission's order shall become effective within 10 days after service, unless an appeal is filed within that time.

The undersigned hereby certifies that the above findings of fact, conclusions of law, and final order represent the actions of the Judicial Conduct Commission this 17 day of June, 2015.

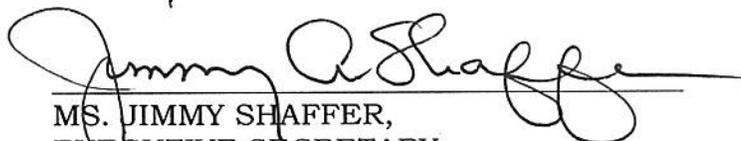


J. DAVID BOSWELL
ACTING CHAIR OF THE COMMISSION

Mr. Stephen Wolnitzek and Judge Karen Thomas recused from any consideration of this matter.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Findings of Fact, Conclusions of Law and Final Order were mailed to counsel for Judge Popovich Hon. Stephen P. Ryan, 7104 Hillcircle Court, Louisville, KY 40214, and Hon. Mark G. Arnzen, Arnzen, Storm & Turner, P.S.C., 600 Greenup St., Covington, KY 41011; and counsel for the Commission, Hon. Luke Morgan, McBrayer, McGinnis, Leslie & Kirkland, PLLC, 201 East Main St., Suite 900, Lexington, KY 40507, this 18th day of June, 2015.



MS. JIMMY SHAFFER,
EXECUTIVE SECRETARY