

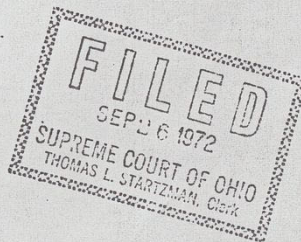
BEFORE THE BOARD OF COMMISSIONERS ON CHARACTER AND FITNESS

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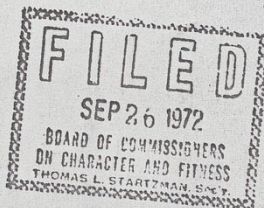
IN THE MATTER OF THE APPLICATIONS OF
FOR REGISTRATION AS A CANDIDATE
FOR ADMISSION TO THE PRACTICE OF LAW
AND TO TAKE THE BAR EXAMINATION

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Case No. 3
(Clerk's File
No. 62150)



REPORT AND RECOMMENDATION OF THE
BOARD OF COMMISSIONERS ON CHARACTER AND FITNESS



BEFORE THE BOARD OF COMMISSIONERS ON CHARACTER AND FITNESS

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REPORT AND RECOMMENDATION OF THE
BOARD OF COMMISSIONERS ON CHARACTER AND FITNESS

I. INTRODUCTORY

On March 3, 1972, the Supreme Court of Ohio referred this matter to the Board of Commissioners on Character and Fitness for investigation and a report and recommendation to the Court.

Procedurally, the Board concluded that a hearing should be held in order to thoroughly investigate the matter and to fully preserve the applicant's right to be heard and his right to confront any witnesses adverse to his applications. Inasmuch as the admissions committee of the Columbus Bar Association had recommended approval of the applications, the President of the Association expressed a desire that the Association not be placed in a position where it could be construed, even inferentially, to be in opposition to the applications. While the Association, therefore, did not assume an active role in the hearing, it did cooperate with the Board in arranging for the testimony of certain members who participated in the Association's investigation of the applicant. At the hearing, held on May 8 and May 9, 1972, the applicant and six witnesses testified on behalf of the applicant; the Board called six witnesses; twenty

exhibits were introduced by applicant and seventeen exhibits were introduced by the Board. After the record had been transcribed and circulated to members of the Board, the full Board met on August 7, 1972, and reached a decision on its recommendation to the Court. Although all members of the Board were present at the hearing held on May 8 and May 9, 1972, Commissioners Corley, Chesney and Dobnicker were not present at the meeting of the Board held on August 7, 1972.

Substantively, the issues, as discussed below, were relatively well defined. Included among those issues, however, was one which the Board regarded as having extraordinary importance and sensitivity, namely, the effect of the applicant's admitted homosexual activities on his character and fitness to practice law. The hearing, upon request of the applicant, was conducted as a private hearing, and the homosexuality issue was the subject of a rather intensive interrogation and investigation, as disclosed by the Record which is submitted with this Report for the Court's consideration.

II. PROCEDURAL HISTORY

1. On March 2, 1971, the Application of _____ for registration as a candidate for admission to the practice of law was filed with the Clerk of the Supreme Court of Ohio. The application was accompanied by an affidavit concerning late registration, a certification that he had earned a Bachelor of Arts degree prior to admission to law school, the applicant's questionnaire, four character questionnaires, and a fingerprint identification form (collectively marked as Exhibit A). On March 5, 1971, the Clerk forwarded the application, affidavit, certification, questionnaires, and the fingerprint identification form, to the Secretary of _____

the Columbus Bar Association's Committee on Admissions to the Bar.

2. On May 26, 1971, the Application of for admission to the July, 1971, bar examination was filed with the Clerk of the Supreme Court of Ohio, accompanied by the Applicant's questionnaire (collectively marked as Exhibit B). On June 2, 1971, the Clerk forwarded the application and questionnaire to the Secretary of the Columbus Bar Association's Committee on Admissions to the Bar.

3. The applicant was a senior in the College of Law, Ohio State University, at the time both applications were filed, and he graduated from the College of Law in June, 1971. The Columbus Bar Association's Committee on Admission to the Bar had not made its recommendation prior to the scheduled date for the July, 1971 bar examination, and the Clerk was so advised by letter dated July 19, 1971, from James Kozelek (Exhibit C). The applicant was nevertheless permitted to take the bar examination in July, 1971, pending the completion of the committee's investigation and recommendation, and the applicant was so informed by letter dated July, 1971, from the Clerk (Exhibit D). Subsequent to the bar examination, the Clerk, by letter dated October 18, 1971, informed the applicant that as of that date no recommendation had yet been received from the bar association committee (Exhibit E).

4. Two members of the admissions committee, James Kozelek and Joseph C. Cizmada, conducted an investigation of the applicant, including a personal interview with him,

and prepared a written report (Exhibit F). Attached to the report are copies of the following documents referred to in said report:

- F1. Letter dated April 26, 1971, from James Kozelek to Kelly Hoskins.
- F2. Ohio State University Inter-Office Communication dated October 21, 1964.
- F3. Inquiry regarding payment of fees.
- F4. Handwritten statement of consisting of five pages.
- F5. Supplementary Application For Admission to the College of Law dated February 24, 1968.
- F6. Letter dated August 17, 1962 from Thomas B. Dutton to
- F7. Ohio University Inter-Office Communication dated August 18, 1962.
- F8. Letter dated April 23, 1971 from James Kozelek to Colonel William Klare.

5. The report of the investigation was considered by a subcommittee of the Committee on Admissions to the Bar which was appointed by the Chairman of the Committee, Charles Myers, to further consider the applications. The Subcommittee consisted of Theodore T. Twynham, Vice Chairman of the Committee on Admissions to the Bar and Chairman of the Subcommittee, together with Michael Graney, Thomas Tripp, James Allison, Richard Warburton, Jr. and Edward W. Erfurt. The applicant prepared and submitted to the Subcommittee a "Memorandum In Support of Application For Admission to the Ohio Bar" (Exhibit G). The Subcommittee interviewed the applicant on December 4, 1971, pursuant to a letter to dated November 15, 1971 (Exhibit H). On January 11, 1972, Mr. Twynham reported to the Chairman the recommendation of

the Subcommittee that the applications be approved (Exhibit I).

6. The full Committee on Admissions to the Bar met on January 28, 1972, and voted to recommend the approval of the applications. The Clerk of the Supreme Court of Ohio was notified of this action by letter dated February 9, 1972, from Mr. Twynham as Vice Chairman of the Admissions to the Bar Committee of the Columbus Bar Association (Exhibit J).

7. On March 3, 1972, the Supreme Court of Ohio referred the file to the Board of Commissioners on Character and Fitness for investigation and a report and recommendation to the Court (Exhibit K).

8. On March 30, 1972, the Board of Commissioners voted to hear this matter as a full Board and authorized the Chairman to conduct a prehearing conference for the purpose of scheduling the hearing and considering any matters which may be conducive to a fair and orderly hearing before the Board.

9. On April 4, 1972, a prehearing conference was held by the Chairman which was attended by Mr. Richard Addison, counsel for the applicant, and Mr. Twynham, Vice Chairman of the Committee on Admissions of the Columbus Bar Association.

10. The hearing was held before the full Board on May 8 and May 9, 1972.

11. The decision and recommendation of the Board was made on August 7, 1972.

III. STATEMENT OF THE CASE

The applicant entered the College of Law, Ohio State University, in September, 1968, and graduated from the College of Law in June, 1971, cum laude. While in law school he was awarded the Lett Civil Liberties Award, given to the third year law school student who demonstrated the most sincere interest in the field of civil liberties and was also awarded the American Jurisprudence Award for federal practice (R. 17-18).

The applicant graduated from Ohio State University with a Bachelor of Arts degree in March, 1968, summa cum laude and second in his class (R. 46). He was elected to Phi Beta Kappa while in undergraduate school (R. 17) and was given the President's Award For Academic Achievement and Scholarship (R. 18).

The applicant classifies himself as "bisexual" (R. 30), and while he is capable of having sexual relationships with members of the opposite sex, he is not emotionally capable of forming the type of a love relationship which is necessary for a successful marriage (R. 47; 93). In the sense that "homosexual" implies both an emotional and physical relationship with members of one's own sex, the

names omitted here

The definitions of "homosexual" as given by the applicant and the expert witnesses were essentially the same. The applicant defined a homosexual as "a person who has an orientation such that his preference in terms of erotic relationships with other people, by this meaning a relationship based upon love, dedication, concern for other people, would be directed at one's own sex" (R. 49). According to Dr. Harding, it is a term "used very broadly to classify a person who tends to enjoy the company of his own sex, rather than that of the opposite sex" (R. 200). Dr. Todd described homosexuality as "where, psychologically, emotionally and erotically a person prefers a love relationship with his own sex" (R. 178). The etiology or causation of such a preference appears uncertain. While in some cases the relationships with the parents seem very important, in other cases this does not seem to be a factor (R. 168). According to Dr. Harding, there are many theories as to the etiology of homosexuality and such theories are still in the developmental stage (R. 206). In the applicant's case, it was Dr. Harding's impression that the homosexual tendency developed as a result of a childhood relationship with his parents in which his mother tended to be a stronger figure than his father; a feeling of weakness and sense of not belonging with ~~others~~ *CORRECTION* and others in his school classes; and homosexual reactions to overcome feelings of weakness and inadequacy (R. 205-206).

Whatever the causes of homosexuality in general or in the specific case of the applicant, the existence of

such a condition does, in the opinion of the Board, have a bearing on the applicant's fitness to practice law. The applicant himself stated that "I definitely believe that sex has a bearing on good moral character" (R. 325). In at least three areas, an applicant's homosexual conduct could be relevant to the ultimate issue of his fitness to practice law, i.e., (1) the activities could be in violation of a statute of this state and show a deliberate disregard for the law; (2) the activities could be indicative or symptomatic of an underlying psychiatric condition which would directly affect the ability to practice law; and (3) the activities, because of the social stigma attached thereto, could subject the practicing attorney to unusually great pressures by threats of exposure and ridicule.

1. The Possibility of a Statutory Violation

Section 2905.44 of the Ohio Revised Code, the so-called sodomy statute, provides that:

"No person shall have carnal copulation with a beast, or in any opening of the body, except sexual parts, with another human being.

"Whoever violates this section is guilty of sodomy and shall be imprisoned not less than one nor more than twenty years."

There is no evidence that the specific acts prohibited by this statute have been performed by the applicant. He has, in fact, repeatedly denied any violation of that statute (R. 30, 31; 68; 74; 331) and has testified that the acts proscribed by the statute are repugnant to him (R. 68; 84).

The applicant, while recognizing certain historical events in which violation of existing laws would have appeared to have been morally proper, e.g., the Fugitive Slave Act and the laws of the Nazi regime in Germany, was convincing in his belief that "our democratic processes have enough built-in safeguards through the courts that people can go through legal channels to get meaningful change in society" (R. 327). In short, there is no indication that the applicant has violated Section 2905.44 of the Ohio Revised Code or that he has any attitude which would indicate, in general, a disrespect for the law.

2. The Possibility of an Underlying Psychiatric Disability

Homosexuality is often considered as a symptom of some underlying problem (R. 200; 219; 223-224), and may be the mechanism, for example, of dealing with some deep-seated anxiety state (R. 225-226). While this manifestation may be "outgrown" when it appears in children or adolescents or may disappear when circumstances change (R. 210), it also may become part of that person's character over a period of time (R. 225). In the opinion of Dr. Harding, a person (such as the applicant) who has practiced homosexuality for a period of five years is not likely to change (R. 210; 219). This, however, does not necessarily indicate that such persons are "unstable or sick" (R. 157). According to Dr. Todd, a homosexual orientation is not pathognomonic (diagnostic by itself) of any severe pathology. As with heterosexuals, a homosexual may possess varying degrees of immaturity, neuroses, borderline psychosis, etc. (R. 168). The real question, therefore, is the present degree of underlying emotional stability of the applicant.

It is undisputed that the applicant did have a degree of emotional instability in his early years. Dr. Harding's initial diagnosis when he examined the applicant in 1964 was a schizophrenic reaction which, in more current terminology, is defined as "an acute or chronic disorganization of a person's ego or himself; a psychotic type episode, where judgment is poor and the person can have feelings of unreality and act impulsively" (R. 199). The condition, as it relates to the applicant, would be classified today as "an adolescent adjustment reaction" (R. 204), occurring in a period of adolescent turmoil or rebellion (R. 209; 224). In the opinion of Dr. Harding, it was a transitory condition as contrasted with a chronic or permanent state (R. 215), and even during this period of time the applicant did not have a high degree of emotional instability (R. 209).

Dr. Todd, who evaluated the applicant for the purpose of the hearing, found that the applicant, after a period of turmoil and self-searching, had become a very mature and stable person, exhibiting characteristics of openness, genuineness and sincerity and possessing an ability to cope with conflict and stress (R. 155-156; 158-159). The applicant has a superior intellect (R. 161), with a genuine interest in and dedication to the legal profession (R. 56; 156) and a sense of altruism and sympathy in the field of civil rights (R. 56). He has good ego strength, is ambitious, and wants to be successful (R. 169-170). With regard to the applicant's admitted homosexual inclination, the doctor felt that the applicant's character, attitudes and values were more important than the details of his private sex life (R. 179). Dr. Todd would have no hesitation in seeking legal

help himself from the applicant if the applicant were admitted to the practice of law (R. 188).

The cumulative medical evidence clearly discloses the applicant's earlier emotional instability, but there is no substantial evidence that would indicate any immaturity or underlying instability at the present time.

3. The Possibility of Pressures Due to Social Stigma

It is recognized that there are widely varying degrees of what could be called homosexual conduct, ranging from aggressive behavior in terms of pursuit, dress, etc., to no physical contact but simply a preference for the company of one's own sex (R. 207; 211). There does not appear to be any uniformity in sexual activities between homosexuals, and stereotypes have no more validity in this group than in the heterosexuals. Nevertheless, it is recognized that there is a certain degree of "handicap and stigma and difficulty" associated with a homosexual in our society today (R. 187) and, therefore, it is believed that each case must be separately evaluated in terms of the possible effect on the applicant's ability to practice his profession and to properly fulfill his responsibilities to his clients.

According to the applicant, his sex activities form an insignificant and unimportant part of his life (R. 84). Such activities are conducted privately with consenting adults, and he has never engaged in solicitation with other males in public places (R. 58). Dr. Todd was of the opinion that the

applicant "did not participate in the public type of acts" (R. 181) and there is no evidence to the contrary. The applicant agreed that public solicitation would show a lack of good moral character (R. 326), the distinction being drawn as to whether one's sexual activity is offensive or injurious to other people (R. 326-327). He insists that there has been nothing destructive or harmful or in any way immoral about any sexual relations he has ever had (R. 325).

Similarly, Dean Kirby testified that, in his opinion, the mere fact of homosexuality alone would make no difference in the certification given by the Dean as to the applicant's good moral character, so long as that conduct did not manifest itself in some way that offended the law school community or created doubts that the applicant would be able to function as an attorney (R. 239). Practicing homosexuality privately with consenting adults would not affect the certification given by the Dean, inasmuch as no injury is done to another person or to society by such conduct (R. 245-246). Furthermore, the Dean does not believe that the applicant would be under any undue pressure or would be the potential subject of extortion attempts, in view of the fact that the applicant has already disclosed this personal characteristic in these proceedings and would have nothing to fear from any future threatened disclosure (R. 240). The applicant himself did not appear concerned over the possibility of being subjected to any such pressures, stating that, "I am proud of who I am and what I am and I am very discreet with what I am, but I have absolutely no fear of revealing this with anyone, if there is a purpose or reason behind it" (R. 90).

The applicant's present employer, while concerned that the applicant's personal life not become notorious, is of the belief that this is not likely to happen. The employer, aware of the applicant's sexual inclinations, has continued to employ him and will continue to employ him if the applicant is admitted to the practice of law (R. 249).

There is no real evidence that the applicant has engaged or is likely to engage in sexual activities of a non-private nature, and there is no proof that the applicant's private sex life has been or is likely to be offensive or injurious to other people. The risk of threatened exposure (which if not eliminated, has been certainly reduced by these proceedings) is not such a risk with this particular applicant as would impair his ability to properly perform the duties and responsibilities of a practicing attorney.

OTHER FACTORS CONSIDERED BY THE BOARD

In arriving at its conclusion and recommendation, the Board has also given weight to the following factors:

A. The Recommendations of the Columbus Bar Association Committees

The investigation of the applicant by the Columbus Bar Association's Committee on Admissions to the Bar was relatively thorough and conscientious, and a comprehensive report (Ex. A) was prepared. While there is some question as to whether the Committee did attempt to evaluate the applicant's mental and emotional stability in connection with his admitted

homosexual behavior (Cf., R. 115; 125), the local committee is to be commended for its investigation which disclosed this aspect of the case and for its handling of the case thereafter. Although one of the investigators did not recommend the applicant and chose to abstain in the voting (R. 145), both the subcommittee and the full committee voted, with no dissents, to recommend that the applications be approved (R. 109; 122).

B. The Recommendations of Others

A number of witnesses appeared in support of the applicant, and without minimizing the importance of the others, it is felt that the strong recommendations of Dean Kirby (R. 241), the applicant's present employer, Attorney Roger Day (R. 249), the applicant's former employer, Attorney Joan Zuber of the Ohio Department of Taxation (R. 278), and Attorney Earle Bridgwater, former President of the Ohio State Bar Association (R. 316-319) should be given weight.

C. The Intangible Factor

The ascertainment of one's character and fitness to practice law is not an exact process. Absent any accurate predictive test, there is always present a certain element of subjective judgment which enters into the ultimate conclusion. In the present case, the Board was favorably impressed with the applicant's obvious intelligence, his candor, and his strong desire to become an attorney. While such impressions would not, standing alone, justify the approval of the applications in question, it is only fair to state that

they were in part responsible for the final conclusion and recommendation of this Report.

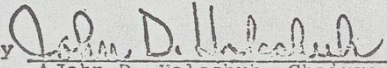
CONCLUSION AND RECOMMENDATION

A majority of the Board present and voting at the meeting held on August 7, 1972, conclude that the applicant is a person of good moral character and is fit to practice law and they recommend that his applications be approved by the Supreme Court of Ohio.

Respectfully submitted,

BOARD OF COMMISSIONERS ON
CHARACTER AND FITNESS

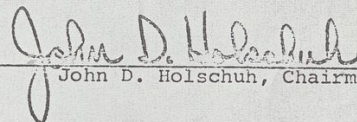
By


John D. Holschuh, Chairman

ADDENDUM

At the meeting of the Board held on August 7, 1972, Commissioners Holschuh, Lynn, Fultz, Barrett and Nathanson voted in favor of the above recommendation and Commissioners Jacobs, Chalfant and Cardinal voted in opposition to the recommendation.

At the meeting of the Board held on September 21, 1972. Commissioners Corley and Chesney indicated that they did not concur in the above recommendation and Commissioner Dobnicker indicated that, without the benefit of the Board's discussion, held on August 7, 1972, he did not wish to either concur in or disapprove the above recommendation.


John D. Holschuh, Chairman