

**DISTRICT OF COLUMBIA COMMISSION
ON JUDICIAL DISABILITIES AND TENURE**

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COMMISSION PUBLIC STATEMENT

On November 4, 2021, the District of Columbia Commission on Judicial Disabilities and Tenure (“the Commission”) filed with the District of Columbia Court of Appeals an “Uncontested Order of Involuntary Retirement” pursuant to D.C. Code §11-1526(b) regarding Hon. Steven N. Berk, now a former Associate Judge of the Superior Court of the District of Columbia (“the Commission’s Order”).¹ The Commission also requested to file additional materials under seal in support of the Commission’s Order (“Supplemental Materials”).

On the same day, the Chief Judge of the District of Columbia Court of Appeals issued an Order affirming the Commission’s Order and granting the Commission’s request to file under seal the Supplemental Materials.

Given the unusual circumstances of the Commission’s Order and broader issues involved, the Commission believes that the public interest is best served by a public announcement of its decision and an explanation of why the Judge was not removed pursuant to the Commission’s powers under D.C. Code §11-1526(a)(2). This statute authorizes the Commission to remove a judge from office under certain circumstances including, *inter alia*, conduct that is prejudicial to the administration of justice.²

I. Background

In May 2021, the Commission began receiving formal and informal complaints regarding Judge Berk. The concerns involved substantial delays and/or failures by the Judge to: (i) dispose of pending motions by written order; (ii) issue written orders following hearings; and (iii) address delays or respond to inquiries by litigants or counsel who sought information about the status of pending matters (collectively “the Concerns”).

In addition to potential violations of the Code of Judicial Conduct for the District of Columbia resulting from significant delays and failures to issue orders, the Concerns further raised questions of a medical or other issues that could be impacting the ability of the Judge to perform his judicial duties. Certain cases and reports also raised possible

¹ The Commission’s Order was dated November 1, 2021, but was filed several days later following mandatory statutory notifications.

² *See also Halleck v. Berliner*, 427 F. Supp. 1225, 1246 (D.D.C. 1977) (“the Commission may either order removal of the judge or, if it decides that under all the circumstances the judge should not be removed, it may either (a) dismiss the case without making its decision public unless the judge consents, or (b) if it determines that the public interest would be best served by a public announcement of the decision and an explanation of why the judge is not being removed, it may in the sound exercise of its discretion make such a public statement”).

cognitive, confusion, memory, focus, attention, speech, and other issues, as well as speculation over health issues.

At the time the Commission received complaints, Judge Berk was assigned to the Domestic Relations calendar in the Family Court of the Superior Court of the District of Columbia (hereafter “Superior Court”). Because of the seriousness of the Concerns, the nature of the Domestic Relations calendar, and the Commission’s duty to protect the public, the Commission initiated a preliminary review of matters brought to its attention and made additional inquiries.

After the Commission’s preliminary review and informal inquiries appeared to corroborate the Concerns, the Commission raised its Concerns and certain information gathered with Superior Court leadership.³ Thereafter, the Commission directed Judge Berk to appear before the full Commission on June 9, 2021.⁴

On June 8, the day before the Commission meeting, the Commission was informed of the following information:

- The Chief Judge and Judge Berk agreed that Judge Berk would take administrative leave pending a review of ongoing matters by the Commission.
- Superior Court leadership provided the Commission with requested data and statistical information regarding dispositions and pending matters before Judge Berk. The information confirmed wide-spread, extensive, and extraordinary delays, as well as an unusually large number of pending cases on Judge Berk’s calendar, as compared to other judges assigned to the Domestic Relations calendar.
- Judge Berk submitted to the Commission a one-paragraph letter from his physicians indicating their opinion that his medical condition was well-managed

³ By the end of March and into early April 2021, the Commission learned that Family Court leadership and the Chief Judge separately were made aware of concerns regarding delays on Judge Berk’s calendar, as well as the potential existence of medical issues, by members of the public and attorneys appearing before the Judge. From the latter part of March through May 2021, Family Court leadership worked with Judge Berk and his staff to understand and address the backlog. By approximately May 2021, Family Court leadership and the Chief Judge became aware of Judge Berk’s pre-existing medical condition. No disclosures were made to the Commission by Superior Court leadership or Judge Berk regarding the Judge’s pre-existing medical condition, calendar delays or the Concerns until after the Commission began its preliminary investigation and made specific inquiries to the Court.

⁴ Judge Berk was unavailable before that date due to a pre-arranged out-of-town vacation the week of May 30 to June 8.

and stating: “we strongly feel he is able to perform all functions of his job serving as a Judge.”⁵

On June 9, after the Commission shared with Judge Berk a general summary of the Concerns, the Commission took the following steps, all of which were agreed to by Judge Berk:

- The Commission required Judge Berk to undergo an independent medical evaluation by a health care professional designated by the Commission, as a condition of continued judicial service, pursuant to District of Columbia Municipal Regulations (DCMR), Title 28 §§ 2002.1-2002.5. The medical evaluation would be completed on an expedited basis.
- After completion of the independent medical evaluation, the Commission would require Judge Berk to reappear to discuss the Concerns, related information that it was gathering as part of its investigation, and any relevant medical information.

II. The Commission’s Findings Regarding Judge Berk

The Commission’s comprehensive and thorough investigation of the Concerns involved the collection of information from lawyers and litigants, judges, court staff, and the former Chief Judge and the current Chief Judge of the Superior Court. The Commission also reviewed and analyzed court reports, dockets, selected court filings and tapes of certain Court proceedings.

Through its investigation, the Commission found the following:

- Extensive and extraordinary delays of cases throughout Judge Berk’s calendar, well-beyond initial cases brought to its attention, including certain cases in which no written rulings were issued for periods as long as six (6) to nine (9) months.⁶ In some cases, hearings were not set at all, or they were simply continued without resolution for months at a time.
- The delays appear to have: (i) noticeably increased in the late spring and summer of 2020, the year Judge Berk assumed responsibility for his then-assigned Domestic Relations calendar, especially as the Court resumed hearings in a virtual environment due to the unprecedented COVID-19 pandemic; and (ii) significantly

⁵ The Commission did not rely on this letter but, at the time, it was the only medical evidence available until the Commission engaged its own independent expert.

⁶ Delays included cases in which trials and hearings were completed, as well as initial status hearings that were never scheduled. Judge Berk’s clearance rate was 54.4%, almost 30% lower than some other judges with similar caseloads on the Domestic Relations calendar and more than 50% lower than other judges whose clearance rates were higher.

worsened in or around late fall 2020 and into 2021 through the date Judge Berk agreed to administrative leave.

- The delays involved child custody, childcare, and child support, contested divorce cases, as well as other family-related matters. In some instances, the Commission noted actual or potential harm to litigants, including particularly vulnerable individuals such as children.
- Judge Berk did not disclose his medical condition to Court leadership until approximately May 2021, despite (i) having reason to believe that he was experiencing increased health issues as early as the Fall of 2020, and (ii) that certain issues may have occurred or been evident during court hearings. Further, Judge Berk did not request assistance nor notify Family Court leadership or the Chief Judge of the extent of the delays on his calendar.
- Following the independent medical evaluation, the Commission reviewed the results of the evaluation, as well as additional information provided by the Commission's independent health professional, Judge Berk's personal physician, Judge Berk, and his legal counsel.
- Additional findings included:
 - Awareness by Judge Berk that his medical condition was interfering with his duties as a judicial officer, yet he did not take sufficient action nor make sufficient disclosures to assure litigants were not unduly impacted, even after litigants brought concerns to his attention and to the attention of Court leadership.
 - Awareness by certain judges and staff within Superior Court, including certain judges in leadership who became aware of "red flags" that raised concerns regarding Judge Berk's performance. While some steps were taken, those steps were not sufficient to protect the public until after the Commission made inquiries and Judge Berk agreed to take a pause in his judicial responsibilities.
 - The presence of significant and unprecedented challenges due to the global coronavirus pandemic that created an unpredictable and unforeseeable situation where safeguards that might normally be present for in-person court proceedings were lacking or insufficient to detect problems as quickly in a largely virtual environment. These challenges led to a breakdown in the

Superior Court's internal processes that periodically assess judicial workloads and calendar activity.

- Failure of Judge Berk to attend both mandatory and recommended training for Family Court judges, as required by statute and Family Court leadership.

Based on all information presented, the Commission determined that:

- Judge Berk violated Rule 2.5 (Competence, Diligence, and Cooperation), Canon 2 of the Code of Judicial Conduct for the District of Columbia (2018), because of the extraordinary nature and extent of the delays on Judge Berk's calendar, as well as its related impact, harm, and cost to litigants.
- Judge Berk suffered from a mental or physical disability which is or is likely to become permanent and which prevents, or seriously interferes with, the proper performance of his judicial duties.

The Commission further acknowledged Judge Berk's full and complete cooperation with this matter, as well as his acknowledgement of:

- The Concerns raised and the actual and potential harm to the public caused by the extraordinary delays in matters over which he presided.
- Physical and cognitive complications that may have contributed to the delays.

Based on the totality of the circumstances and despite the seriousness of the Code of Judicial Conduct violations, the Commission determined that Judge Berk should be involuntarily retired pursuant to D.C. Code § 11-1526(b).

A judge of a District of Columbia court shall be involuntarily retired from office when (1) the Commission determines that the judge suffers from a mental or physical disability (including habitual intemperance) which is or is likely to become permanent and which prevents, or seriously interferes with, the proper performance of the judge's judicial duties, and (2) the Commission files in the District of Columbia Court of Appeals an order of involuntary retirement and the order is affirmed on appeal or the time within which an appeal may be taken from the order has expired.

III. Commission's Additional Public Statement

The Commission's decision to pursue involuntary retirement in lieu of removal in this matter was based on the totality of the circumstances and the specific challenges presented.

The Commission weighed the harm to the public and the Code of Judicial Conduct violations against Judge Berk's medical issues, the unusual challenges presented by the global pandemic, as well as Judge Berk's overall cooperation with the Commission's review and approach to an appropriate resolution.

However, despite the resolution with Judge Berk, the Commission found more needed to be done to assure these matters are addressed differently in the future. As such, the Commission determined an additional public statement was appropriate to serve the public interest and to assure the public that any systemic failures or weaknesses are addressed by the Superior Court.

The following steps have been taken:

- First, at the direction of the Court leadership and over a period of several months, extensive efforts were made to process and manage Judge Berk's backlogged calendar and to limit actual and potential harm to the public. One judge was assigned full time to Judge Berk's former calendar and was assisted by between six (6) to eight (8) other judges at any given time in making trial findings and judgments, resolving motions, holding hearings, and issuing orders.
- Second, the Commission made inquiries of Superior Court leadership regarding existing procedures for monitoring calendar backlogs, delays, and performance standards for all Divisions. While certain internal processes were temporarily paused during the pandemic, those processes have now been reinstated, and enhancements in training, oversight, and monitoring have been made. In addition, Superior Court leadership recently has adopted new measures to address possible weaknesses exposed by the Judge Berk matter for periodically monitoring judicial workloads and calendar management. The steps taken by Superior Court leadership are not only intended to address the situation uncovered with Judge Berk but also to improve efficiencies across the Superior Court as the court is resuming hearings and trials delayed by the pandemic. Court leadership will periodically update the Commission on progress made. The Commission will inquire about any significant backlogs, as needed.
- Third, the Commission has asked Court leadership to provide additional training and guidance on the importance of future reporting and transparency with the Commission in the event of medical situations that may require monitoring, accommodations of disabilities, or action to avoid unnecessary challenges or harm to the public. Such reporting and transparency is in the

public interest, which the Courts and the Commission are entrusted to serve. The Commission further notes that such reporting under certain circumstances may be required under the Code of Judicial Conduct. See Rule 2.14 (Disability and Impairment)⁷ and Rule 2.15 (Responding to Judicial and Lawyer Misconduct)⁸ of the Code of Judicial Conduct of the District of Columbia (2018 edition). Knowledge of these rules and their applicable commentary is important for all judges to understand and follow.

The Commission commends the public, including litigators and litigants, who brought their concerns regarding Judge Berk's conduct to the Commission's attention.

The Commission appreciates and is sensitive to challenges present when litigants must raise these issues, especially in pending cases where a judge's conduct calls into question the fairness of the process or fitness of the judge to make decisions or serve in his or her role. However, the Commission cannot serve its mission and protect the public interest without the kind of proactive disclosures, reporting, and cooperation here.

DISTRICT OF COLUMBIA COMMISSION ON
JUDICIAL DISABILITIES AND TENURE

By: Colleen Kollar-Kotelly
Hon. Colleen Kollar-Kotelly
Chairperson

December 29, 2021

⁷ Rule 2.14 states: "A judge having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program." The comments further define "appropriate action" to include reporting the judge or lawyer to the appropriate authority.

⁸ Rule 2.15 further requires that judges and lawyers, who are aware of conduct that calls into question the fitness of a judge or lawyer to serve, take appropriate action.