State of New York
Commission on Judicial Conduct

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

Determination

ANTHONY G. AUSTRIA, JR.,

a Judge of the City Court of Newburgh, Orange County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Helaine M. Barnett, Esq.
Honorable Evelyn L. Braun
E. Garrett Cleary, Esq.
Mary Ann Crotty
Lawrence S. Goldman, Esq.
Honorable Juanita Bing Newton
Honorable Eugene W. Salisbury
Barry C. Sample
John J. Sheehy, Esq.
Honorable William C. Thompson

APPEARANCES:

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

Jeffrey P. Tunick for Respondent

The respondent, Anthony G. Austria, Jr., a judge of the Newburgh City Court, Orange County, was served with a Formal Written Complaint dated October 14, 1994, alleging that, at the arraignments of a number of criminal defendants, he failed to advise defendants of their rights, elicited potentially

incriminating statements, made remarks that presumed guilt and made sarcastic and inappropriate statements. Respondent did not answer the Formal Written Complaint.

On January 9, 1995, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided by Judiciary Law §44(4), stipulating that the Commission make its determination based on the agreed upon facts, jointly recommending that respondent be censured and waiving further submissions and oral argument.

On January 12, 1995, the Commission approved the agreed statement and made the following determination.

As to Charge I of the Formal Written Complaint:

1. Respondent has been a judge of the Newburgh City Court since January 1990.

2. On December 2, 1993, respondent arraigned Ahmed A. Ahmed, Benjamin L. Booth, David M. Day, Michael T. Lawrence, Carlton O'Hearn, Pelham P. Pointer and Bruce J. Rode on misdemeanor charges of Patronizing A Prostitute, Fourth Degree.

3. Contrary to CPL 170.10(3) and 170.10(4), respondent failed to advise properly the defendants of their right to communicate free of charge, by letter or telephone, for the purpose of obtaining counsel and failed to accord the defendants the opportunity to exercise the right to counsel, the right to an adjournment to obtain counsel, the right to communicate for the

purpose of obtaining counsel and the right to have counsel assigned by the court if they were unable to afford a lawyer, and respondent failed to take affirmative steps to effectuate such rights.

4. Contrary to CPL 510.30(2), respondent:

a) announced in advance that bail would be set at $750 in each case;

b) set bail at that amount in all but one of the cases as a "deterrence" and a warning to potential defendants; and,

c) made his decision to set bail instead of releasing the defendants and his decision as to the amount of bail on factors other than the kind and degree of restriction necessary to secure the defendants' attendance in court.

5. Respondent engaged the defendants in conversation about their arrests and elicited potentially incriminating statements from them, in that:

a) he asked Mr. Day why he was in Newburgh and, when the defendant replied that he worked there, respondent asked what time he finishes work; and,

b) he asked Mr. O'Hearn why he was in Newburgh and, when the defendant replied that he was visiting his brother, respondent asked where the brother lived.

6. Respondent made statements that presumed the guilt of the defendants. In arraigning Mr. Ahmed, respondent announced:

> I see the police officers here. Get word out in the street, gentlemen, that we mean business. This is the third such sweep. Bail started out at $250, went up to $500 for the johns on the second sweep. This is the third sweep. Bail will be set at $750. The next time $1,000 and, if we continue on it, it will be one weekend to jail to two weekends in jail, and the community service will escalate proportionately. That is my position on this. There has to be a stop. There has got to be a stop in making Newburgh the sewer of Orange County and the Northeast....

7. Respondent made sarcastic and otherwise inappropriate remarks to and about the defendants, in that:

a) when Mr. Lawrence said that he lived on John Street in New Windsor, respondent said, "That is appropriate;"

b) respondent asked Mr. O'Hearn whether he was lost when he was arrested since he was far from the home of the brother that the defendant said that he was visiting;

c) respondent asked Mr. O'Hearn whether he had forgotten doing jail time on previous convictions;

d) when Mr. Pointer said that he was 73 years old and retired, respondent replied, "I am not going to comment on that one with a ten-foot pole;" and,

e) after ascertaining that Mr. Rode was married and that his wife was in the courtroom, respondent asked, "Do you want to come up and stand by your husband?"

As to Charge II of the Formal Written Complaint:

8. On December 2, 1993, respondent granted an interview to a reporter from the Middletown Times Herald-Record in which he commented on the merits of the seven cases cited above and made statements that presumed the defendants' guilt.

As to Charge III of the Formal Written Complaint:

9. On December 7, 1993, respondent disqualified himself from Ahmed, Day, Lawrence, O'Hearn, Pointer and Rodes after the attorney for one of the defendants moved for recusal "in light of the recent publicity" concerning the arrest and arraignment of the seven defendants.

10. In recusing himself, respondent made statements that presumed the guilt of the defendants and cast doubt on his ability to impartially decide similar cases in the future.

As to Charge IV of the Formal Written Complaint:

11. On April 21, 1994, respondent arraigned Benedicto M. Diaz on a charge of Possession Of An Open Container, a city code violation punishable by a term of incarceration.

12. Contrary to CPL 170.10(3) and 170.10(4), respondent:

a) failed to advise the defendant of his right to counsel, the right to an adjournment to obtain counsel, the right to communicate free of charge, by letter or telephone, for the

purpose of obtaining counsel and the right to have counsel assigned by the court if the defendant could not afford a lawyer; and,

b) failed to take affirmative action to accord the defendant the opportunity to exercise such rights, although he did ask a friend of the defendant who was acting as interpreter whether the defendant wished to speak with an attorney.

As to Charge V of the Formal Written Complaint:

13. On May 10, 1994, respondent arraigned Alberto L. Grieve on a charge of Loud Musical Device, a violation of the city code which is punishable by a term of incarceration.

14. Contrary to CPL 170.10(3) and 170.10(4), respondent:

a) failed to advise the defendant of his right to communicate free of charge, by letter or telephone, for the purpose of obtaining counsel and of his right to have counsel assigned by the court if he could not afford a lawyer; and,

b) failed to take affirmative action to accord the defendant the opportunity to exercise his rights to counsel, to an adjournment to obtain counsel, to communicate for the purpose of obtaining counsel and to have counsel assigned if necessary.

As to Charge VI of the Formal Written Complaint:

15. On July 19, 1994, respondent arraigned Kevin M. Halvorsen on a charge of Possession Of An Open Container, a violation of the city code punishable by a term of incarceration.

16. Contrary to CPL 170.10(3) and 170.10(4), respondent:

a) failed to advise the defendant of his right to communicate free of charge, by letter or telephone, for the purpose of obtaining counsel and his right to have counsel assigned by the court if he was unable to afford a lawyer; and,

b) failed to take affirmative action to accord the defendant the opportunity to exercise his rights to counsel, to an adjournment to obtain counsel, to communicate for the purpose of obtaining counsel and to have counsel assigned if necessary.

As to Charge VII of the Formal Written Complaint:

17. On August 9, 1994, respondent arraigned Angel Delgado, Jr., on a charge of Unnecessary and Unusual Noise, a city code violation punishable by a term of incarceration.

18. Contrary to CPL 170.10(3) and 170.10(4), respondent:

a) failed to advise the defendant of his right to communicate free of charge, by letter or telephone, for the purpose of obtaining counsel and his right to have counsel assigned by the court if he was unable to afford a lawyer; and,

b) failed to take affirmative action to accord the defendant the opportunity to exercise his rights to counsel, to an adjournment to obtain counsel, to communicate for the purpose of obtaining counsel and to have counsel assigned if necessary.

As to Charge VIII of the Formal Written Complaint:

19. On August 16, 1994, respondent arraigned Everett W. Cain on a charge of Unnecessary and Unusual Noise, a violation of the city code punishable by a term of incarceration.

20. Contrary to CPL 170.10(3) and 170.10(4), respondent:

a) failed to advise the defendant of his right to communicate free of charge, by letter or telephone, for the purpose of obtaining counsel and of his right to have counsel assigned by the court if he was unable to afford a lawyer; and,

b) failed to take affirmative action to accord the defendant the opportunity to exercise his rights to counsel, to an adjournment to obtain counsel, to communicate for the purpose of obtaining counsel and to have counsel assigned if necessary.

Supplemental finding:

21. Respondent has agreed to enroll in and complete the next available basic training program and, thereafter, the next available advanced training program offered by the Office of Court Administration for part-time judges.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2(a), 100.3(a)(1), 100.3(a)(2), 100.3(a)(3) and 100.3(a)(6), and Canons 1, 2A, 3A(1), 3A(2), 3A(3) and 3A(6) of the Code of Judicial Conduct. Charges I, II, III, IV, V, VI, VII and VIII of the Formal Written Complaint are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established.

A judge has an obligation at the arraignment of a criminal defendant to inform the defendant of his or her rights concerning counsel and to take steps to safeguard those rights. (CPL 170.10[3] and 170.10[4]; Matter of Winegard, 1992 Ann Report of NY Commn on Jud Conduct, at 70, 75). In a series of cases, respondent ignored this duty and, thus, violated his ethical obligation to be faithful to the law.

In the seven cases involving charges of Patronizing A Prostitute, respondent also abandoned his proper role as a neutral and detached magistrate (see, Matter of Wood, 1991 Ann Report of NY Commn on Jud Conduct, at 82, 86) by making remarks that were sarcastic, presumed guilt and elicited potentially incriminating statements from the defendants. He compounded this wrongdoing in a newspaper interview and a subsequent court proceeding, necessitating his recusal.

He also ignored the requirements of the law for setting bail (see, CPL 510.30[2]) and made it clear that he was using bail to punish the defendants for failing to respond to earlier police "sweeps" and to deter similar conduct in the future. The only legitimate concern in setting bail is "whether any bail or the amount of bail fixed was necessary to insure the defendant's future appearances in court;" punitive use of bail is improper. (Matter of Sardino v State Commission on Judicial Conduct, 58 NY2d 286, 289).

It was also wrong for respondent to speak to a newspaper reporter concerning the merits of pending cases (Rules Governing Judicial Conduct, 22 NYCRR 100.3[a][6]; Matter of Fromer, 1985 Ann Report of NY Commn on Jud Conduct, at 135, 137) and, especially, to make statements during that interview that presumed the defendants' guilt.

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

Mr. Berger, Ms. Barnett, Judge Braun, Mr. Cleary, Mr. Goldman, Judge Newton, Judge Salisbury, Mr. Sample, Mr. Sheehy and Judge Thompson concur.

Ms. Crotty was not present.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct, containing the findings of fact and conclusions of law required by Section 44, subdivision 7, of the Judiciary Law.

Dated: March 10, 1995

Henry T. Berger, Esq., Chair
New York State
Commission on Judicial Conduct