

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

BRUCE M. BARNES,

a Justice of the Newfane Town Court,
Niagara County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Honorable Frances A. Ciardullo, Vice Chair
Henry T. Berger, Esq.¹
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission

Muscato, DiMillo & Vona, LLP (By George V. C. Muscato) for
Respondent

¹ Mr. Berger's term ended on March 31, 2004. The terms of Ms. DiPirro and Mr. Emery commenced on April 1, 2004. The vote in this matter was taken on March 18, 2004.

The respondent, Bruce M. Barnes, a Justice of the Newfane Town Court, Niagara County, was served with a Formal Written Complaint dated November 12, 2003, containing two charges. Respondent filed an answer dated December 15, 2003.

On March 18, 2004, the Administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be censured and waiving further submissions and oral argument.

On March 18, 2004, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Newfane Town Court, Niagara County since January 1996. Respondent is not an attorney.

As to Charge I of the Formal Written Complaint:

2. On or about March 11, 2002, respondent issued an order at the request of Ronald Riel, a Florida resident, directing Clarissa T. Malcolm to turn over to Mr. Riel a horse, a horse trailer and a truck then in Ms. Malcolm's possession.

3. Respondent issued the order based upon the oral request of Mr. Riel made in respondent's court. Respondent was aware that Mr. Riel had not filed any statement of his cause of action in respondent's court and had not served any summons and complaint in connection with his claim against Ms. Malcolm.

4. During his discussion with Mr. Riel about the claim, respondent learned that Mr. Riel had spoken with the police about the claim. Before issuing the order, respondent spoke with the State Police and Niagara County Sheriff's Department who advised him that there was a dispute between Mr. Riel and Ms. Malcolm about ownership of the property.

5. Documents presented to respondent by Mr. Riel indicated that the trailer had been purchased for \$3,850 in February 2000, that the horse was a pure bred, registered Arabian that had been purchased for \$1,200 in May 2001 and that the truck was a 1991 Ford F350 pickup.

6. Respondent was aware that no accusatory instrument had been filed in his court in connection with Mr. Riel's claim against Ms. Malcolm. Respondent was not notified that any accusatory instrument had been filed in any other court in connection with Mr. Riel's claim.

7. Respondent was aware that no civil action or small claims action had been filed against Ms. Malcolm in his court.

8. Respondent was not presented with any judgment issued to Mr. Riel against Ms. Malcolm concerning the property he claimed, or any other property.

9. Respondent had no personal jurisdiction over Ms. Malcolm at the time he issued the order against her.

10. Before issuing the order, respondent attempted, unsuccessfully, to contact Ms. Malcolm.

11. Within a few hours after issuing the order on Mr. Riel's behalf against Ms. Malcolm, respondent was contacted by a Niagara County Sheriff's Deputy who advised him that Ms. Malcolm objected to the order.

12. Respondent told the deputy to direct Ms. Malcolm to appear in respondent's court that evening to discuss her possession of the property listed in the order.

13. Respondent acknowledges that he had no criminal or civil personal jurisdiction over Ms. Malcolm at the time that he directed her to appear in his court.

14. Ms. Malcolm appeared before respondent later that day along with Mr. Riel. Ms. Malcolm stated that respondent had no jurisdiction since no claim had been filed. Ms. Malcolm also indicated that the value of the property at issue exceeded \$10,000. Respondent realized that he did not have jurisdiction over the matter and vacated the order.

As to Charge II of the Formal Written Complaint:

15. On or about June 11, 2001, respondent contacted the Town of Newfane Dog Control Officer to advise him that the dog owned by respondent's neighbor, Susan Winkley, had been running loose in respondent's yard. Respondent asked the Dog Control Officer to speak with Ms. Winkley about the matter.

16. On or about June 11, 2001, the Dog Control Officer issued Ms. Winkley tickets charging her with Allowing Dog To Run Loose, based on his discussion with respondent, and Unlicensed Dog.

17. On or about June 20, 2001, Ms. Winkley appeared before respondent in response to the tickets. Respondent advised Ms. Winkley of the charges. Respondent observed in the papers that he was listed as the complainant on the Dog Running Loose charge. Respondent did not disclose this to Ms. Winkley.

18. Respondent dismissed the Dog Running Loose charge because the accusatory instrument filed in connection with the charge was unsigned. The defendant pleaded guilty to the Unlicensed Dog charge and respondent fined her \$25.

19. Respondent acknowledges that as a consequence of his discussions with the Dog Control Officer about Ms. Winkley's dog, he should not have presided over her matters.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(B), 100.2(C), 100.3(B)(1), 100.3(B)(6), 100.3(E)(1), 100.3(E)(1)(a)(ii) and 100.3(E)(1)(b)(iii) of the Rules Governing Judicial Conduct and should be disciplined for cause, pursuant to Article 6, Section 22 of the New York State Constitution and Section 44(1) of the Judiciary Law. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established.

Respondent abused his judicial power by issuing an order directing the surrender of disputed property based on an *ex parte* request, notwithstanding that no proceeding was pending before him. Thereafter, when a sheriff's deputy advised him that

a party to the dispute had objected to the order, respondent committed further misconduct by directing that the party appear in court to discuss the matter although no action had been filed. Respondent's conduct was not only contrary to law, but compromised his impartiality and conveyed the appearance of favoritism. *See Matter of Colf*, 1987 Ann Rep 71 (Comm'n on Jud Conduct, Feb 26, 1986) (judge issued an order threatening contempt based on an *ex parte* communication, although no action had been filed). It is a fundamental principle of law that every person with a legal interest in a proceeding must be accorded the right to be heard under the law (*see* Section 100.3[B][6] of the Rules Governing Judicial Conduct).

As a judge for six years, respondent should have recognized that he lacked jurisdiction in the matter. The fact that respondent promptly vacated the order after being reminded of the law mitigates but scarcely excuses his misconduct. As a judge, respondent is required to maintain professional competence in the law (Section 100.3[B][1] of the Rules).

It was also improper for respondent to dispose of a code violation that arose out of his own complaint. Although he dismissed the Dog Running Loose charge which listed him as the complainant, respondent accepted a guilty plea on a related charge and fined the defendant. Respondent should have recognized the impropriety of presiding over a matter in which he himself was the complainant. A judge's disqualification is required in a proceeding in which the judge's impartiality might be reasonably be questioned, including instances where the judge has personal knowledge of disputed

evidentiary facts or is a material witness in the matter (Sections 100.3[E][1][a][ii] and 100.3[E][1][b][iii] of the Rules); *see, e.g., Matter of Tracy*, 2002 Ann Rep 167 (Commn on Jud Conduct, Nov 19, 2001) (judge failed to disqualify himself in cases involving youths who had vandalized the judge's home); *Matter of Ross*, 1990 Ann Rep 153 (Commn on Jud Conduct, Sept 29, 1989) (judge failed to disqualify himself in numerous cases in which his impartiality could reasonably be questioned, including a case in which he was the complaining witness).

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

Mr. Berger, Judge Ciardullo, Mr. Coffey, Mr. Felder, Mr. Goldman, Ms. Hernandez, Judge Luciano, Judge Peters, Mr. Pope and Judge Ruderman concur.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: May 18, 2004

A handwritten signature in black ink, appearing to read "Lawrence S. Goldman", is written over a horizontal line.

Lawrence S. Goldman, Esq., Chair
New York State
Commission on Judicial Conduct