

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

FRANK R. BAYGER,

a Justice of the Supreme Court,
Eighth Judicial District (Erie
County).

Determination

THE COMMISSION:

Mrs. Gene Robb, Chairwoman
Honorable Fritz W. Alexander, II
John J. Bower, Esq.
David Bromberg, Esq.
E. Garrett Cleary, Esq.
Dolores DelBello
Victor A. Kovner, Esq.
Honorable William J. Ostrowski
Honorable Isaac Rubin
Honorable Felice K. Shea
Carroll L. Wainwright, Jr., Esq.

APPEARANCES:

Gerald Stern (John J. Postel, Of
Counsel) for the Commission

Albrect, Maguire, Heffern & Gregg
(Charles H. Dougherty, Of Counsel)
for Respondent

The respondent, Frank R. Bayger, a justice of the Supreme
Court, Eighth Judicial District (Erie County), was served with
a Formal Written Complaint dated November 25, 1981, alleging
that he disparaged a litigant in a matter before him and

that he engaged in numerous business activities prohibited by the Rules Governing Judicial Conduct. Respondent filed an answer dated January 28, 1982.

By order dated March 2, 1982, the Commission designated the Honorable Francis Bergan as referee to hear and report proposed findings of fact and conclusions of law. The hearing was held on May 13 and 14, 1982, and the referee filed his report with the Commission on September 28, 1982.

By motion dated November 3, 1982, the administrator of the Commission moved to confirm in part and disaffirm in part the report of the referee, and for a determination that respondent be censured. By cross-motion dated November 18, 1982, respondent opposed the administrator's motion and moved to confirm the referee's report and for dismissal of the Formal Written Complaint. The Commission heard oral argument on the motions on November 30, 1982, at which respondent appeared with counsel, thereafter considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. On January 20, 1981, the case of Wecksler v. Kubiak and Whelan came before respondent in Special Term of Supreme Court, Erie County. Robert E. Whalen, as City Comptroller of Buffalo, was a nominal party to the proceeding, which involved a disability claim.

2. Prior to January 20, 1981, respondent had two experiences involving Mr. Whelan. First, in 1975, respondent presided over an election law matter in which he ruled in Mr. Whelan's favor. Sometime thereafter, in a public encounter at a restaurant, respondent and Mr. Whelan had an angry verbal confrontation in which, among other things, Mr. Whelan made a denigrating ethnic remark about Polish people.

3. On January 20, 1981, respondent decided to recuse himself from presiding over the Wecksler v. Kubiak and Whelan case. Respondent instructed his court deputy, Joseph D. Pirrone, to go into a public hallway outside the courtroom and request members of the press to come into the courtroom. Mr. Pirrone informed two newspaper reporters of respondent's request. The reporters went to the courtroom, where attorneys, court personnel and spectators were also present.

4. Respondent announced in open court that he was disqualifying himself in the Wecksler v. Kubiak and Whalen case because Robert E. Whelan was a litigant. Respondent disparaged Mr. Whelan as a "so-called public servant" and an "anti-Polish American." Respondent announced that he would urge the administrative judge to assign the case to a judge who is not of Polish extraction.

5. At the time of his actions on January 20, 1981, respondent knew Mr. Whalen was a declared candidate for Erie County Surrogate. Respondent knew or should have known that his dispar-

aging comments about Mr. Whelan would be widely reported in the Buffalo area. In no other case in which he disqualified himself had respondent called members of the press into his courtroom for the announcement.

6. Respondent's actions and comments were based upon his intense dislike of Mr. Whelan.

As to Charge II of the Formal Written Complaint:

7. On October 7, 1971, respondent entered into a general partnership with Dimitri Tzetzso, Donald Hayes, John Conroy, Mary Chur, Oliver Reed and Robert Brooks, to form Capital Leasing Company. Respondent was aware that the agreement which he signed on that date in entering the partnership was for a general and not a limited partnership.

8. Capital Leasing Company was a business organized for profit which leased equipment, including dental equipment, office equipment, office furniture and automobiles. As a general partner, respondent had rights concerning the operation of the business, including: the right to prevent the company or its partners from borrowing or lending money on behalf of the partnership; selling, assigning or pledging any partnership interest; or executing any lease, mortgage or security agreement.

9. Respondent was an active participant in the company. As a general partner he had a role equal to that of the other general partners in the management and conduct of the business.

Throughout the life of the Capital Leasing Company, respondent exercised the rights and obligations of a general partner and participated in management, as noted in the examples below:

(a) by participating in the decision to buy the share of retiring partner Mary Chur and continue the company's operation in February 1975, by discussing with the other general partners the amount to offer and by signing the formalized agreement to do so;

(b) by participating in the decision to buy the share of retiring partner Oliver Reed and continue the company's operation in July 1975, by discussing with the other general partners the amount to offer and by formalizing and signing the agreement to do so;

(c) by participating in the decision to buy the share of deceased partner Robert Brooks and continue the company's operation in December 1977, by discussing with the other general partners the amount to offer and by formalizing and signing the agreement to do so;

(d) by attending dinner meetings with the other general partners once or twice a year to discuss company matters;

(e) by being consulted periodically about certain partnership transactions; and

(f) by signing documents related to the conduct of the business.

10. Respondent sold his interest in Capital Leasing Company in January 1982.

As to Charge III of the Formal Written Complaint:

11. On August 1, 1975, respondent entered into a general partnership with Dimitri Tzetzso, Donald Hayes and John Conroy, to form Willink Development Company. Respondent was aware that the agreement which he signed on that date in entering the partnership was for a general and not a limited partnership.

12. Willink Development Company was a business organized for profit which leased property. As a general partner, respondent had rights concerning the operation of the business, including: the right to prevent the company or its partners from borrowing or lending money on behalf of the partnership; selling, assigning or pledging any partnership interest; or executing any lease, mortgage or security agreement.

13. Respondent was an active participant in the company. As a general partner he had a role equal to that of the other general partners in the management and conduct of the business. Throughout his tenure as a general partner in Willink Development Company, respondent exercised the rights and obligations of a general partner and participated in management.

14. Respondent sold his interest in Willink Development Company in January 1982 and presently holds a mortgage as a result of the sale.

As to Charge IV of the Formal Written Complaint:

15. On August 1, 1979, respondent filed a certificate that he was conducting business under the name of Arlington Properties, a business organized for profit.

16. On August 23, 1979, respondent formed 19 Arlington Place Corporation, a business organized for profit, of which he is president. Respondent formed the corporation in order to secure a \$225,000 commercial loan from Western New York Savings Bank. His earlier application to the same bank for a personal loan in that amount had been denied.

17. On August 28, 1979, 19 Arlington Place Corporation entered into a \$225,000 mortgage agreement with Western New York Savings Bank for purchase of a tract of land in Buffalo from Burke Rental Corporation. On that same date, 19 Arlington Place Corporation entered into a \$25,000 mortgage agreement with Burke Rental Corporation. On that same date, 19 Arlington Place Corporation transferred the tract of land to Arlington Properties.

18. Respondent is an active and managing participant in Arlington Properties. While his employee, Wendy Rothfuss, performs certain duties delegated to her by respondent with respect to Arlington Properties, such as collecting rents, respondent makes all management decisions and without exception signs all company checks. He alone reviews the company books and finances. He alone approves major repairs and determines which company will be contracted to make the repairs.

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), 100.3(a)(3), and 100.5(c)(2) of the Rules Governing Judicial Conduct (formerly Sections 33.1, 33.2[a], 33.3[b], 33.3[a][3] and 33.5[c][2]) and Canons 1, 2A and 2B of the Code of Judicial Conduct. Charges I through IV of the Formal Written Complaint are sustained, and respondent's misconduct is established. The affirmative defenses asserted by respondent are not sustained.

Respondent's conduct in the course of announcing his disqualification in the case involving Buffalo City Comptroller Robert E. Whalen was improper. Rather than recuse himself in a decorous manner, respondent disparaged Mr. Whalen in open court, having deliberately invited the press into the courtroom for the specific purpose of hearing his remarks. Respondent knew Mr. Whalen was a declared candidate for judicial office at the time, and he knew or should have known that his disparaging remarks would be widely publicized. Respondent allowed his personal animosity toward Mr. Whalen to affect his judicial conduct and judgment.

Respondent's participation in four businesses organized for profit was also improper. The Rules Governing Judicial Conduct (Section 100.5[c][2]) specifically prohibit the very type of business activity in which respondent engaged. Respondent's

business activities cannot be excused by the assertion that they did not interfere with the performance of his duties as a judge. The prohibitions in the Rules are straightforward and unequivocal and make no exception for business activities which do not interfere with the judicial function.

By reason of the foregoing, the Commission determines that respondent should be admonished.

Mrs. Robb, Judge Alexander, Mr. Bower, Mr. Bromberg, Mr. Cleary, Mrs. DelBello, Mr. Kovner, Judge Shea and Mr. Wainwright concur.

Judge Ostrowski did not participate.

Judge Rubin 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: January 18, 1983


Lillemor T. Robb, Chairwoman
New York State Commission on
Judicial Conduct.