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

PAUL G. FEINMAN,

a Judge of the Civil Court of the City of New York, New York County.

Determination

THE COMMISSION:

Henry T. Berger, Esq., Chair
Jeremy Ann Brown, C.A.S.A.C.
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel W. Joy
Honorable Daniel F. Luciano
Honorable Frederick M. Marshall
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman
Honorable Eugene W. Salisbury

APPEARANCES:

Gerald Stern (Alan W. Friedberg, Of Counsel) for the Commission

Emery Cuti Brinckerhoff & Abady, P.C. (By Richard D. Emery, John R. Cuti and David H. Gans) for Respondent

The respondent, Paul G. Feinman, a judge of the Civil Court of the City of New York, New York County, was served with a Formal Written Complaint dated April 21, 1999, alleging two charges of misconduct. Respondent filed an answer dated May 10, 1999.

By motion dated August 9, 1999, respondent moved for summary determination and dismissal of the charges. The administrator of the Commission cross moved, by motion dated September 1, 1999, for summary determination and a finding that respondent had engaged in judicial misconduct. Respondent replied to the cross motion in papers dated September 7, 1999. By Decision and Order dated September 10, 1999, the Commission denied respondent's motion and the cross motion in all respects.

On October 20, 1999, the administrator, 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 admonished and waiving further submissions and oral argument.

On October 28, 1999, 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 New York City Civil Court since January 1, 1997, and is currently assigned to the Criminal Court.

2. On February 25, 1999, respondent was presiding in AP 7, a large calendar part of the Criminal Court. More than 100 defendants were scheduled to appear that day. Respondent typically instructs court personnel to warn those present of rules of

decorum, including that beepers and cell phones are to be turned to the "off" or "vibrate" positions. No one recalls whether such warnings were given on February 25, 1999. During the morning, on two separate occasions, persons in the spectator section were directed by court officers to leave the courtroom for talking loudly and disrupting the proceedings.

3. William Brown, who was charged with Criminal Mischief, 4th Degree, was one of the defendants scheduled to appear before respondent that day. About 15 minutes before the lunch recess, Mr. Brown's pager sounded loudly. A court officer directed that he shut it off. It continued to ring, and the officer ordered Mr. Brown to "take it outside."

4. Respondent then stated, "No, put him on the bench," referring to an area of the courtroom where some defendants who are not at large are seated while they wait to have their cases called. Although respondent did not expressly order that Mr. Brown be handcuffed, he knew that defendants seated "on the bench" are routinely handcuffed by court officers.

5. Initially, respondent intended to have Mr. Brown seated "on the bench" for a few minutes so that respondent could finish the case that he was handling at the time. He intended to then admonish Mr. Brown that beepers and cell phones should not be used while court is in session. Respondent's intention was to then have Mr. Brown returned to the spectator section of the courtroom.

6. However, as Mr. Brown was escorted into the "well" of the courtroom, respondent observed that Mr. Brown appeared to be talking in an agitated fashion to one of the officers, Sgt. Glen Damato; respondent could not hear what Mr. Brown was saying.

7. Mr. Brown was seated "on the bench" and placed in handcuffs.

8. After finishing the case before him, respondent conferred with Sergeant Damato, who told him that Mr. Brown had cursed the sergeant. The sergeant suggested in general terms that Mr. Brown had also cursed the court.

9. Respondent then changed his mind about how to handle the matter. He decided to have Mr. Brown detained while he considered the possibility of holding him in contempt of court.

10. Respondent decided to defer further action until after lunch and, at 1:00 P.M., called a recess.

11. After he had left the bench but was still in the courtroom, respondent was approached by two lawyers of the Legal Aid Society, which was representing Mr. Brown. They asked him to release Mr. Brown during the lunch recess. Mr. Brown also asked whether respondent intended to keep him detained during lunch. Respondent refused to release Mr. Brown and advised the Legal Aid lawyers that he would handle the matter after lunch.

12. At no time did respondent explain to Mr. Brown or Legal Aid attorneys why the defendant was being detained.

13. During the lunch break, respondent concluded that, because he had not directly heard any contumacious statements, he did not have a sufficient basis to hold Mr. Brown in summary contempt. He considered the possibility of holding plenary contempt proceedings but decided to resolve the matter by releasing Mr. Brown.

14. Court resumed at about 2:20 P.M. Respondent handled two other matters. The Legal Aid attorney assigned to Mr. Brown was not present, but respondent was advised that one of the Legal Aid attorneys who had approached him before lunch would handle the case. The case was called at approximately 2:30 P.M. Mr. Brown was released from the handcuffs, and respondent ruled on pending pretrial matters.

15. The lawyer who had undertaken Mr. Brown's representation attempted to make a record about Mr. Brown's detention during the lunch break. Respondent interrupted him and did not allow him to address the issue.

16. Although respondent did make a record regarding his initial reasons for summoning Mr. Brown from the audience and placing him "on the bench", he did not explain his reasons for having prolonged the detention. At no time did respondent hold Mr. Brown in contempt or order him to desist from any behavior.

17. Mr. Brown was held in handcuffs for approximately one hour and 40 minutes.

18. Respondent has expressed regret for his errors in handling the matter and has pledged not to repeat them.

As to Charge II of the Formal Written Complaint:

19. The charge is not sustained and is therefore dismissed.

Supplementary finding:

20. Respondent's reputation among defense attorneys, prosecutors, judges and court staff is that he is a conscientious, intelligent judge who is impartial, diligent and knowledgeable.

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(B)(1) and 100.3(B)(3). Charge I of the Formal Written Complaint is sustained insofar as it is consistent with the findings herein, and respondent's misconduct is established. Charge II is dismissed.

It was an abuse of his judicial power for respondent to detain a defendant for one hour and 40 minutes without any basis for doing so and without affording him any legal process.

As a consequence of respondent's order, Mr. Brown was handcuffed and deprived of his liberty based only on respondent's observation of his demeanor. He was

given no opportunity to speak and was not even told why he was being held. Even after Legal Aid attorneys appealed to respondent to release him, respondent did not appreciate that he had no legitimate power to order him held during the lunch break.

A judge has broad discretion in the exercise of the contempt power. (See, Judiciary Law §§ 750, 751). But the law allows a judge to summarily punish only contempt "committed in the immediate view and presence of the court...." (Judiciary Law § 751[1]). Respondent acknowledges that he did not hear what Mr. Brown was saying to the court officer and that his decision to hold him through the lunch hour was based only on the officer's unsworn allegations that the defendant had cursed him and the court -- allegations that Mr. Brown had had no opportunity to contest. Thus, as respondent himself conceded, respondent could not have reasonably concluded from his own observation, that Mr. Brown's behavior was "[d]isorderly, contemptuous, or insolent...." (See, Judiciary Law § 750[A][1]).

Even had respondent personally witnessed the contempt, he would have been required to warn Mr. Brown that his conduct was deemed contumacious and to give him an opportunity to desist. (See, Rules of the Appellate Division, First Department, 22 NYCRR 604.2[c]). He would have been obligated to afford Mr. Brown "a reasonable opportunity to make a statement in his defense or in extenuation of his conduct." (See, Rules of the Appellate Division, First Department, 22 NYCRR 604.2[a][3]).

Having not personally witnessed the alleged contempt, respondent was required to give notice and a hearing before he could impose a punishment. (See, Judiciary Law § 751[1]; Rules of the Appellate Division, First Department, 22 NYCRR 604.2[b]).

Instead, respondent ignored proper legal procedure; he merely ordered Mr. Brown placed "on the bench", which he knew would result in his being handcuffed, and he detained him there throughout the lunch break and afterward. By improperly depriving Mr. Brown of his liberty, even temporarily, respondent deviated from the confines of the law that he is sworn to uphold. (See similarly, Matter of Sharpe, 1984 Ann Report of NY Commn on Jud Conduct, at 134, 139).

Respondent exacerbated the situation by failing at any point to state his reason for holding Mr. Brown, thereby creating the appearance that he was punishing him because his beeper had sounded in the courtroom.

In mitigation, it must be considered that respondent soon recognized that he had no authority to hold Mr. Brown and released him. Respondent has been cooperative and contrite in this proceeding. (See, Matter of Holmes, 1998 Ann Report of NY Commn on Jud Conduct, at 139, 140). Furthermore, he has achieved an admirable reputation in his short tenure on the bench. (See, Matter of Gassman, 1987 Ann Report of NY Commn on Jud Conduct, at 89, 91; Matter of Doolittle, 1986 Ann Report of NY Commn on Jud Conduct, at 87, 89).

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

Mr. Berger, Ms. Brown, Mr. Coffey, Mr. Goldman, Judge Joy, Mr. Pope, Judge Ruderman and Judge Salisbury concur.

Ms. Hernandez, Judge Luciano and Judge Marshall were 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: December 21, 1999

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