

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

DEBRA M. McCALL,

a Justice of the Cherry Valley Town
Court and Acting Justice of the Cherry
Valley Village Court, Otsego County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Mary Holt Moore
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the Commission

Honorable Debra M. McCall, *pro se*

The respondent, Debra M. McCall, a Justice of the Cherry Valley Town
Court and Acting Justice of the Cherry Valley Village Court, Otsego County, was served

with a Formal Written Complaint dated October 4, 2002, containing two charges.

Respondent filed an answer dated November 16, 2002.

On March 12, 2003, the Administrator of the Commission and respondent entered into an Agreed Statement of Facts, agreeing that the Commission make its determination based upon the referee's findings of fact and conclusions of law, jointly recommending that respondent be censured and waiving further submissions and oral argument.

On March 13, 2003, the Commission approved the Agreed Statement of Facts and made the following determination.

1. Respondent has been a Justice of the Cherry Valley Town Court and an Acting Justice of the Cherry Valley Village Court since 1998. She is not an attorney. Respondent has attended and successfully completed all required training sessions for judges.

As to Charge I of the Formal Written Complaint:

2. On or about September 12, 2001, the small claims case of *Thompson v. Ludder* was scheduled to commence at 7:00 PM, and the parties had been notified to be present at 7:00 PM. The claimant, Mr. Thompson, arrived early, and respondent, believing that the case had been noticed for 6:30 PM, commenced the hearing 20 to 30 minutes earlier than it had been noticed for, and prior to the arrival of the defendant.

3. Respondent heard evidence from the claimant in *Thompson v. Ludder* prior to the arrival of the defendant. When the defendant arrived on time, she showed respondent the notice to appear, and respondent proceeded with the balance of the hearing.

4. On September 12, 2001, at the conclusion of the hearing, respondent mistakenly awarded the claimant double the court costs and awarded attorneys' fees of \$50, notwithstanding that the claimant had not been represented by counsel at the hearing. Respondent's judgment was for \$65 more than the amount claimed in the notice of claim. Respondent believed that the claimant was entitled to recover attorneys' fees because the claimant stated that he had incurred attorneys' fees in attempting to collect from the defendant.

As to Charge II of the Formal Written Complaint:

5. Respondent failed to cooperate with the Commission in that respondent failed to respond to three letters from the Commission, dated, respectively, March 25, April 12, and April 24, 2002, concerning respondent's handling of *Thompson v. Ludder*, and failed to appear to give testimony on June 3, 2002, as requested by the Commission in a letter dated May 20, 2002.

6. Respondent ultimately appeared before the Commission on June 19, 2002, and explained that she opened the letter of March 25 and did not respond to it because of the stress of personal matters. The letter of March 25 was a follow-up letter to a letter of response respondent had previously submitted to the Commission concerning

her handling of *Thompson v. Ludder*. Respondent explained in her testimony that she did not respond to the subsequent letters because she had not opened them, although she knew that the envelopes contained letters from the Commission. Respondent asserts that the letters from the Commission were the only official mail that she failed to open, and she recognizes that it was improper to have neglected to open the correspondence and respond.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.3(B)(1), 100.3(B)(6) and 100.3(C)(1) of the Rules Governing Judicial Conduct¹ and engaged in misconduct in office and conduct prejudicial to the administration of justice, as defined in Article 6, Section 22a of the New York State Constitution and Section 44, subdivision 1 of the Judiciary Law. Charges I and II of the Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established.

Respondent's mishandling of a small claims case violated her obligation to perform her judicial duties diligently and fairly. A judge is required to accord to all interested parties a full right to be heard under the law (Section 100.3[B][6] of the Rules Governing Judicial Conduct). By commencing the hearing in *Thompson v. Ludder* in the

¹ Sections 100.1 and 100.2(A) of the Rules were also charged in the Formal Written Complaint. By order of the U.S. District Court in *Spargo v. NYS Comm'n on Jud Conduct*, ___ F Supp2d ___, 2003 WL 355467 (NDNY Feb 20, 2003), the Commission has been barred from enforcing those provisions.

defendant's absence before the scheduled time and by failing to re-start the hearing when the defendant arrived and advised her of the error, respondent deprived the defendant of a full opportunity to be heard. Since respondent had already heard evidence from the claimant before the defendant arrived at the scheduled time, respondent should have re-started the proceeding. Respondent further conveyed the appearance of partiality towards the claimant by a series of errors, including mistakenly awarding the claimant double the court costs and awarding attorneys' fees, notwithstanding that the claimant had not been represented by counsel at the hearing.

Respondent committed serious misconduct by her failure to cooperate with the Commission during its investigation of the matter. Pursuant to Section 7000.3, subdivisions (c) and (e), of the Commission's Operating Procedures and Rules (22 NYCRR §7000.3[c] and [e]), the Commission is authorized to "request a written response from the judge who is the subject of the complaint" and to take a judge's testimony during an investigation. Respondent's failure to open mail which she recognized was from the Commission is unacceptable and obviously does not excuse her failure to respond to the letters and her failure to appear for testimony. Respondent's lack of cooperation demonstrates a lack of respect for the process, created by Constitution and statute, under which the Commission is empowered to investigate the conduct of judges. *Matter of Cooley*, 53 NY2d 64 (1981). In mitigation, respondent ultimately appeared for testimony as requested and has acknowledged that her conduct was improper.

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

Mr. Berger, Mr. Coffey, Mr. Goldman, Ms. Hernandez, Ms. Moore, Judge Peters, Mr. Pope and Judge Ruderman concur.

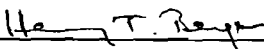
Judge Ciardullo votes to reject the Agreed Statement of Facts on the basis that paragraph 4 does not constitute misconduct, but concurs with the disposition of censure.

Judge Luciano was not present.

CERTIFICATION

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

Dated: March 28, 2003



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

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CONCURRING OPINION
BY JUDGE CIARDULLO


Once again I am compelled to comment upon the distinction between errors of law and judicial misconduct. *See, Matter of Cox*, 2003 Annual Report ___ (Dec 30, 2002). Here, respondent stands accused of “mistakenly” awarding a small claims claimant \$65 more than the amount originally claimed, plus double court costs and attorneys fees. The record reflects that respondent awarded attorneys fees upon evidence that the claimant had consulted with an attorney, notwithstanding that the attorney did not appear at the hearing.

I do not view these mistakes as judicial misconduct. They are not egregious violations of basic fundamental rights (*Matter of LaBelle*, 79 NY2d 350 [1992]), nor do they demonstrate respondent’s general unfitness to perform her duties. Moreover, I do not find these errors so grievous as to suggest total disregard of legal principles, bias, incompetence or insensitivity to the proper role of a judge (*e.g., Matter of Reeves*, 63 NY2d 105, 110-11 [1984]). Rather, I believe respondent’s errors resulted

from her ignorance of certain legal restrictions surrounding an award of money judgments. This should be addressed through additional educational efforts rather than by disciplinary action.

On the other hand, respondent deprived the defendant of his fundamental and basic due process rights by hearing the case prior to the scheduled time and in his absence. This constitutes judicial misconduct. Standing alone, respondent's action would not warrant a censure. However, respondent's intentional and repeated refusal to cooperate with the Commission's inquiry justifies the imposition of a harsh sanction. Therefore, I concur in the result.

Dated: March 28, 2003


Honorables Frances A. Ciardullo, Member
New York State
Commission on Judicial Conduct