

**State of New York**  
**Commission on Judicial Conduct**

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

**Determination**

JOSEPHINE D. TYLER,

a Justice of the Caneadea Town  
Court, Allegany County.

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THE COMMISSION:

Mrs. Gene Robb, Chairwoman  
Honorable Myriam J. Altman  
Henry T. Berger, Esq.  
John J. Bower, Esq.  
Honorable Carmen Beauchamp Ciparick  
E. Garrett Cleary, Esq.  
Dolores DelBello  
Victor A. Kovner, Esq.  
Honorable William J. Ostrowski\*  
Honorable Isaac Rubin  
John J. Sheehy, Esq.

APPEARANCES:

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

Lipsitz, Green, Fahringer, Roll, Schuller & James  
(By Herbert L. Greenman) for Respondent

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\* Judge Ostrowski's term expired on March 31, 1989. The vote in this matter was on March 30, 1989. The Honorable Eugene W. Salisbury was appointed to the Commission for a term beginning April 1, 1989.

The respondent, Josephine D. Tyler, a justice of the Caneadea Town Court, Allegany County, was served with a Formal Written Complaint dated September 23, 1987, alleging, inter alia, that she presided over a case in which her husband was the complaining witness and that she struck a youth in the face with a telephone book. Respondent filed an answer dated December 3, 1987. A Supplemental Formal Written Complaint was served on January 27, 1988, and respondent filed a supplemental answer dated February 19, 1988.

By order dated December 21, 1987, the Commission designated Alexander C. Cordes, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on May 16, 17 and 18 and June 1, 1988, and the referee filed his report with the Commission on December 13, 1988.

By motion dated January 20, 1989, the administrator of the Commission moved to confirm in part and disaffirm in part the referee's report, to adopt additional findings and conclusions and for a determination that respondent be removed from office. Respondent opposed the motion by cross motion on March 15, 1989. The administrator filed a reply on March 23, 1989. Oral argument was waived.

On March 30, 1989, the Commission considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. Respondent has been a justice of the Caneadea Town Court since 1978.

2. On May 12, 1986, respondent's husband, Richard M. Tyler, told her that a bank had refused to honor for insufficient funds a check written to Mr. Tyler's business by David G. Smyers. Mr. Tyler showed respondent Mr. Smyers' check and a certificate of protest by the bank.

3. Respondent advised her husband to file a complaint with the State Police and provided him with instructions by the State Police for handling bad checks.

4. Trooper Thomas McDonnell came to Mr. Tyler's business the same day and took a complaint from him accusing Mr. Smyers of Issuing A Bad Check. Respondent subscribed the complaint, listing her judicial title after her name.

5. Respondent then signed a warrant for Mr. Smyers' arrest, returnable in her court, and wrote a recommended bail of \$5,000 cash or \$10,000 property bond at the bottom of the warrant in the event that Mr. Smyers was arraigned before another judge. Respondent told Trooper McDonnell that the matter was a "priority."

6. Trooper McDonnell arrested Mr. Smyers on May 13, 1986, and brought him before respondent for arraignment.

7. Respondent arraigned Mr. Smyers and set bail at \$5,000 cash or \$10,000 property bond. In determining the amount

of bail, respondent considered information that she had heard outside of court from a third party that Mr. Smyers had plans to leave the area for Canada. She also considered information that she had obtained outside of court that Mr. Smyers owed a total of approximately \$5,000 in debts to four persons, including her husband.

8. Respondent indicated that she intended to disqualify herself from further action in the case but did not do so at the arraignment.

9. Mr. Smyers filled out an application for assigned counsel and was sent to jail in lieu of bail.

10. Respondent did not mail until May 16, 1986, the application for assigned counsel to the assistant public defender who regularly appeared in her court, and took no other steps to notify him that Mr. Smyers was in jail and desired assigned counsel.

11. From jail, Mr. Smyers contacted the public defender's office, and on May 16, 1986, the assistant public defender, Jerry Fowler, made a motion before Allegany County Court Judge Wayne A. Feeman, Jr., for a reduction in bail.

12. On May 15 or 16, 1986, the district attorney, James E. Euken, called respondent by telephone to discuss the bail reduction application. Respondent told Mr. Euken that the amount of the check was sizable enough to have a significant impact on her husband's business. Mr. Euken advised her that he

felt that she should have disqualified herself from the case. Respondent replied that she had taken steps to do so.

13. While the motion and both counsel were before him, Judge Feeman spoke to respondent by telephone concerning bail. Respondent told Judge Feeman that Mr. Smyers was a criminal and was adamant that he should stay in jail.

14. Judge Feeman also told respondent that she should not preside over the matter because her husband was the complaining witness. On May 19, 1986, he sent respondent a letter, indicating the proper procedures for transferring a case and drawing her attention to the ethical standards concerning disqualification.

15. Judge Feeman reduced Mr. Smyers' bail to \$2,500.

16. After the hearing before Judge Feeman, Mr. Euken again spoke to respondent by telephone and advised her to disqualify herself. He also wrote to her concerning the issue.

17. Respondent took no steps to advise the County Court that she was disqualified from the Smyers case and that the matter would have to be transferred to another court since she is the only judge in her court.

18. Mr. Euken obtained an order from County Court Judge Peter R. Sprague transferring the Smyers case to another court, where it was dismissed on May 19, 1986, after Mr. Smyers had spent one week in jail.

As to Charge II of the Formal Written Complaint:

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

As to Charge III of the Formal Written Complaint:

20. On June 25, 1984, respondent arraigned David J. Nagel on a charge of Harassment filed by Matilda Westfall.

21. Respondent issued a temporary protective order in favor of Ms. Westfall, ordering Mr. Nagel to pay child support "at \$25.00 per load of wood at least \$25.00 per week and try for the provision of \$50.00 per wk. / Amended by Family Court."

22. No support order had been entered in Family Court against Mr. Nagel.

As to Charge IV of the Formal Written Complaint:

23. The charge is not sustained and is, therefore, dismissed.

As to Charge V of the Formal Written Complaint:

24. On April 27, 1985, respondent wrote a letter on her judicial stationery to Pomeroy Brothers concerning a dispute over the cost of work performed by Pomeroy Brothers on an apartment building which respondent managed on behalf of her father.

25. Respondent wrote the letter even though she had been advised by the town attorney in 1983 that the use of court stationery for private purposes could be viewed as improper.

As to Charge VI of the Formal Written Complaint:

26. In July 1980, respondent learned that an obscenity that referred to her had been written on a table outside her courtroom. She concluded that it had been written by Steven J. Fish, who had appeared before her on traffic charges at the previous court session.

27. Respondent summoned Mr. Fish, who was then 19 years old, to the court. She repeatedly and loudly accused him of writing the obscenity. She was angry and upset. He denied it and refused respondent's command that he clean the table.

28. Mr. Fish suggested that respondent question two other men who were in court the same evening. Respondent consulted a telephone book and called the two men.

29. She then again accused Mr. Fish of writing the obscenity. He used an obscenity, and she struck him in the face with the phone book.

As to Charge I of the Supplemental Formal Written Complaint:

30. On June 23, 1983, respondent sent a letter to tenants of an apartment building which she managed on behalf of her father. The letter advised them that the building's water

source was contaminated and that they should obtain water from another source or vacate the premises. The letter was mailed in an envelope with respondent's court as the return address.

31. On August 9, 1983, respondent mailed a letter on the same subject to Caneadea Town Attorney David T. Pullen. The letter was also mailed in an envelope bearing the return address of respondent's court.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2, 100.3(a)(1), 100.3(a)(3), 100.3(a)(4) and 100.3(c)(1) of the Rules Governing Judicial Conduct and Canons 1, 2, 3A(1), 3A(3), 3A(4) and 3C(1) of the Code of Judicial Conduct. Charges I, III, V and VI of the Formal Written Complaint and Charge I of the Supplemental Formal Written Complaint are sustained, and respondent's misconduct is established. Charges II and IV of the Formal Written Complaint are dismissed.

Public confidence in the judicial system requires a neutral and impartial magistrate at all stages of a legal proceeding. Matter of Sardino v. State Commission on Judicial Conduct, 58 NY2d 286, 290-91 (1983). "The handling by a judge of a case to which a family member is a party creates an appearance of impropriety as well as a very obvious potential



for abuse, and threatens to undermine the public's confidence in the impartiality of the judiciary." Matter of Wait v. State Commission on Judicial Conduct, 67 NY2d 15, 18 (1986). It is equally inappropriate for a judge to sign an arrest warrant in a case in which the complaining witness is a relative. Matter of Sims v. State Commission on Judicial Conduct, 61 NY2d 349 (1984).

Respondent should have had no part in the Smyers matter since her husband was the complaining witness. Section 100.3(c)(1) of the Rules Governing Judicial Conduct clearly requires her disqualification in a case in which she has personal knowledge of disputed evidentiary facts and in which her spouse has an interest that could be substantially affected by the outcome of the proceeding, even though she is the sole judge of the court. See Matter of Merkel, 1989 Annual Report 111 (Com. on Jud. Conduct, May 19, 1988).

It was also improper for her to rely in setting bail on extra-judicial information concerning debts owed by the defendant. See Section 510.30 of the Criminal Procedure Law; Matter of Mullen, 1987 Annual Report 129 (Com. on Jud. Conduct, May 22, 1986). By permitting the defendant to remain in jail for three days before taking affirmative action to effectuate his right to assigned counsel, respondent violated Section

170.10(4)(a) of the Criminal Procedure Law. See Matter of Earl, unreported (Com. on Jud. Conduct, Mar. 31, 1989). These errors of law in connection with a case in which she had a personal interest significantly contributed to the appearance of partiality. See Matter of Zapf, 1988 Annual Report 251 (Com. on Jud. Conduct, July 24, 1987).

In addition, respondent knew or should have known that a town justice does not have authority to impose child support on the defendant in a family offense matter. In doing so in the Nagel case, respondent violated her ethical duty to be faithful to the law and maintain professional competence in it. Section 100.3(a)(1) of the Rules Governing Judicial Conduct.

Respondent's physical abuse of Mr. Fish was highly inappropriate. See Matter of Cerbone v. State Commission on Judicial Conduct, 61 NY2d 93 (1984); Matter of Kuehnel v. State Commission on Judicial Conduct, 49 NY2d 465 (1980).

Finally, by using her court letterhead in three instances involving personal disputes, she lent the prestige of her judicial office to advance her private interests. See Section 100.2(c) of the Rules Governing Judicial Conduct.

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

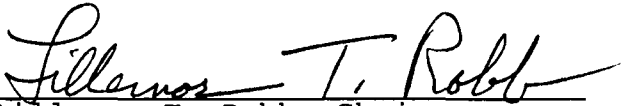
Mrs. Robb, Judge Altman, Mr. Berger, Mr. Bower, Judge Ciparick, Mr. Cleary, Mrs. DelBello, Mr. Kovner, Judge Ostrowski and Mr. Sheehy concur.

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: May 1, 1989

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