

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

KENNETH VAN BUSKIRK,

a Justice of the Whitehall Town Court,
Washington County.

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 Isaac Rubin
Honorable Eugene W. Salisbury
John J. Sheehy, Esq.

APPEARANCES:

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

Honorable Kenneth Van Buskirk, pro se

The respondent, Kenneth Van Buskirk, a justice of the
Whitehall Town Court and the Whitehall Village Court, Washington
County, was served with a Formal Written Complaint dated March
24, 1988, alleging improper conduct in connection with two

cases. Respondent filed an undated answer which was received on April 21, 1988.

By order dated April 26, 1988, the Commission designated Michael G. Breslin, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on June 9 and 15, 1988, and the referee filed his report with the Commission on February 7, 1989.

By motion dated March 20, 1989, the administrator of the Commission moved to confirm the referee's report, to adopt additional findings and conclusions and for a determination that respondent be admonished. Respondent did not file any papers in response thereto. Oral argument was waived.

On April 25, 1989, the Commission considered the record of the proceeding and made the following findings of fact.

Preliminary findings:

1. Respondent has been a justice of the Whitehall Town Court since January 1, 1986. He also serves by appointment as acting justice of the Whitehall Village Court.

2. Respondent has known the parents of Girard Marcino for 40 years. Respondent's wife and Ms. Marcino grew up together. About eight years ago, the Marcinos bought a house across the street from respondent's home, and respondent has known Girard Marcino since that time. Respondent and his wife

and Mr. Marcino's parents socialize together, and respondent occasionally does plumbing on the Marcinos' house as a favor.

3. Respondent has known John Dalton since he was a child. He feels that Mr. Dalton has trouble getting along with people.

4. Mr. Dalton and Girard Marcino were once friends but have been bitter enemies for about six years. Their disputes have resulted in continual litigation in respondent's and other courts.

5. During his campaign in 1985 for town justice, respondent told voters that previous judges had failed to deal effectively with Mr. Dalton, whom respondent described as "running the court."

As to paragraphs 4(a) and 4(b) of Charge I of the Formal Written Complaint:

6. On September 11, 1986, Mr. Dalton signed a complaint of Harassment against Mr. Marcino in the Warren County Town of Queensbury. Based on the complaint, Queensbury Town Justice J. David Little subsequently signed an arrest warrant for Mr. Marcino.

7. On September 13, 1986, Warren County Deputy Sheriff Shane Ross called Whitehall Village Police Officer Richard LaChapelle and asked him to arrest Mr. Marcino on the warrant.

8. Officer LaChapelle brought Mr. Marcino to the village police station and notified respondent, who also came to the police station.

9. Officer LaChapelle called Deputy Ross by telephone and told him that respondent wanted to speak with him.

10. In a raised voice, respondent asked Deputy Ross the basis of the complaint, whether there were witnesses to the incident and whether the sheriff's department took complaints without having corroborating witnesses. Respondent said that there was an "on-going situation" between Mr. Dalton and Mr. Marcino that was "plugging up" the court.

11. Respondent told Deputy Ross that he had imposed a condition on Mr. Dalton not to harass Mr. Marcino. Respondent also said that previous charges brought at Lake George by Mr. Dalton against Mr. Marcino had been dismissed.

12. Respondent said that he did not feel that an arrest should be made, and he asked Deputy Ross for the name of the judge who had issued the warrant.

13. Deputy Ross gave respondent Judge Little's name but suggested that he, rather than respondent, should contact Judge Little.

14. After his conversation with respondent, Deputy Ross contacted Judge Little and relayed respondent's information. Judge Little told the deputy to destroy the

complaint by Mr. Dalton and the arrest warrant and not to arrest Mr. Marcino.

15. While respondent was talking to Deputy Ross, Mr. Dalton came to the police station wearing a neck brace and said that he wanted to report an accident caused by Mr. Marcino. Respondent told Officer LaChapelle to inspect Mr. Dalton's car for damage. The officer did so and reported to respondent that there was no damage.

16. Respondent then told Mr. Dalton to leave the police station. He asked Mr. Marcino whether there had been an accident. Mr. Marcino said that he was not present at the time and place at which Mr. Dalton had claimed the accident had occurred.

17. Based on the conversation with Mr. Marcino, respondent concluded that Mr. Dalton was harassing Mr. Marcino by attempting to file a false complaint against him, and respondent issued a warrant for Mr. Dalton's arrest on a charge which he listed as "Violation of Conditional Discharge."

18. No accusatory instrument was before respondent as the basis for the warrant. He testified in this proceeding that the warrant was based on a complaint that respondent had handled on August 12, 1986, against Mr. Dalton by Lee Ann Williams. In that case, respondent had granted an adjournment in contemplation of dismissal and, on a court form labelled "Order and Conditions of Conditional Discharge," he had listed certain conditions, including, "Do not harass by phone or personally

people you have been harassing." Respondent testified that he considered Mr. Dalton's attempt to file an accident report against Mr. Marcino as a violation of this condition.

19. Mr. Dalton was arrested and brought before respondent for arraignment. Mr. Dalton repeatedly asked why he had been arrested. Respondent told him that he had been "harassing people." At the arraignment, respondent told Mr. Dalton:

...You have been running roughshod. You've made a mockery of this court. You and some other people. The mockery is ceasing. You are not going, not going to disturb people in this community. There are other people that you have disturbed here. I'm not bringing them up now because the charges might come up later on. You know who I am talking about. There are so many that you don't, that you can't keep track....

You have caused nothing but problems. Now you violated this ACD that I granted you....

20. Respondent set bail at \$250 and adjourned the matter.

21. On September 16, 1986, Mr. Dalton pled guilty and paid a \$225 fine. Respondent's docket lists the offense as "Violation of ACD" and lists Mr. Marcino as the complainant. He reported the matter to the state comptroller as a conviction for Harassment.

As to paragraph 4(c) of Charge I of the Formal Written Complaint:

22. In April 1987, an incident involving Mr. Marcino occurred in the driveway of Mr. Dalton's grandmother's home. Thereafter, respondent learned that Mr. Dalton blamed Mr. Marcino for his grandmother's death and also blamed respondent for contributing to her death. Respondent decided and informed the district attorney's office that he could not be impartial and that he should disqualify himself from any cases involving Mr. Dalton.

23. Nevertheless, on July 31, 1987, respondent issued a criminal summons to Mr. Dalton on a charge of Criminal Mischief, Fourth Degree, brought by Mr. Marcino.

As to paragraph 4(d) of Charge I of the Formal Written Complaint:

24. Mr. Dalton's complaint against Mr. Marcino for Trespass and Harassment stemming from the April incident at Mr. Dalton's grandmother's home and Mr. Marcino's Criminal Mischief complaint against Mr. Dalton were both scheduled before respondent on August 21, 1987.

25. Before Mr. Marcino's arraignment and before Mr. Dalton's attorney had arrived, respondent allowed the prosecutor, Assistant District Attorney Robert Winn, to examine

Mr. Dalton under oath in an attempt to impugn his credibility as the complaining witness against Mr. Marcino.

26. Both cases were subsequently transferred to another court.

As to Charge II of the Formal Written Complaint:

27. In March 1987, Donald J. Williams, Sr., then the Village of Whitehall dog warden, prepared an appearance ticket charging Joseph L. Galone with a violation of the village leash law on the complaint of David B. Gebo, who was a part-time village police officer. Mr. Williams mistakenly made the ticket returnable for March 25, 1987, although court was not scheduled to be in session on that date.

28. On March 24, 1987, Mr. Williams served the appearance ticket on Mr. Galone's wife, Antoinette Lynn Galone. He told Ms. Galone that her husband should appear in court that evening.

29. Mr. Williams then delivered a copy of the ticket to respondent's home and told him that he had just served the ticket on Ms. Galone.

30. Mr. Galone was out of town. His wife called respondent by telephone, explained that she had just received the appearance ticket and that she had been unable to reach her husband. She asked for an adjournment. Respondent denied the

request and insisted that Mr. Galone was to appear in court that evening.

31. Ms. Galone eventually contacted her husband, who appeared in court that evening before respondent. Several times Mr. Galone demanded a copy of the accusatory instrument. Respondent repeatedly and angrily refused to provide it. Eventually, Mr. Galone was given a copy by Officer Gebo, the complaining witness, who was also in court.

32. Respondent then granted Mr. Galone an adjournment to obtain counsel. There was a discussion among respondent, Mr. Galone and Officer Gebo as to the adjourned date. Mr. Galone testified that the three agreed to a date a few weeks later in April. Respondent and Officer Gebo testified that the matter was adjourned to March 31, 1987. Respondent kept no record of the date.

33. On March 25, 1987, Mr. Galone lodged a complaint concerning a dog owned by Robert Rice. Mr. Williams made the matter returnable before respondent on April 7, 1987.

34. On March 31, 1987, Mr. Galone went to respondent's court, believing that his complaint against Mr. Rice was to be heard. He waited from about 6:40 P.M. until about 7:30 P.M. for the case to be heard. Respondent saw Mr. Galone and his mother, Marion, in court.

35. Mr. Galone concluded that the Rice case would not be heard and left the courthouse.

36. Shortly thereafter, respondent issued a warrant for Mr. Galone's arrest for failure to appear on the leash law violation in which he was the defendant. Respondent testified that Mr. Galone had been scheduled to appear as a defendant and that he considered his leaving the court to be "contempt of court."

37. Officer Gebo, the complaining witness against Mr. Galone, executed the warrant and returned Mr. Galone to respondent's court.

38. Mr. Galone asked why he had been arrested and demanded to see the arrest warrant.

39. Respondent refused. He told Mr. Galone not to make a big deal out of the matter. He stated that Mr. Galone's dogs had been running loose and that he was guilty of violating a village ordinance.

40. Respondent insisted that a trial be conducted immediately. Without swearing him as a witness, respondent asked Officer Gebo whether Mr. Galone's dogs were unleashed. He replied that they had been.

41. Respondent pronounced Mr. Galone guilty and imposed a \$20 fine.

42. Respondent failed to keep a docket or other suitable records of the Galone case, in violation of Sections 107, 2019 and 2019-a of the Uniform Justice Court Act.

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) (2), 100.3(a) (3), 100.3(a) (4), 100.3(b) (1) and 100.3(c) (1) (i) of the Rules Governing Judicial Conduct and Canons 1, 2, 3A(1), 3A(2), 3A(3), 3A(4), 3B(1) and 3C(1) (a) of the Code of Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established.

Attempting to find solutions to difficult community problems involving contentious parties, respondent abandoned his proper role as a neutral and detached magistrate in the Dalton-Marcino disputes and in the Galone case. By his informality and inattention to proper legal procedure, respondent repeatedly conveyed the appearance of partiality and denied parties their right to be fully heard.

In view of respondent's close relationship to the Marcinos, his impartiality might reasonably be questioned in any matter in which they are involved, and he should have disqualified himself in all disputes involving Mr. Dalton and Girard Marcino. See Section 100.3(c) (1) (i) of the Rules Governing Judicial Conduct. It was particularly improper for him to entertain Mr. Marcino's complaint and issue a criminal summons to Mr. Dalton in July 1987, after respondent had

determined that he could no longer fairly judge Mr. Dalton's cases because of the accusations made against him.

Regardless of his relationship with the family, it was improper for respondent to intervene on Mr. Marcino's behalf to have the warrant issued by Judge Little withdrawn. See Matter of LoRusso, 1988 Annual Report 195 (Com. on Jud. Conduct, June 29, 1987); Matter of Montaneli, 1983 Annual Report 145 (Com. on Jud. Conduct, Sept. 10, 1982). Respondent's statements to Deputy Ross were clearly designed to favor Mr. Marcino and demonstrated bias against Mr. Dalton.

Compounding this pattern of partial conduct, respondent then ordered Mr. Dalton arrested for attempting to file a complaint against Mr. Marcino. Although he had no accusatory instrument before him, respondent signed a warrant on the spurious ground that Mr. Dalton had violated a condition of the disposition of another case not involving Mr. Marcino. His information was based solely on unsworn, ex parte conversations with Mr. Marcino and a police officer.

In the Galone matter, respondent again demonstrated bias and denied the defendant his right to be heard. No matter how minor the charge, a defendant has the right to contest the allegations against him and to be fully heard by a fair and impartial judge. Matter of Sardino v. State Commission on Judicial Conduct, 58 NY2d 286, 290-91 (1983); Matter of Edwards, 1987 Annual Report 85 (Com. on Jud. Conduct, Nov. 21, 1986);

Matter of Wilkins, 1986 Annual Report 173 (Com. on Jud. Conduct, Dec. 24, 1985).

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

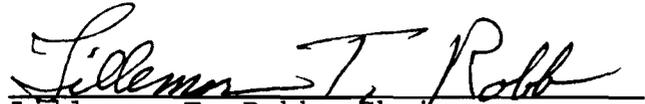
Mrs. Robb, Judge Altman, Mr. Berger, Mr. Cleary, Mrs. DelBello, Mr. Kovner, Judge Rubin, Judge Salisbury and Mr. Sheehy concur.

Mr. Bower and Judge Ciparick 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: May 23, 1989


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