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

DONALD E. WHALEN,

a Justice of the Ticonderoga Town Court, Essex 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 (Albert B. Lawrence, Of Counsel) for the Commission

Gerald J. Lawson for Respondent

The respondent, Donald E. Whalen, a part-time justice of the Ticonderoga Town Court, Essex County, was served with a Formal Written Complaint dated March 15, 1982, alleging that he presided over 37 matters in May 1981 in which his employer was a party. Respondent filed an answer dated April 5, 1982.

By order dated April 22, 1982, the Commission designated Michael Whiteman, Esq., as referee to hear and report proposed findings of fact and conclusions of law. The hearing was held on June 1 and 2, 1982, and the referee filed his report with the Commission on September 27, 1982.

By motion dated October 27, 1982, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be removed from office. Respondent cross-moved on November 16, 1982, to disaffirm the referee's report and for dismissal of the Formal Written Complaint. The Commission heard oral argument on the motion on November 29, 1982, at which respondent appeared by counsel, thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a town justice of Ticonderoga since July 1977. He is not a lawyer. He serves as town justice part-time.

2. Respondent is also an x-ray technician at the Moses Ludington Hospital in Ticonderoga, a position he has held since 1966.

3. Respondent has successfully completed the judicial training courses required of all non-lawyer town and village justices by the state Constitution. He is familiar with the Rules Governing Judicial Conduct and the annual reports of this Commission.

4. In May 1981, the controller of the Moses Ludington Hospital filed 37 claims with the clerk of the Ticonderoga Town Court. The hospital was not represented by an attorney.

5. On May 11, 1981, respondent signed 37 summonses with respect to the claims filed by the Moses Ludington Hospital. All 37 summonses were made returnable before respondent on June 4, 1981, based on respondent's instructions to the court clerk.

6. On May 19, 1981, Francis Barnes was served with a summons signed by respondent regarding the claim of the Moses Ludington Hospital that he owed a balance of $130.13. On that date, Mr. Barnes telephoned respondent and advised him that the hospital's bill had been paid. Mr. Barnes was aware at the time that respondent was employed by the hospital. (The evidence is not sufficient to establish whether the payment took place before or after the telephone call.) Respondent did not inform Mr. Barnes that he was employed by the hospital at any time during the telephone call or at any other time in the proceeding. Respondent did not disqualify or offer to disqualify himself from the case.

7. During the telephone conversation on May 19, 1981, Mr. Barnes told respondent that his participation in the case created a conflict of interest.

8. On June 4, 1981, Mr. Barnes appeared before respondent pursuant to the summons. The Barnes case was the first one heard by respondent on that date. Mr. Barnes offered evidence

that the hospital bill had been paid. Respondent thereupon dismissed the claim. Prior to leaving the courtroom, Mr. Barnes again stated that respondent had a conflict of interest in the case.

9. On June 4, 1981, Earl Gould, Jr., appeared in court pursuant to a summons signed by respondent on a claim by Moses Ludington Hospital that Mr. Gould owed a balance of $482.36. When Mr. Gould first saw respondent in court, he recognized him as the hospital's x-ray technician and thought he was appearing for the hospital. He did not know respondent was a judge and he was confused as to whether the ensuing events were indeed a court proceeding. Respondent never offered to disqualify himself or transfer the case to another judge. Mr. Gould paid the hospital bill in full, as respondent noted on his docket in this case.

10. On May 12, 1981, a summons signed by respondent was served on Sarah Wescott regarding the claim of Moses Ludington Hospital that she owed a balance of $674.89. Sometime thereafter, Mrs. Wescott's husband, Ellis Wescott, spoke with respondent at the hospital and told him the bill would be paid. Respondent did not advise Mr. Wescott at any time during that conversation or thereafter that his employment by the hospital might create a conflict of interest for him as the presiding judge. Respondent did not at any time disqualify or offer to disqualify himself from the case. On June 10, 1981, respondent entered judgment in favor of the hospital for $674.89 plus costs.

11. On June 4, 1981, Ernest Fleury appeared in court pursuant to a summons signed by respondent on a claim by Moses Ludington Hospital that he owed a balance of $519.37. When his case was called by respondent, Mr. Fleury discussed the matter first with respondent and thereafter with the hospital's controller, who was present. Respondent did not at any time disqualify or offer to disqualify himself from the case. On June 10, 1981, respondent entered judgment in favor of the hospital for $519.37 plus costs.

12. On June 4, 1981, Rose St. Andrews appeared in court pursuant to a summons signed by respondent on a claim by Moses Ludington Hospital that she owed a balance of $200.87. Ms. St. Andrews advised respondent that Medicaid was to have paid her bill. Respondent said he would inquire into the matter. Although Ms. St. Andrews was aware that respondent was employed by the hospital, respondent did not at any time mention that fact, nor did he disqualify or offer to disqualify himself from the case. On June 10, 1981, respondent entered judgment in favor of the hospital for $200.87 plus costs.

13. On June 4, 1981, Harry Gould, Sr., appeared in court pursuant to a summons signed by respondent on a claim by Moses Ludington Hospital that he owed a balance of $410.87. Mr. Gould advised respondent that the bill from the hospital was inconsistent with an earlier statement sent by the hospital. Respondent said he would inquire into the matter. Although Mr. Gould was aware

that respondent was employed by the hospital, respondent did not at any time mention that fact, nor did he disqualify or offer to disqualify himself from the case. On June 10, 1981, respondent entered judgment in favor of the hospital for $410.87 plus costs.

14. On June 4, 1981, Ida Mae Bazan appeared in court pursuant to a summons signed by respondent and issued to her husband, Raymond, on a claim by Moses Ludington Hospital that Mr. Bazan owed a balance of $111.28. When she appeared on behalf of her husband, Mrs. Bazan paid the claimed amount to the hospital's controller, who was present. Respondent advised Mrs. Bazan that he was employed by the hospital, but he at no time disqualified or offered to disqualify himself from the case, which he marked on his docket as paid in full.

15. On June 4, 1981, Benjamin O'Dell appeared in court pursuant to a summons signed by respondent on a claim by Moses Ludington Hospital that he owed a balance of $2,420.37. In response to questioning by respondent, Mr. O'Dell stated that he owed the amount claimed and would pay it. Respondent told Mr. O'Dell that he was employed by the hospital, which Mr. O'Dell already knew. Respondent did not at any time disqualify or offer to disqualify himself from the case. On June 10, 1981, respondent entered judgment in favor of the hospital for $2,420.37 plus costs.

16. On June 4, 1981, James M. Taylor appeared in court pursuant to a summons signed by respondent on a claim by Moses Ludington Hospital that he owed a balance of $1,139.51. In response

to questioning by respondent, Mr. Taylor stated that he could afford to pay something toward the claimed amount and that he could make monthly payments of $5. Although Mr. Taylor was aware that respondent was employed by the hospital, respondent did not at any time mention that fact, nor did he disqualify or offer to disqualify himself from the case. On June 10, 1981, respondent entered judgment in favor of the hospital for $1,139.51 plus costs.

17. On June 4, 1981, Trustan Whittemore appeared in court pursuant to a summons signed by respondent on a claim by Moses Ludington Hospital that he owed a balance of $467.49. Mr. Whittemore told respondent that he had not paid the bill because his employer's insurance was responsible for payment. Respondent advised Mr. Whittemore to retain a lawyer in this matter. Respondent did not advise Mr. Whittemore that he was employed by the hospital, although Mr. Whittemore may have known it. Respondent did not at any time disqualify or offer to disqualify himself from the case. On June 10, 1981, respondent entered judgment in favor of the hospital for $467.49 plus costs.

18. The remaining claims filed by Moses Ludington Hospital and returnable before respondent pursuant to summonses he had signed on May 11, 1981, were against the following defendants: Sylvia Anderson, Deborah Bain, William Ball, Hazelton Belden, George Besson, Thomasina Buckman, Gladys Burger, Camp Adirondack, Michael Coffin, Kenneth Frasier, William Gibbs, John Hunsdon, Faith Lincourt, Peter Mars, Gloria Morse, Ernest Plumley, Douglas Russell,

Jennie Savage, Dennis Scuderi, Harriett Stevenson, Colleen Stone, Leslie Taylor, David Thompson, Josephine Thompson, Allan Trombley, William C. Wilson and Carl Woodard.

19. On June 10, 1981, respondent entered judgments in favor of the hospital against Ms. Anderson, Ms. Bain, Mr. Ball, Ms. Buckman, Mr. Coffin, Mr. Frasier, Mr. Gibbs, Mr. Hunsdon, Ms. Lincourt, Mr. Plumley, Mr. Russell, Ms. Stevenson and Ms. Stone.

20. On June 10, 1981, respondent entered default judgments in favor of the hospital against Ms. Beldon, Ms. Taylor and Mr. Woodard.

21. Respondent's dockets as to the remaining cases record the following. The case against Camp Adirondack was "dismissed by hospital." The case against Mr. Wilson was marked "no service dismissed." The cases against Mr. Besson, Mr. Scuderi, Ms. Thompson and Mr. Trombley were marked "Pd in full." The cases against Mr. Mars, Ms. Morse and Mr. Thompson were marked "moved to New Mexico," "moved to New Hampshire" and "moved to Oklahoma," respectively. The case against Ms. Burger was marked "bankrupt." The case against Ms. Savage was marked "deceased."

22. In each instance in which a judgment was entered, the judgment itself was prepared by the court clerk, on the basis of docket entries made by her from bench notes made by respondent. In those cases in which judgments were not entered, docket entries were made by the court clerk from bench notes made by respondent. The dockets were signed in respondent's name by the clerk, with respondent's knowledge and permission.

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) and 100.3(c)(1) of the Rules Governing Judicial Conduct and Canons 1, 2, 3A(1) and 3C(1) of the Code of Judicial Conduct. The Charge in the Formal Written Complaint is sustained and respondent's misconduct is established.

Respondent was disqualified by his employment relationship with Moses Ludington Hospital from participating in any way in any cases involving that hospital. Nevertheless, in one day respondent signed 37 summonses on claims brought by the hospital, insured that all 37 matters were returnable before him one month later, and thereafter disposed of all 37 cases, typically by finding in the hospital's favor for the full amount of the claim, plus costs. Respondent did not disqualify or offer to disqualify himself from these cases, despite the rules requiring him to do so and despite the assertion of at least one defendant that his presiding created a conflict of interest.

The role of a judge in our legal system is to preside over legal disputes in an impartial, dispassionate manner. Public confidence in the integrity of the judiciary and the entire legal system is diminished when a judge has an interest in a matter over which he presides.

Respondent's conduct both was improper and appeared to be improper. Even had his role in these 37 cases been strictly ministerial, it would have been inappropriate and contrary to the rules for him to participate. In fact, respondent played an active role in the hospital's pursuit of its payment claims, some of which were disputed by defendants who appeared in his court. The summary manner in which respondent disposed of even the disputed claims evinced his predisposition to favor his employer-plaintiff. Indeed, his bias was so obvious and his courtroom decorum so unjudicial that one defendant thought respondent was representing the hospital and was unaware he was the judge.

In essence, respondent acted as his employer's debt-collector, abusing the power and prestige of his judicial office to advance a private interest, in clear violation of the applicable ethical standards. By his conduct, respondent has compromised the integrity and independence of the judiciary.

In determining the appropriate sanction, we have considered the extreme seriousness of respondent's misconduct but note that it was limited to a single episode.

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

Judge Alexander, Mr. Bromberg, Mr. Cleary, Mr. Kovner, Judge Ostrowski, Judge Shea and Mr. Wainwright concur.

Mrs. Robb, Mr. Bower and Mrs. DelBello dissent as to sanction and vote that respondent should be removed from office.

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 20, 1983

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

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DISSENTING OPINION BY MRS. DEL BELLO, IN WHICH MRS. ROBB AND MR. BOWER JOIN

I respectfully dissent from the majority determination and vote that respondent be removed from office.

Unfitness for judicial office should be a primary consideration in determining sanction. See, Matter of Kane v. State Commission on Judicial Conduct, 50 NY2d 360 (1980). If unfitness is established, then removal from office is clearly warranted. A lesser discipline as censure or admonition is in order when unfitness has not been established.

In this case, respondent presided over 37 cases brought by his employer. He virtually turned his courtroom into a collection agency and did so even after a question was raised by an involved party as to his conflict of interest. To further compound his actions, respondent's testimony at the hearing was found by the referee to be lacking in credibility in several key areas.

Respondent has exhibited his unfitness for office by the manner in which he used his courtroom and by not acknowledging the impropriety of presiding over 37 cases in which he had an interest due to his employment and by his lack of candor at the hearing in this matter. He has exhibited an affront and insensitivity to judicial ethical standards.

For these reasons, I believe that the integrity of respondent's court has been irreparably compromised and that removal from office is appropriate.

Dated: January 20, 1983

Dolores DelBello