

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

DAVID M. WIATER,

a Justice of the Batavia Town Court,
Genesee County.

THE COMMISSION:

Raoul Lionel Felder, Esq., Chair
Honorable Thomas A. Klonick, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Marvin E. Jacob, Esq.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission

Michael Mohun for the Respondent

The respondent, David M. Wiater, a justice of the Batavia Town Court,
Genesee County, was served with a Formal Written Complaint dated December 14, 2005,
containing one charge. Respondent filed an answer dated January 25, 2006.

On May 22, 2006, the administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be censured and waiving further submissions and oral argument.

On June 22, 2006, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Batavia Town Court, Genesee County since January 1, 1993.
2. On or about April 6, 2002, David Ksiezopolski was charged with No Front Windshield, a violation of Section 375.12-a of the Vehicle and Traffic Law. The case was returnable before respondent on April 22, 2002. Mr. Ksiezopolski did not appear in court on April 22, 2002, or enter a plea by mail. As a consequence of Mr. Ksiezopolski's failure to appear, respondent notified the Commissioner of the Department of Motor Vehicles to suspend his driver's license pursuant to Sections 510.4(a) and 514.3(a) of the Vehicle and Traffic Law.
3. In August 2002 Mr. Ksiezopolski was advised by the Department of Motor Vehicles that his driver's license was to be suspended in 30 days for failure to answer the ticket and that to avoid such license suspension, he would have to appear in the Batavia Town Court.

4. On or about September 14, 2002, Mr. Ksiezopolski telephoned the Batavia Town Court and left a message on the court's answering machine, asking to be contacted about his ticket and stating that he would file a notice of claim against the town if he was not contacted.

5. On or about September 16, 2002, respondent received a note from his court clerk indicating that Mr. Ksiezopolski had called the court and left a "nasty" message concerning his suspension. Respondent never listened to the message Mr. Ksiezopolski had left on the court's answering machine.

6. On September 16, 2002, respondent contacted Mr. Ksiezopolski by telephone and in the course of their discussion spoke to Mr. Ksiezopolski in a rude, harsh and nasty tone, making the following statements:

Judge Wiater: It's ridiculous, very insulting and nasty message on my machine, which I am not pleased with. Do you understand me? Do you have any idea of who you left this message for? Do you realize who I am?

Mr. Ksiezopolski: I've tried to get in touch with you for a whole month, sir.

Judge Wiater: You listen to me.

Mr. Ksiezopolski: Yes, sir.

Judge Wiater: Because I think I'm going to send you to the Genesee County Jail. What do you think about that?

Mr. Ksiezopolski: What would I have said on that tape that would have--

Judge Wiater: You're calling me and leaving me, telling me what I'm supposed to do? Do you have any idea of who you're talking to? Do you?

Mr. Ksiezopolski: Well, you're trying to make that point across, sir, but I--

Judge Wiater: --Do you know who you're talking to?

Mr. Ksiezopolski: Sir, I didn't say anything that would warrant me going to jail. I requested--

Judge Wiater: --Listen to me, do you know who you're talking to--

Mr. Ksiezopolski: --I requested a copy of the--

Judge Wiater: --who are you talking to? Who are you--

Mr. Ksiezopolski: --you said--
Judge Wiater: Do you understand? I'm going to hang up and I'm going to do a warrant for you. You're interrupting me. Who are you talking to?
Mr. Ksiezopolski: You won't let me answer you.
Judge Wiater: Here's what I'm going to do. What's your address?
Mr. Ksiezopolski: My address is 434 7th Street, Buffalo, New York.
Judge Wiater: Give me that pen. 434--
Mr. Ksiezopolski: --7th Street--
Judge Wiater: --what street?
Mr. Ksiezopolski: 7th Street, Buffalo, New York.
Judge Wiater: 7th Street, um, huh.
Mr. Ksiezopolski: And you're Judge Wiater?
Judge Wiater: I think I'm going to send somebody down to your house in a short time.
Mr. Ksiezopolski: Okay, sir, okay, I'll be here.
Judge Wiater: Next time when you call--
Mr. Ksiezopolski: --yes, sir--
Judge Wiater: --make sure you know who you're talking to.
Mr. Ksiezopolski: Sir, I have been--
Judge Wiater: --You're talking to a New York State Judge--
Mr. Ksiezopolski: --sir, sir--
Judge Wiater: --not somebody next door--
Mr. Ksiezopolski: --I did not leave a threat--
Judge Wiater: --or some of these friends that you hang around with.
Mr. Ksiezopolski: I did not leave a threat.

* * *

Judge Wiater: Well, what do you want to ask the nice judge now?
Mr. Ksiezopolski: Sir, I had been in a car accident. My truck was taken and impounded in Batavia that day of the car accident.

* * *

Judge Wiater: I look forward to meeting you. Do you understand that?
Mr. Ksiezopolski: Yes, sir.
Judge Wiater: Your name, your first name again is what?
Mr. Ksiezopolski: David John.
Judge Wiater: David, I'd probably bring a couple thousand dollars in bail money when you come down too, okay?
Mr. Ksiezopolski: Why, sir?
Judge Wiater: Do you have the address of this court?
Mr. Ksiezopolski: It is written here, 3833--

Judge Wiater: --That's the one, yup--
Mr. Ksiezopolski: -- W. Main Street--
Judge Wiater: --you're right. I've got to get going, but listen when you come in, bring a couple thousand for some bail money. Thank you very much for the nice phone message you left the judge, okay?

7. It is not respondent's practice to set bail or to commit defendants to jail in lieu of bail in traffic violation cases. Respondent acknowledges that he had no basis in law to threaten to incarcerate Mr. Ksiezopolski in the Genesee County Jail.

8. Mr. Ksiezopolski did not appear in court, and his license remained suspended until respondent vacated the suspension in September 2005, because of his having recognized that his statements in their prior discussion may have discouraged Mr. Ksiezopolski from appearing.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A) and 100.3(B)(3) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

After being told by his court clerk that a defendant had left a "nasty" message about his license suspension on the court answering machine, respondent reacted in an inappropriate, intemperate manner. Without even listening to the message, respondent telephoned the defendant and, while repeatedly referring to his judicial office,

angrily berated him and threatened to send him to jail. Respondent's lengthy harangue was laced with threats, sarcasm and repeated references to his judicial power. Although respondent had no basis in law to incarcerate the defendant, who had failed to respond to a ticket for an equipment violation, he told the defendant that he was about to issue a warrant and was thinking of sending the defendant to jail. As the defendant attempted to explain that he had not done anything to warrant jail, respondent repeatedly stated, "Do you know who you're talking to? ... You're talking to a New York State judge." Respondent told the defendant twice that he should "bring a couple thousand dollars in bail money," and he added sarcastically, "I look forward to meeting you. Do you understand that?"

Respondent's angry, threatening diatribe was a grossly inappropriate response to the message left by the defendant. Although the court clerk had described the defendant's message as "nasty," the record indicates that the defendant merely had asked the court to contact him and said he would sue the town if he were not contacted. (The defendant told the judge he had been trying for a month to contact the court.) Significantly, respondent did not even know what the defendant had said in the message before responding so injudiciously, and the defendant's attempts to explain that he had done nothing to warrant jail did not prompt respondent to determine for himself exactly what the defendant had said. Respondent's conduct was contrary to his duty as a judge to observe high standards of conduct at all times, both on and off the bench, and to be patient, dignified and courteous to litigants and others with whom he deals in his judicial

capacity (Rules Governing Judicial Conduct, §100.3[B][3]).

Even if provoked by a perceived lack of respect for the court, respondent's conduct cannot be excused. As the Court of Appeals stated, "respect for the judiciary is better fostered by temperate conduct [than] by hot-headed reactions to goading remarks." *Matter of Cerbone*, 61 NY2d 93, 95-96 (1984).

The consequences of respondent's conduct were significant. Although respondent never acted on his threats to issue a warrant and send the defendant to jail, the defendant's license was suspended as a result of his subsequent failure to appear. Not until three years later did respondent vacate the suspension, after belatedly recognizing – apparently after being contacted by the Commission – that his threatening statements may have discouraged Mr. Ksiezopolski from appearing.

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

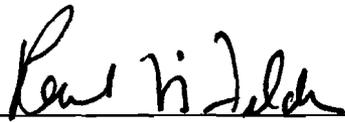
Mr. Felder, Judge Klonick, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Jacob, Judge Peters and Judge Ruderman concur.

Judge Luciano was not present.

CERTIFICATION

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

Dated: June 29, 2006



Raoul Lionel Felder, Esq.
Chair
New York State
Commission on Judicial Conduct