

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

JAMES J. FASO,

Determination

a Justice of the Niagara Town Court,
Niagara County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Jeremy Ann Brown
Stephen R. Coffey, Esq.
Mary Ann Crotty
Lawrence S. Goldman, Esq.
Honorable Daniel F. Luciano
Honorable Frederick M. Marshall
Honorable Juanita Bing Newton
Alan J. Pope, Esq.
Honorable Eugene W. Salisbury
Honorable William C. Thompson

APPEARANCES:

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

Joseph L. Arbour and James J. Faso, Jr.
for Respondent

The respondent, James J. Faso, a justice of the Niagara Town Court, Niagara County, was served with a Formal Written Complaint dated February 24, 1997, alleging two charges of misconduct. Respondent filed an answer dated March 18, 1997.

By Order dated March 31, 1997, the Commission designated Jacob D. Hyman, Esq., as referee to hear and report proposed

findings of fact and conclusions of law. A hearing was held on June 10, 1997, and the referee filed his report with the Commission on October 24, 1997.

By motion dated November 12, 1997, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be removed from office. Respondent opposed the motion on November 28, 1997. The administrator filed a reply dated December 2, 1997.

On December 11, 1997, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter 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 Niagara Town Court since 1990.

2. In October 1992, respondent attended a mandatory training session offered by the Office of Court Administration.

3. It was customary for the town to pay a \$250 advance toward the expenses of travelling to and attending judicial training sessions. The balance of the expenses was customarily paid by the town upon a voucher and receipts submitted by the judge.

4. The state also had a practice of reimbursing some of the expenses of attending training programs. Respondent knew that he could not be reimbursed twice for the same expenses, and he knew

that he was expected to turn over to the town any expense reimbursements that he received from the state which had already been paid by the town.

5. Before the 1992 training session, respondent received a \$250 advance from the town. After the session, he submitted a voucher to the town for the balance of his expenses in the amount of \$509.45. He was paid that amount on December 11, 1992.

6. Respondent also submitted to the state a voucher for \$279.81 for some of the same expenses. He was paid \$272.86 by the state on January 4, 1993.

7. Rather than turning the money over to the town, respondent cashed or deposited the state check and used the funds for his personal use.

As to Charge II of the Formal Written Complaint:

8. Respondent also attended a training session in October 1993. Before the session, he received a \$250 advance from the town. After the session, he submitted a voucher to the town for the balance of his expenses: \$559.48. He received a check in that amount on December 16, 1993.

9. Respondent also submitted to the state a voucher for \$196 for some of the same expenses. He was paid that amount by the state on December 10, 1993.

10. Rather than turning the money over to the town, respondent cashed or deposited the state check on January 6, 1994,

the same day that he negotiated the town check, and used the funds for his personal use.

Supplemental Findings:

11. In late 1993, respondent was told by his fellow judge, John P. Teixeira, that the duplicate expense reimbursement paid by the state had to be turned over to the town. "It's the town's money," Judge Teixeira said. "It goes back to the town."

12. In late 1993 or early 1994, James A. Sacco, who was then the town supervisor, reminded respondent that the state money must be paid to the town.

13. In May 1996, respondent was notified that Commission staff was investigating his failure to reimburse the town for the duplication in expense payments. On July 30, 1996, respondent repaid the town \$468.86, covering the amounts that he had received from the state for the 1992 and 1993 training sessions.

14. In 1992, 1993 and 1994, respondent experienced a number of personal and family problems.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct then in effect, 22 NYCRR 100.1 and 100.2(a), and Canons 1 and 2A of the Code of Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established.

Knowing that he should not be reimbursed twice for the same expenses, respondent retained for several years more than \$450 of public monies until he learned that his conduct was under scrutiny. He was aware that the proper procedure was to repay the town the duplicate reimbursement that he had received from the state, and he was reminded of that obligation on two occasions by other town officials.

The careless or improper handling of public funds by a judge - even if not for personal profit - constitutes a breach of the public trust and serious misconduct. (Bartlett v Flynn, 50 AD2d 401, 404 [4th Dept]). "Such breaches of public trust have frequently led to removal." (Matter of Murphy, 82 NY2d 491, at 494). However, the severity of the sanction to be imposed depends upon the presence or absence of mitigating or aggravating circumstances. (Matter of Rater, 69 NY2d 208, 209).

A number of mitigating circumstances compel a sanction of less than removal in this case. First, we are not persuaded that the record establishes that respondent's misuse of the money was intentional; it may well have been that his extreme personal and family troubles at the time distracted him from recognizing his responsibility and following the proper procedure. (See, Matter of Miller, 1981 Ann Report of NY Commn on Jud Conduct, at 147, 148 [judge inadvertently used court funds to pay a personal debt and was admonished]). Second, although carelessness alone in handling public monies may warrant removal, respondent's carelessness involved only two checks of an unusual variety and is unaccompanied

by the kinds of recordkeeping failures and administrative neglect for which judges charged with mishandling money have been removed. (Compare, e.g., Matter of Vincent, 70 NY2d 208 [for four years, judge failed to promptly deposit court funds and remit them to the state and arbitrarily dismissed cases after defendants failed to pay fines]; Matter of Petrie, 54 NY2d 807 [judge was unable to account for missing court funds and disregarded statutory recordkeeping requirements]; but see, Matter of Salman, 1995 Ann Report of NY Commn on Jud Conduct, at 134, 135 [judge censured after using campaign funds for his personal use]). Third, respondent has admitted his conduct, has expressed contrition and has reimbursed the town. (See, Matter of Slomba, 1994 Ann Report of NY Commn on Jud Conduct, at 106, 108; Matter of Hall, 1992 Ann Report of NY Commn on Jud Conduct, at 46, 48; Matter of Sandburg, 1986 Ann Report of NY Commn on Jud Conduct, at 157, 161).

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

Ms. Brown, Mr. Coffey, Ms. Crotty, Mr. Goldman, Judge Luciano and Judge Newton concur.

Mr. Berger, Judge Marshall and Judge Thompson dissent as to sanction only and vote that respondent be removed from office.

Mr. Pope and Judge Salisbury 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: February 5, 1998

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

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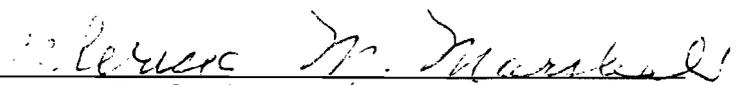
a Justice of the Niagara Town Court,
Niagara County.

DISSENTING OPINION
BY JUDGE MARSHALL
IN WHICH JUDGE THOMPSON
JOINS

The actions of respondent clearly demonstrate an intentional misuse of public funds on two separate occasions. The Court of Appeals and this Commission in factually similar cases involving misuse of public funds have determined that such conduct warrants removal. (See, Matter of Murphy, 82 NY2d 491, 494 [after misplacing \$1,173 in court funds, judge made no attempt to find it for extended period of time]; Matter of Burrell, 1990 Ann Report of NY Commn on Jud Conduct, at 82 [judge cashed three checks or money orders constituting \$610 in court funds]).

Respondent's conduct is aggravated by the facts that he knew the proper procedure and ignored two requests to return the money to the town.

Dated: February 5, 1998


Honorable Frederick M. Marshall, Member
New York State
Commission on Judicial Conduct