

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

DAVID R. STILSON,

a Justice of the Alma Town Court and
an Associate Justice of the Andover
Village Court, Allegany County.

**MEMORANDUM BY COUNSEL TO THE
COMMISSION IN SUPPORT OF RECOMMENDATION
THAT RESPONDENT BE REMOVED FROM OFFICE**

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PRELIMINARY STATEMENT

This Memorandum is respectfully submitted by Counsel to the Commission on Judicial Conduct (“Commission”) in support of a determination that Respondent should be removed from office for the misconduct described in Commission Counsel’s motion for summary determination on October 7, 2021, which the Commission granted on October 28, 2021.

PROCEDURAL HISTORY

A. The Formal Written Complaint

Pursuant to Judiciary Law §44(4), the Commission authorized a formal written complaint (“Complaint”), dated May 10, 2021, containing two charges. Charge I alleged that in or about 2014, Respondent repeatedly posted and disseminated sexually charged content on social media, in that he used his Facebook account to publicly promote and/or approvingly comment upon posts and images that were demeaning toward women or otherwise offensive. Charge II alleged that in or about February 2014, Respondent used his Facebook account to publicly engage in fundraising for the National Rifle Association (“NRA”).

B. Respondent’s Failure to Answer

Respondent did not file an Answer to the Complaint.

C. Motion for Summary Determination

By motion papers dated October 7, 2021, Commission Counsel moved for summary determination and a finding that the allegations in the Complaint – which were

deemed admitted by Respondent's failure to file an Answer – constituted judicial misconduct.

D. Respondent's Failure to Respond

Respondent did not file a response to Commission Counsel's motion with the Clerk of the Commission.

On the evening of October 15, 2021, Respondent sent an email to Deputy Administrator John J. Postel that stated, "I did receive the Motion Papers. As I am sure you have seen that after [our] meeting in your office, I have a much better understanding of the rules on social media. Have changed the settings, and what I like and share. Thank you." Mr. Postel forwarded a copy of the email to the Clerk of the Commission the following morning.

E. The Commission's Decision and Order

By decision and order dated October 28, 2021, the Commission granted Commission Counsel's motion for summary determination in all respects. The order held that Charges I and II of the Complaint were sustained and determined that Respondent's misconduct was established.

In conjunction with the Commission's findings, the Clerk of the Commission set a schedule for the submission of briefs and oral argument as to the appropriate sanction.

ARGUMENT

POINT I

THE TOTALITY OF RESPONDENT’S MISCONDUCT – HIS SOCIAL MEDIA POSTS DEMEANING AND OBJECTIFYING WOMEN, PROMOTING FUNDRAISING EFFORTS FOR THE NRA, AND DEMONSTRATING HIS DISREGARD FOR LAWS HE IS SWORN TO UPHOLD – ESTABLISHES HIS UNFITNESS FOR JUDICIAL OFFICE.

As the Court of Appeals said over 40 years ago, judges must observe “[s]tandards of conduct on a plane much higher than those of society as a whole . . . so that the integrity and independence of the judiciary will be preserved,” emphasizing that “[a]ny conduct, on or off the Bench, inconsistent with proper judicial demeanor subjects the judiciary as a whole to disrespect and impairs the usefulness of the individual Judge to carry out his or her constitutionally mandated function.” *Matter of Kuehnel*, 49 NY2d 465, 469 (1980) (internal citations omitted). For that reason, conduct of a non-judge that “might be acceptable behavior when measured against societal norms could constitute ‘truly egregious’ conduct” when committed by a member of judiciary. *Matter of Mazzei*, 81 NY2d 568, 572 (1993) (internal citations omitted). That is the case here. By using his public Facebook account to sexually objectify women, promote fundraising events for the NRA, and signal his reticence to enforce a duly passed law of the State of New York, the Respondent has demonstrated his unfitness for the bench. Accordingly, Respondent should be removed from office.

To be sure, “the sanction of removal is reserved for those instances where the conduct is ‘truly egregious’ and not merely an exercise of poor judgment.” *Matter of*

Collazo, 91 NY2d 251, 255 (1998) (internal citations omitted). At the same time, however, “the ‘truly egregious’ standard is measured with due regard to the fact that Judges must be held to a higher standard of conduct than the public at large,” and where a judge commits multiple acts of misconduct, the sanction to be imposed must contemplate the totality of the misconduct, “in the aggregate” (*Matter of Miller*, 35 NY3d 484, 491 [2020]; *Matter of O’Connor*, 32 NY3d 121, 128-29 [2018]), plus any aggravating factors such as failure to accept responsibility for the misconduct (*Matter of Ayres*, 30 NY3d 59 [2017]). Here, Respondent’s multiple categories of inexcusable misconduct, coupled with his refusal to participate in Commission proceedings, let alone acknowledge his wrongdoing, more than justify the sanction of removal.

A. Respondent’s public Facebook posts denigrating and objectifying women are unacceptable from a judge and bring disrepute to the judiciary.

Judges have long been disciplined for making demeaning and derogatory communications about particular identifiable groups of people. *See, e.g., Matter of Cunningham*, 1995 Ann Rep 109 (Comm’n on Jud Conduct, Mar 18, 1994) (judge Censured for remarking that “. . . the Dominican people are just killing us in the courts”); *Matter of Sweetland*, 1989 Ann Rep 127, 129 (Comm’n on Jud Conduct, November 21, 1988) (judge Censured for speaking about Central American individuals by stating, “these birds come up here and commit rape”); *Matter of Cook*, 1987 Ann Rep 75, 77 (Comm’n on Jud Conduct, November 19, 1986) (judge Removed for *inter alia* commenting, “These damn Puerto Ricans get away with everything,” and remarking that he was “sick and tired of you colored people”).

Demeaning and derogatory communications about women have been specifically recognized as significant misconduct and have constituted a basis for stern discipline. *See, e.g., Miller*, 35 NY3d at 491 (Removing judge for *inter alia* making sexually charged comments to the clerk of his court); *Matter of Abramson*, 2011 Ann Rep 62 (Commn on Jud Conduct Oct 26, 2010) (Removing judge who *inter alia* made improper comments of a sexual nature about a litigant's shirt, including, "[y]ou can't look at your shirt without feeling aroused"); *Matter of Dye*, 1999 Ann Rep 93 (Commn on Jud Conduct Feb 6, 1998) (Censuring judge for making improper comments to his secretary concerning her physical appearance and that of other women); *Matter of Doolittle*, 1986 Ann Rep 87, 88 (Commn on Jud Conduct June 13, 1985) (Censuring judge for "[t]he cajoling of women about their appearance or their temperament," which "has come to signify differential treatment on the basis of sex").

Here, Respondent's repeated public comments and demeaning and degrading depictions of his views about women and sex create the reasonable perception that those views infect his ability to afford women equal treatment in the performance of his judicial duties, and "subject the judiciary as a whole to disrespect." *Kuehnel*, 49 NY2d at 469. Respondent publicly shared the following Facebook posts that sexually objectified and denigrated women:

- a photograph of a woman wearing a revealing bra with the word "Boobies" above her chest and cleavage, and the caption, ". . . proof that men can focus on two things at once!" (Exhibit 1);
- the comment, "Can[']t argue this one bit. Very true" to a post that described "country girls" as "hotter" because "[t]heir boobs are real," "they can ride hard," and "sex in the woods is way better" (Exhibit 2); and

- a pair of tandem photographs showing a man fishing in one frame, and a woman lying on a bed in a bra and underwear with her wrists and ankles tethered in the other, with the words, “She asked me to tie her up and do anything I want” (Exhibit 3).

These posts and memes did not merely reference explicit or undignified material but communicated an unacceptable and intolerable bias against the female gender. Indeed, by posting a photograph of a woman cropped to show only her scantily clad torso, Respondent explicitly sexually objectified her breasts in order to land the punchline to a crude joke. Moreover, while Respondent objectified a women’s breasts to make a facetious point about “men,” his juvenile characterization of certain women as country “girls” suggested an unacceptable belief that women are not a coequal gender. His use of a bondage-themed meme to make yet another insensitive gender-based joke was doubly degrading for its casual depiction of a demeaning sexual stereotype and its insinuation that women should be submissive objects of domination by men. That kind of gender-based misconduct requires a severe sanction, as the “standards of judicial conduct exist to maintain a respect to everyone who appears in a court and to encourage respect for the operation of the judicial process at all levels of the system.” *Matter of Roberts*, 91 NY2d 93, 97 (1997). *See also Matter of Senzer*, 35 NY3d 216, 219 (2020) (“[i]n determining the appropriate sanction, we must also consider the effect of the misconduct upon public confidence in [the Judge’s] character and judicial temperament”) (internal citation omitted).

Respondent’s misconduct in sexually objectifying women is exacerbated by his other puerile and sex-themed public Facebook posts, including those about “cover[ing]

your wiener,” and the shower getting “turned on” when he “get[s] naked in the bathroom” (Exhibits 4-5). These undignified public posts, which are unacceptable from a judge who is held to a higher standard of conduct than the public at large (*Kuehnel*, 49 NY2d at 469), demonstrate the breadth of Respondent’s lack of judgment and cast disrepute upon the integrity of the judiciary in their own right.

B. Respondent unacceptably promoted a fundraising event for the NRA despite its engagement in partisan politics, and he cast doubt on his willingness to apply the SAFE Act.

Respondent committed additional serious misconduct by publicly soliciting funds to benefit the NRA, an organization immersed in political activity regarding the nation’s gun laws. On two separate occasions, Respondent promoted a “Friends of the NRA Banquet” on his public Facebook account, advertising a fundraiser that charged \$180 per ticket (Exhibits 6-7). In one of those posts, Respondent explicitly solicited 10 ticket sales from his viewership by stating, “Looking for a few more friends to attend . . . I want a table of ten” (Exhibit 6). In the other post, he publicly endorsed the fundraiser again and added that all who purchased tickets would “learn about” a linked article at “www.copssupportgunrights.com” entitled, “New York Troopers and Sheriffs Refusing to Enforce SAFE Act” (Exhibit 7).

Respondent’s blatant fundraising violates the letter of the Rule prohibiting fundraising on behalf of an organization (Rule 100.4[C][3][b][iv]) and lends the prestige of neutral judicial office (Rule 100.2[C]) to a volatile political cause.¹ Indeed, the

¹ As the Commission and Court of Appeals have repeatedly observed, a judge may violate Rule 100.2(C) even without overtly referring to judicial office or expressly requesting special treatment based on judicial

Commission and the Court of Appeals have publicly disciplined judges who misused their office to benefit apolitical charitable organizations like the American Heart Association and the Cystic Fibrosis Foundation. *See, e.g., Matter of Harris*, 1989 Ann Rep 85 (Commn on Jud Conduct Jan 22, 1988) (Admonition), accepted, 72 NY2d 335 (1988); *Matter of Wolfgang*, 1988 Ann Rep 245 (Commn on Jud Conduct Nov 19, 1987) (Admonition); *Matter of Turner*, 1988 Ann Rep 235 (Commn on Jud Conduct Mar 23, 1987) (Admonition). Here, where the fundraising has an undeniably political bent and is thus more egregious, the sanction must appropriately be more stern.

To make matters worse, Respondent demonstrated a bias in favor of law enforcement and against a duly enacted law he is obliged to uphold by promoting and effectively endorsing an article about New York State law enforcement officers “refusing to enforce the SAFE ACT” (Exhibit 7). While Respondent is entitled to his own personal views about the SAFE act, he committed egregious misconduct by publicly trumpeting his views on the topic, which created at least the appearance that he cannot be impartial in cases that involve guns, law enforcement, and the SAFE Act. *See Matter of Barringer*,

status. *See Matter of Lonschein*, 50 NY2d 569, 572-73 (1980) (judge committed misconduct by asking an agency official to expedite an application for his friend, even though he never “asserted his judicial office”); *Matter of Sullivan*, 2016 Ann Rep 209, 213 (Commn on Jud Conduct July 14, 2015) (judge committed misconduct by “acting as his son’s advocate in two conversations with law enforcement officials” even though he neither mentioned his judicial title nor explicitly asked for preferential treatment); *Matter of Clark*, 2007 Ann Rep 93, 96-97 (Commn on Jud Conduct Mar 26, 2007) (judge lent prestige of judicial office to his friend by accompanying her to file a claim at the sheriff’s station because his presence “could be interpreted as an implicit request for favorable treatment”); *Matter of Thwaites*, 2003 Ann Rep 171, 174 (Commn on Jud Conduct Dec 30, 2002) (judge’s presence in small courtroom with other family members to show support for defendant during hearing “could reasonably convey the appearance of lending her judicial prestige to support the defendant and his family”). That precedent certainly applies here, where Respondent’s Facebook posts identified him with his name and photograph, and many of his friends and viewers in the local community undoubtedly knew of his judicial office.

2006 Ann Rep 97, 100 (Commn on Jud Conduct Oct 11, 2005) (Censuring judge whose “public advocacy against a local road closure by the New York City Department of Environmental Protection (DEP) violated [ethical] standards by demonstrating that he no longer had the ability to be and appear to be impartial in matters involving the DEP”); *see also Matter of Schmidt*, 2021 Ann Rep __ (Commn on Jud Conduct Nov 3, 2020) (Admonishing judge for “ma[king] Facebook posts and links which contained various undignified and disrespectful statements including regarding laws that he would be required to uphold as a judge”).² Indeed, as the Court of Appeals has repeatedly emphasized:

the perception of impartiality is as important as actual impartiality: Judges must conduct themselves “in such a way that the public can perceive and continue to rely upon the impartiality of those who have been chosen to pass judgment on legal matters involving their lives, liberty and property.”

Matter of Duckman, 92 NY2d 141, 153 (1998) (emphasis added, quoting *Matter of Sardino*, 58 NY2d 286, 290-91 (1983); *see also Matter of Watson*, 100 NY2d 290, 302 (2003). All told, by making the subject Facebook posts, Respondent knowingly and deliberately cast aside his “duty to conduct himself in such a manner as to inspire public confidence in the integrity, fair mindedness and impartiality of the judiciary” (*Matter of Esworthy*, 77 NY2d 280, 282 [1991]), and as such, has severely eroded public confidence in his ability to preside as an impartial arbiter.

² Available at cjc.ny.gov/Determinations/S/Schmidt.Robert.H.2020.11.03.DET.pdf.

C. Respondent's misconduct is exacerbated by his refusal to participate in the Commission proceedings, let alone accept responsibility for his wrongdoing.

As the Court of Appeals articulated in *Matter of Ayres*, a judge's "misconduct is compounded by his failure to recognize these breaches of our ethical standards and the public trust," constituting an aggravating factor that "can be grounds for removal." 30 NY3d at 65. Here, far from acknowledging that he violated the Rules by misusing his public Facebook account, Respondent chose not to engage in the Commission's proceedings, electing instead to ignore the duly served Complaint and the Commission's motion for summary determination. Such a dismissive attitude toward the Commission and his own disciplinary proceeding exemplifies Respondent's cavalier attitude toward the ethical responsibilities of a judge. His refusal to appreciate that he violated the Rules, and his failure to participate in the Commission's inquiry into those violations, constitute significant aggravating factors as to sanction.

* * *

The Court of Appeals has articulated that "[t]he purpose of judicial disciplinary proceedings is not punishment but the imposition of sanctions where necessary to safeguard the Bench from unfit incumbents" (*Matter of Reeves*, 63 NY2d 105, 111 [1984] [quotation marks omitted]), and that "[judicial misconduct] cases are essentially institutional and collective judgment calls based on assessment of their individual facts, in relation to prevailing standards of judicial behavior and the prospect of future misconduct and continued judicial service" (*Roberts*, 91 NY2d at 97). In this matter, Respondent has publicly and repeatedly engaged in a grossly undignified manner toward

women, demeaned his office with puerile social media communications, abused the prestige of his judicial status to attempt to raise funds for the NRA, and communicated his interest in undermining a duly enacted New York State Law. The totality of his misconduct has irreparably damaged public confidence in Respondent's ability to act with the integrity, independence and impartiality required of a judge.

CONCLUSION

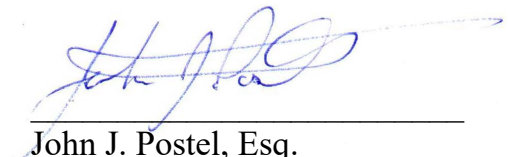
Counsel to the Commission respectfully requests that the Commission, based upon Respondent's collective established misconduct, issue a determination recommending Respondent's removal from office.

Dated: November 15, 2021
Rochester, New York

Respectfully submitted,

ROBERT H. TEMBECKJIAN
Administrator and Counsel to the
Commission on Judicial Conduct

By:



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Dave Stilson shared a photo.

January 23, 2014 ·



EXHIBIT 1

Flaunt Girls

January 23, 2014 ·

Like Page

2

Share



Dave Stilson shared a photo.

February 19, 2014 ·

Cant argue this one bit. Very True

Country Girls Are Hotter Because:

- 1)They can work hard
- 2)Their boobs are real
- 3)They don't mind gettin dirty
- 4)They make great mothers
- 5)They stay faithful
- 6)They love the outdoors
- 7)Daisy dukes and boots are sexy
- 8)They can ride hard
- 9)Your girl can double as your hunting partner
- 10)Sex in the woods is way better

Proud Country Gal

February 19, 2014 ·

Like Page

Little bit of Wednesday humor for y'all ... see the funny in it ❤️ 😊 Proud Country Girl

Like & Share & Laugh

1

Share



Dave Stilson shared a [photo](#).

March 4, 2014 ·

EXHIBIT 3

SHE ASKED ME TO TIE HER UP AND DO ANYTHING I WANT



Sexy, Flirty, Drunk, Haters & the Rest
March 4, 2014 ·

Like Page

5

1 Comment

Share



Ken Williams Funny



Dave Stilson shared a photo.

March 10, 2014 ·



EXHIBIT 4

RadioNOW 100.9 is with [Amanda Risinger](#) and 36 others.

March 4, 2014 ·

Better safe than sorry

Like Page

3



Dave Stilson shared a photo.

October 14, 2014 ·

more true than some may think

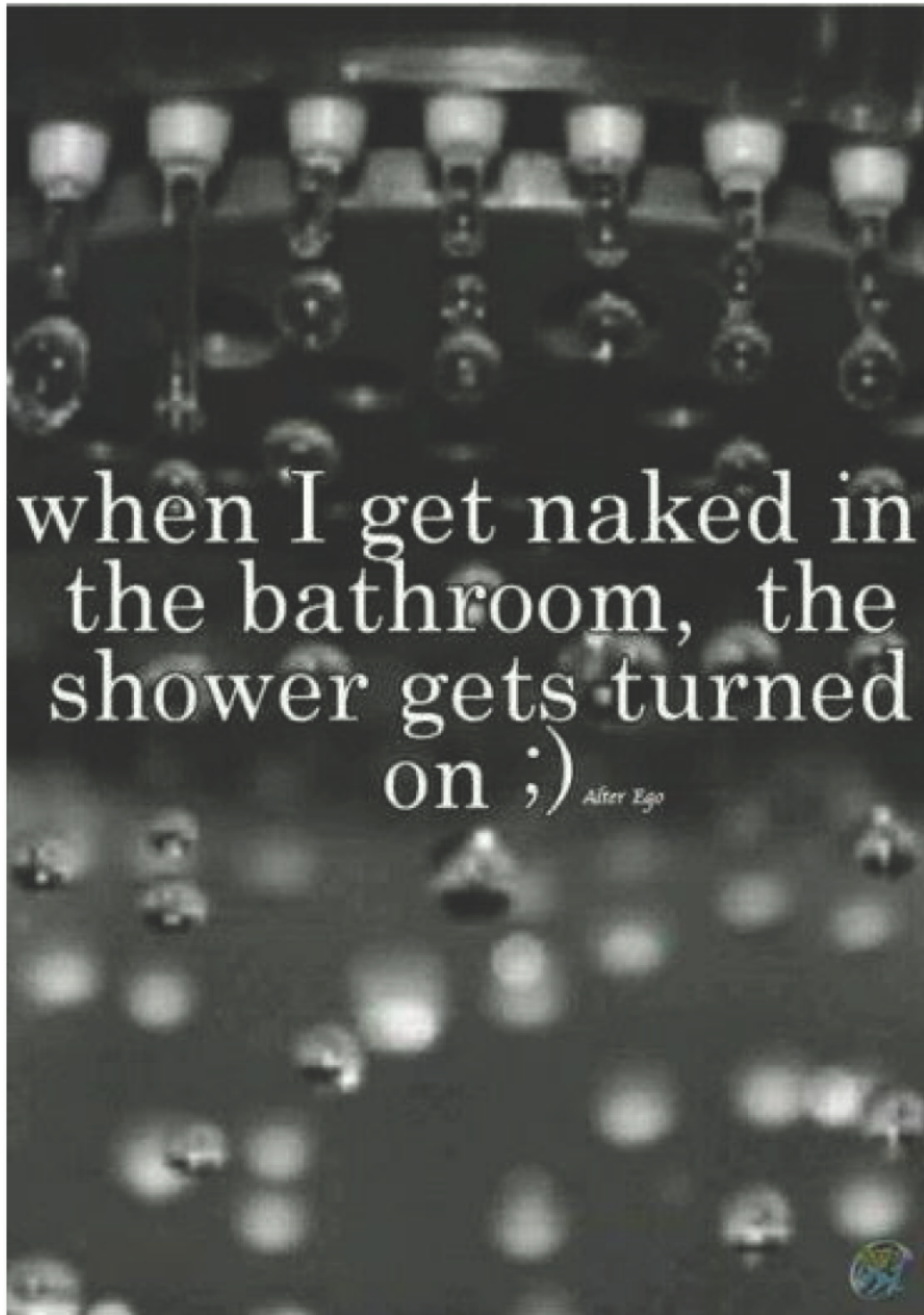


EXHIBIT 5

KHOP @ 95.1fm is with Albert Jones and 12 others.

August 28, 2014

Yeah it does!

Like Page

EXHIBIT 6

**Dave Stilson**

February 20, 2014 ·

Looking for a few more friends to attend the Friends of the NRA Banquet in Olean on March 15th, I want a table of ten. Its \$180.00 each person, includes dinner, pistol case, \$200.00 Bucket tickets, 10 Gun table Tickets, And 7 Gun of the year Tickets. Always a good time, great meal. And one of us 10 is Guaranteed to win a gun.

3

1 Share

**Dave Stilson**

February 26, 2014 ·

Come the Friends of The NRA Banquet with me and learn more about this.

COPSSUPPORTGUNRIGHTS.COM

New York Troopers and Sheriffs refusing to enforce SAFE Act - Cops Support Gun Rights

2

2 Comments

[Share](#)

Paul Szymkowiak Why should they enforce something that's unconstitutional, what should happen is we put all these midnight politicians in jail for what they did

4y



David Zembrzycki Prison with BUBBA sounds better. Then they'll know the meaning of YOU will take it AND learn to LIKE it.....

4y

EXHIBIT 7



FAQs >

Track Another Package +

Tracking Number: 9405509202121063997613

Remove X

Your item was picked up at the post office at 1:34 pm on November 17, 2021 in ALLENTOWN, NY 14707.

USPS Tracking Plus™ Available ✓

✓ **Delivered, Individual Picked Up at Post Office**

November 17, 2021 at 1:34 pm
ALLENTOWN, NY 14707

Get Updates ✓

Text & Email Updates

Tracking History

November 17, 2021, 1:34 pm

Delivered, Individual Picked Up at Post Office

ALLENTOWN, NY 14707

Your item was picked up at the post office at 1:34 pm on November 17, 2021 in ALLENTOWN, NY 14707.

November 17, 2021, 12:54 pm

Arrived at Post Office

ALLENTOWN, NY 14707

November 16, 2021, 10:05 pm

Departed USPS Regional Facility

BUFFALO NY DISTRIBUTION CENTER

November 16, 2021, 6:34 pm

Arrived at USPS Regional Facility

BUFFALO NY DISTRIBUTION CENTER

November 16, 2021, 4:39 pm

Departed USPS Regional Facility

NORTHWEST ROCHESTER NY DISTRIBUTION CENTER

November 16, 2021, 1:20 pm
Arrived at USPS Regional Facility
NORTHWEST ROCHESTER NY DISTRIBUTION CENTER

November 16, 2021, 12:05 pm
Accepted at USPS Origin Facility
ROCHESTER, NY 14604

November 15, 2021, 1:50 pm
Shipping Label Created, USPS Awaiting Item
ROCHESTER, NY 14604

USPS Tracking Plus™



Product Information



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