

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

JOHN B. CANARY,

a Justice of the Mayfield Town Court,
Fulton County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Mary Holt Moore
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

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

Edward F. Skoda for Respondent

The respondent, John B. Canary, a Justice of the Mayfield Town Court,
Fulton County, was served with a Formal Written Complaint dated November 30, 2001,
containing two charges. Respondent filed an answer dated January 10, 2002.

By Order dated January 24, 2002, the Commission designated Michael Hutter, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on April 16, 18 and 23, 2002, in Fonda, New York. The referee filed his report dated September 19, 2002, with the Commission.

The parties submitted briefs with respect to the referee's report. Oral argument was waived. On November 8, 2002, the Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a Justice of the Mayfield Town Court, Fulton County, since 1987. He is not an attorney. He has successfully completed all required judicial training sessions.

As to Charge I of the Formal Written Complaint:

2. Respondent has three children, the oldest of whom is Timothy Canary, who was born in 1971 and lives in Gloversville, Fulton County. Timothy Canary has a criminal record, which includes convictions for Petit Larceny, Grand Larceny and Driving While Impaired. He has also received traffic tickets, including for Speeding.

3. On November 5, 1999, Matthew Weise, a Fulton County Deputy Sheriff, issued traffic tickets to Timothy Canary for Speeding (92 miles per hour in a 55-mile per hour zone) on State Highway 29, and for a broken speedometer. The tickets were returnable in the Town of Mayfield. Deputy Weise issued the Speeding ticket based on his visual observation of Mr. Canary's vehicle and on radar confirmation, and issued

the ticket for a broken speedometer based on Mr. Canary's oral admission to him. The tickets were issued in the driveway of Mr. Canary's home, about a mile from where Deputy Weise had initially observed Mr. Canary's vehicle. With his patrol car's flashing lights on, Deputy Weise had followed Mr. Canary from that location to the driveway.

4. When Deputy Weise issued the tickets, he knew that respondent was Mr. Canary's father. Mr. Canary said: "Go ahead and write it. I know too many people in too many powerful positions."

5. A day or two after the tickets were issued, respondent, whose son had told him about the tickets, telephoned Deputy Weise at the Fulton County Sheriff's Department and spoke to him about the tickets. Respondent said that his son had told him that he (Timothy Canary) was going slower than the cited speed, and that respondent believed him. Respondent raised the possibility that Deputy Weise had erred as to the speed of his son's vehicle. An argument ensued when Deputy Weise said that he had confirmed a visual estimate of the speed with radar, and respondent replied in a loud voice, "You can't estimate speeds in the dark" and referred to many cases in his own court where the visual estimates of the speed had been proven faulty. Deputy Weise then handed the telephone to his superior, Sergeant Michael Franko, who spoke to respondent.

6. Respondent told Sergeant Franko that respondent was "not happy" about the ticket issued to his son, that he did not believe the vehicle could travel that fast and that the ticket was ridiculous. Sergeant Franko replied that respondent had been the judge on many of the Sheriff's Department's cases and had never had a problem before

and that this case should not be any different. He then told respondent that there was nothing he could do about the ticket and that he would notify his superiors of respondent's displeasure. Respondent said something to the effect that they were always picking on his son.

7. Subsequently, after the other Mayfield Town Justice recused himself with respect to the matter, the charges were transferred to the Broadalbin Town Court. Timothy Canary pleaded guilty to the Broken Speedometer charge in satisfaction of both pending charges with the consent of the Fulton County District Attorney's office.

8. On April 24, 2001, on Route 29 in the Town of Mayfield, Robert Stemmler, a Fulton County Deputy Sheriff, stopped Timothy Canary, who was driving a pickup truck loaded with brush. Respondent had accumulated the brush from yard work he was doing as a favor for a friend, and Timothy Canary was disposing of it. Deputy Stemmler had stopped the truck because the brush had fallen from the truck onto Route 29, creating a traffic obstruction. Deputy Stemmler, who cleaned up the obstruction, wanted the load of brush better secured. Deputy Stemmler did not intend to issue any tickets when he stopped the truck.

9. Upon stopping the truck, Deputy Stemmler asked the driver for his license and registration. Deputy Stemmler realized the driver, Timothy Canary, was respondent's son. He asked Mr. Canary to secure the load of brush and indicated that he would not issue a ticket because Mr. Canary was the son of the town justice. After some further talk between the two, and after Mr. Canary told Deputy Stemmler that the load of

brush was his father's, Mr. Canary cursed Deputy Stemmler and flung the door to the truck open, striking Deputy Stemmler and knocking him into the highway.

10. Deputy Stemmler went back to his patrol car and called his dispatcher, requesting that another patrol car be sent and that respondent be called to take care of the load of brush. Deputy Stemmler then went back to the truck and arrested Mr. Canary, who was standing outside the truck, based on his striking and pushing Deputy Stemmler. Mr. Canary became physically abusive towards Deputy Stemmler and ran away from him. To stop and control him, Deputy Stemmler jumped on Mr. Canary's back and used pepper spray. Deputy Stemmler was unable to get both handcuffs on Mr. Canary, who outweighed the Deputy by 70 or 80 pounds, until an off-duty police officer appeared and assisted.

11. Sergeant Franko, who arrived at the scene, observed Mr. Canary on the ground in front of the truck. Sergeant Franko talked with Deputy Stemmler. Approximately five to ten minutes later, respondent arrived and asked Sergeant Franko what had happened. Sergeant Franko told respondent what Deputy Stemmler had said.

12. Respondent walked over to Deputy Stemmler and confronted him. In close physical contact with Deputy Stemmler, respondent pushed Deputy Stemmler, swore at him and shouted, "What the hell happened here? There isn't a mark on you." Respondent further said to the Deputy, "I've got your number now," that any tickets they wrote would be "thrown out," that this was "bullshit" and that they were always picking on his kid.

13. Sergeant Franko intervened and told respondent to “stop,” implying that arrests might be in order if respondent did not stop. Respondent walked away and Deputy Stemmler was escorted away by an off-duty Deputy Sheriff.

14. Timothy Canary was taken by ambulance to a hospital, escorted by Sergeant Franko. At the hospital, respondent asked Sergeant Franko if his son was going to be arrested and when Sergeant Franko said, “Yes,” respondent objected and said, “You can’t do that.”

15. After being treated at the hospital, Timothy Canary was escorted by Sergeant Franko to the Fulton County Sheriff’s Department’s booking room at the station. Respondent was permitted to remain at his request. Timothy Canary was charged with Assault, Second Degree on a police officer, Resisting Arrest, and two counts of Unsecured Load.

16. After the booking procedures were completed, respondent asked Sergeant Franko, when they were alone together, if his son’s attorney had spoken to Sergeant Franko about keeping the arrest out of the newspapers. When Sergeant Franko said, “No,” respondent said, “Then, I am officially requesting that you keep it out of the paper.” Sergeant Franko replied that the Sheriff’s Department would be criticized if they were to keep the arrest of the son of a town justice out of the paper, to which respondent said, “Things get squashed all the time.” Arrests would be kept out of the papers if they were not recorded on the Sheriff’s Department’s blotter, where they were usually recorded, thereby preventing the media from acquiring information about arrests. When

Sergeant Franko refused respondent's request, respondent left angrily.

17. The charges against Timothy Canary were prosecuted by the Saratoga County District Attorney's Office. Mr. Canary pleaded guilty to Resisting Arrest.

18. After Deputy Stemmler submitted a complaint to the Commission concerning respondent's conduct, the Commission wrote to respondent on June 20, 2001, requesting his appearance to give testimony concerning the allegations. The Commission's letter enclosed a copy of the complaint of Deputy Stemmler, which included his and the other officers' official reports of the incident on April 24, 2001.

19. Upon receipt of the Commission's letter, respondent telephoned Fulton County Undersheriff Thomas Daggett. Respondent told the undersheriff that he had just received some paperwork from the Commission and accused Sergeant Franko and Deputy Stemmler of lying under oath in their reports.

As to Charge II of the Formal Written Complaint:

20. Elder Douglas Kampfer and his wife, Barbara Kampfer, reside on Kunkle Point Road in the Town of Mayfield. Elder Kampfer is a Mormon minister, a Melchizedek priest in the Church of Jesus Christ of Latter-Day Saints. He holds himself out as a paralegal. He has no degree or schooling as a paralegal.

21. On February 9, 2001, a vehicle ran over and killed the Kampfers' pet geese on or near Kunkle Point Road. After ascertaining with much difficulty from the State Police the identity of the driver of the vehicle, Kathy Baker, Elder Kampfer spoke

with a State Trooper about bringing a criminal charge against Ms. Baker under New York's animal cruelty law, known as Buster's Law. The trooper said that since he did not know much about the law, he would have to speak with respondent about the matter.

22. Subsequently, the trooper spoke with respondent, and respondent told the trooper that although he did not know much about the law, he did not think that it applied to barnyard animals, such as geese. Respondent did not instruct the trooper not to file any charges against Kathy Baker or otherwise suggest that such charges should not be filed.

23. Afterwards, the trooper spoke with Elder Kampfer about his conversation with respondent.

24. No criminal charges were filed by Elder Kampfer or the trooper in connection with the death of the geese.

25. On February 12, 2001, Elder Kampfer contacted Sherill Gallup, the other Mayfield Town Justice, to obtain small claims forms so that he could commence a small claims action against Kathy Baker. Judge Gallup said that he did not have any forms and he referred Elder Kampfer to respondent.

26. Elder Kampfer drove to respondent's farm to obtain the forms. Respondent's wife, who is his court clerk, gave the forms to Elder Kampfer. Elder Kampfer filled out the forms, asserting a claim against Kathy Baker in the amount of \$85.00 for her destruction of the geese, and gave the completed forms to respondent's wife for filing purposes, along with a check for \$10.00 for the filing fee.

27. On February 28, 2001, respondent wrote a letter to Elder Kampfer and his wife, stating that he was returning the small claims form and the filing fee to them, "due to a conflict of interest." Respondent believed that he could not preside impartially because, in connection with an earlier matter involving a daughter of the Kampfers, respondent had given a document to Mrs. Kampfer attesting to her presence in court, which respondent believed Mrs. Kampfer, or someone on her behalf, had altered, and respondent had sought unsuccessfully to have Mrs. Kampfer charged criminally for the alteration. Respondent had discussed this matter with OCA's Judicial Resource Center.

28. Elder Kampfer then contacted the Judicial Resource Center, inquiring how a judge could refuse to accept a small claims court filing as respondent had done. He was advised to send the small claims form and filing fee back to respondent, which he did. Subsequently, the Judicial Resource Center contacted respondent. Respondent then accepted the small claim for filing, as well as a counterclaim against the Kampfers, and scheduled both matters for trial on April 17, 2001.

29. On April 17, 2001, the hearing date set for the claim and counterclaim, the Kampfers appeared in court, but the defendant, Kathy Baker, did not. A few days earlier respondent had granted an adjournment at Ms. Baker's request due to her inability to appear because she would be out of town. Respondent did not notify the Kampfers of the adjournment.

30. On April 18, 2001, Elder Kampfer filed *pro se* for an action for a

declaratory judgment in Supreme Court, seeking a declaration that, *inter alia*, respondent was not allowed to give an adjournment without notification to the other party.

31. Respondent then wrote a letter to Elder Kampfer, stating that he was recusing himself from hearing the small claims action because of the commencement against him of the declaratory judgment action. Respondent did not transfer the small claims action to the other Mayfield Town Justice. No further judicial action has been taken with respect to the action.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(B), 100.2(C), 100.3(B)(3) and 100.3(B)(4) of the Rules Governing Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained insofar as they are consistent with the above facts, and respondent's misconduct is established.

The record establishes that on two separate occasions respondent angrily intervened with police authorities in connection with the arrest of his son, abusing his judicial status in repeated attempts to have the charges dismissed.

With respect to the earlier incident, it was improper for respondent to call the arresting officer and angrily dispute the traffic tickets issued to respondent's son. Stating that he was "not happy" about the tickets, respondent argued with the officer and his superior, labeling the charges "ridiculous" and asserting that the cited speed was inaccurate. Pointedly, and in a loud voice, respondent inappropriately invoked his

judicial status, referring to cases in his court where the officer's estimate of the speed had been proved wrong. Although there was no explicit request for special consideration, the clear import of respondent's advocacy was that the charges should be dismissed. His conduct could only be perceived as intimidating and constituted an improper assertion of influence to advance private interests, in violation of Section 100.2(C) of the Rules Governing Judicial Conduct. *See Matter of LoRusso*, 1988 Ann Rep 195 (Comm'n on Jud Conduct, June 29, 1987); *Matter of Crosbie*, 1990 Ann Rep 86 (Comm'n on Jud Conduct, Sept 8, 1989).

In another episode, some 17 months later, respondent's intervention in his son's arrest produced an unseemly display of aggression and intimidation. As the referee found, respondent confronted and pushed the arresting officer, shouted and used profanity while questioning the officer's conduct, vowed that the charges would be "thrown out," and told the officer, "I've got your number now." At the hospital, respondent again objected to his son's arrest, and at the station house, he "officially" requested, as a "favor," that the arrest be kept out of the papers. Respondent's grossly injudicious behavior and blatant assertion of influence were indefensible. Throughout the entire incident, respondent, "although off the bench remained cloaked figuratively, with his black robe of office devolving upon him standards of conduct more stringent than those acceptable to others" (*Matter of Kuehnel*, 49 NY2d 465, 469 [1980]), and his conduct seriously detracted from the dignity and integrity of the judiciary. Respondent's subsequent call to the Undersheriff to accuse the deputies of lying about the incident

continued the pattern of intimidation, poor judgment and insensitivity to the high ethical standards required of judges.

Respondent's misconduct was not an isolated episode of poor judgment, but a series of acts which provided opportunities, regrettably not taken, for respondent to reflect upon his conduct and restrain himself from further misdeeds.

Respondent demonstrated bias in his handling of the Kampfer matter by returning the small claims form when it was initially filed, by adjourning the hearing without notifying the Kampfers, and by finally recusing himself without reassigning the case. As the referee concluded, respondent's conduct "amounted to an unjustified refusal to hear the claim on its merits due to his personal dislike of the Kampfers." Respondent's conduct violated the requirement that every judge must not only be impartial, but act "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 Sardino*, 58 NY2d 286, 290-91 (1983). Such conduct undermines public confidence in the fair and impartial administration of justice.

Although respondent's lack of self-control and insensitivity to the appearances created by his actions are troubling, we have concluded that his misbehavior does not irretrievably damage his effectiveness on the bench. To the extent that his actions were prompted by concern for his son, especially in the second incident when he was called to the scene and observed his son's distress, his parental instincts mitigate, but do not excuse, the serious lapses depicted in this record. *See Matter of Edwards*, 67

NY2d 153, 155 (1986).

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

Mr. Berger, Judge Ciardullo, Mr. Coffey, Mr. Goldman, Ms. Hernandez, Judge Luciano, Judge Peters, Mr. Pope and Judge Ruderman concur.

Ms. Moore was not present.

CERTIFICATION

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

Dated: December 26, 2002



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