

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

GENE R. HEINTZ,

a Justice of the Sardinia Town Court,
Erie County.

DETERMINATION

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Jodie Corngold
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (John J. Postel and David M. Duguay, Of Counsel)
for the Commission

Daniel M. Killelea for the Respondent

The respondent, Gene R. Heintz, a Justice of the Sardinia Town Court, Erie
County, was served with a Formal Written Complaint dated August 19, 2015, containing

one charge alleging that he mishandled a Dangerous Dog case. Respondent filed a verified Answer dated October 2, 2015.

On November 30, 2015, the Administrator, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Section 44, subdivision 5, of the Judiciary Law, stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On December 10, 2015, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Sardinia Town Court, Erie County, since January 1, 2014. Respondent's term expires on December 31, 2017. He is not an attorney.

2. In August 2014, while presiding over *Town of Sardinia v Megan Shimburski*, a Dangerous Dog matter pursuant to Section 123 of the Agriculture and Markets Law, respondent failed to be faithful to the law and created the appearance that he was biased in favor of the town, in that he: (A) *sua sponte* sent hearing notices to witnesses whom he speculated would be needed to testify for the town; (B) summarily ended the hearing at the conclusion of the prosecutor's case; (C) did not allow Ms. Shimburski or her witnesses to testify; and (D) issued a decision ruling for the town without including statutorily-mandated conditions consistent with the ruling.

3. On July 31, 2014, Detectives Gregory McCarthy and John Graham

of the Erie County Sheriff's Office affirmed a Dangerous Dog complaint, alleging that on July 25, 2014, a pit bull terrier owned by Megan Shimburski attempted to attack Detective McCarthy as he, Detective Graham and Detective Matthew Noecker approached the home of Ms. Shimburski's parents, looking for Ms. Shimburski's boyfriend.

4. On August 5, 2014, the detectives filed the complaint in the Sardinia Town Court.

5. On August 5, 2014, respondent issued an order under the provisions of Section 123 of the Agriculture and Markets Law directing Sardinia Dog Control Officer Duane DeGolier to seize Ms. Shimburski's two-year-old pit bull terrier, known as "Lady." Respondent also issued a notice to Ms. Shimburski advising her that a hearing concerning her pit bull terrier would be held on August 12, 2014, at 5:00 PM.

6. On August 6, 2014, respondent *sua sponte* sent witness appearance notices addressed to the complainants, Detectives McCarthy, Noecker and Graham, at the Erie County Sheriff's Office, advising them of the hearing date in *Shimburski*.

7. On August 12, 2014, respondent commenced the hearing in *Sardinia v Shimburski*. After testimony by the town's first witness, Detective McCarthy, respondent granted a request by Matthew A. Albert, Ms. Shimburski's attorney, to call two defense witnesses out of order due to scheduling conflicts. After the first witness testified, Sardinia Town Prosecutor Jill S. Anderson objected to the second witness because the second witness had been in the courtroom during the first witness's testimony. Mr. Albert responded that there had been no request to sequester witnesses.

Respondent then prohibited testimony by the second witness.

8. Detectives Graham and Noecker then testified for the town, and Ms. Anderson rested her case. Respondent asked Mr. Albert if he was ready to proceed. Mr. Albert said Ms. Shimburski was going to testify, but needed a brief recess. He also stated that he would make a motion to dismiss.

9. After a short recess, Mr. Albert informed respondent that Erie County Sheriff's deputies had directed Animal Control Officer Joseph Neamon, an intended defense witness, to leave the court before he was called to testify and that such police conduct raised a "serious constitutional issue." Respondent replied, "The problem is, is we have no list of who was to appear on the defense, so I can't say if this person was allowed or not," and "we weren't told that this person was coming ... we needed this knowledge prior and it didn't occur." The following exchange then occurred:

MR. ALBERT: Is that a problem that a witness of mine was kicked out of the courtroom?

THE COURT: No, it's not at all. Obviously, there was an issue.

MR. ALBERT: To me, it's a problem, Your Honor.

THE COURT: Well, you'll have to discover that yourself. Obviously there was an issue elsewhere, outside of this court, that has nothing to do with this case, obviously.

10. Mr. Albert then made an oral motion to dismiss, which Ms. Anderson opposed. Respondent took another short recess.

11. When the proceeding resumed, respondent announced his ruling that Ms. Shimburski's dog was dangerous. Mr. Albert objected, stating that he had not had a

chance to present the rest of his case on behalf of the defense. Respondent replied, "We're done." The following exchanges then occurred:

MR. ALBERT: No, you cannot cut me off in the middle of my case, Judge. (Inaudible) --

THE COURT: You were done. You were done, sir. The process was completely finished, sir.

MR. ALBERT: Judge, I said --

THE COURT: Have a seat, sir.

MR. ALBERT: -- that was my motion to dismiss.

THE COURT: And continue listening. It was dismiss -- I am not honoring a dismissal, I am giving [] you my judgment. Let me continue. And that is the end.

MR. ALBERT: I have two witnesses.

THE COURT: There is no other witnesses [sic], sir.

MR. ALBERT: Judge, how am I not allowed to put on my case?

THE COURT: Have a seat, sir. We're continued. We're done. Sit down, please.

MR. ALBERT: I made a motion to dismiss. Do you know the procedure?

THE COURT: And I am -- I am not honoring it.

MR. ALBERT: You denied the motion to dismiss --

THE COURT: I heard you out.

MR. ALBERT: -- then I'm supposed to put on my witnesses.

THE COURT: I heard you out and I am not honoring it. That's my decision.

MR. ALBERT: So I'm allowed to put on my witnesses.

THE COURT: Negative. It's through.

MR. ALBERT: I said, before I call my witnesses, I'm making a motion to dismiss.

THE COURT: It's not.

MR. ALBERT: You heard that.

THE COURT: It's done.

MR. ALBERT: It's on the record.

THE COURT: Your motion is not accepted.

MR. ALBERT: You know there's a motion to dismiss. I know --

THE COURT: Your motion's not accepted.

MR. ALBERT: -- it's not accepted, so now I'm bringing on my witnesses.

THE COURT: Negative. It's done.

MR. ALBERT: What are you talking about?

THE COURT: The process is over.

12. In his written decision, dated August 12, 2014, respondent did not “order neutering or spaying of the dog” and “microchipping of the dog,” as required by Section 123(2) of the Agriculture and Markets Law following a “dangerous” dog determination by a judge after a hearing.

Additional Factors

13. *Sardinia v Shimburski* was the first hearing or trial over which respondent presided in his judicial career.

14. Respondent provided notice of the *Sardinia v Shimburski* hearing to all interested parties of whom he was aware, including Ms. Shimburski and Town of Sardinia Dog Control Officer Duane DeGolier, who was called about the trial date by the court clerk.

15. Respondent regrets his failure to be and appear to be fair and

impartial and to abide by the Rules in this instance. He avers that he has since familiarized himself with the procedural rules governing hearings and trials and discussed his handling of this case with his Supervising Judge. Respondent has also, since the date of the trial, attended additional judicial training seminars. He pledges to conform himself in accordance with the Rules for the remainder of his term as a judge.

16. Respondent has been cooperative with the Commission throughout its inquiry.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(1), 100.3(B)(4) and 100.3(B)(6) 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.

In handling a Dangerous Dog case during his first year as a judge, respondent made numerous procedural and substantive errors. Most seriously, he summarily ended the hearing before the attorney for the dog’s owner had completed his case, which resulted in a decision made on an abbreviated record that deprived the dog’s owner of the right to be heard pursuant to law. After the prosecutor had rested her case, respondent announced his decision that the dog was dangerous and that the case was over. Even if he was confused because a defense witness had testified out of order or because a

motion to dismiss was made before the defense had concluded, the attorney's repeated objections that he was "in the middle of my case" and wanted to call two additional witnesses should have prompted respondent to recognize that his decision was premature. Instead, he refused to be dissuaded, reiterating, "You were done ... We're done." It also appears that respondent impermissibly excluded another defense witness from testifying because the witness had been in the courtroom during earlier testimony, although the prosecutor had not requested sequestration and no witness list was provided.

It is a fundamental principle of law that every person with a legal interest in a proceeding – civil or criminal – must be accorded the right to be heard under the law (Rules, §100.3[B][6]). By foreclosing the dog's owner from calling her witnesses, respondent failed to afford an essential element of due process. *See, e.g., Matter of Buchanan*, 2013 NYSCJC Annual Report 103.

Other errors by respondent in the same case include failing to include statutorily-mandated conditions (microchipping and neutering or spaying) in his decision that the dog was dangerous, and *sua sponte* sending witness appearance notices to the complaining witnesses. Even if those individuals would likely be called to testify by the prosecutor, it is not the judge's role to determine who the potential witnesses are and then require their appearance.

"Legal error and judicial misconduct are not mutually exclusive" (*Matter of Reeves*, 63 NY2d 105, 109-10 [1983]). Errors that are clearly contrary to well-established law have been found to constitute misconduct, especially where the conduct involves

deprivation of fundamental rights. *See Matter of Jung*, 11 NY3d 365 (2008) (Family Court judge violated the due process rights of litigants by depriving them of the right to be heard and/or the right to counsel). While some of respondent's errors might be explained by the fact that this was his first hearing in his first year as a judge, the right to be heard is fundamental, and even a new judge must be able to understand and adhere to basic trial procedures. Every litigant has a right to expect that his or her case will be heard by a judge who is familiar with and follows the relevant law.

It is stipulated that since this case, respondent has had additional training and has familiarized himself with procedural rules governing hearings and trials, and that he pledges to adhere to the mandated rules in the future.

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

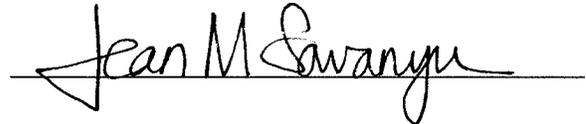
Judge Klonick, Judge Ruderman, Mr. Belluck, Mr. Cohen, Ms. Corngold, Mr. Emery, Mr. Harding, Mr. Stoloff and Judge Weinstein concur.

Judge Acosta was not present.

CERTIFICATION

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

Dated: December 17, 2015

A handwritten signature in black ink, reading "Jean M. Savanyu", is written over a horizontal line. The signature is cursive and includes a large initial "J" that loops back to the left.

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct