

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

NICOLE S. POST,

a Justice of the Maine Town Court,
Broome County.

DETERMINATION

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Thea Hoeth, Of Counsel) for the Commission

Hinman, Howard and Kattell, LLP (by Richard C. Lewis) for the
Respondent

The respondent, Nicole S. Post, a Justice of the Maine Town Court, Broome
County, was served with a Formal Written Complaint dated May 27, 2010, containing

three charges. The Formal Written Complaint alleged that respondent failed to appear for sentencing on a violation of Dog Running at Large and failed for seven months to pay the fine imposed; served simultaneously as both judge and court clerk of the Maine Town Court; and participated in fund-raising activities on behalf of her and her son's sports teams.

On September 23, 2010, 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 either admonished or issued a letter of caution, and waiving further submissions and oral argument.

On September 29, 2010, the Commission accepted the Agreed Statement of Facts and made the following determination.

1. Respondent has been a Justice of the Maine Town Court, Broome County, since January 1, 2007. Respondent's term expires on December 31, 2010, at which time the position will be abolished. Respondent is not an attorney.

As to Charge I of the Formal Written Complaint:

2. On May 22, 2007, respondent was charged in the Maine Town Court with seven counts of Dog Running at Large, a violation of a local leash law.

3. On or about August 14, 2007, Broome County Court Judge Martin E. Smith transferred the charges to the Chenango Town Court.

4. On October 31, 2007, respondent was arraigned in the Chenango Town Court. Respondent rejected a proposed plea agreement from the District Attorney and requested a trial. Prior to trial, six of the seven charges were dismissed on the motion of the Chenango County District Attorney.

5. On February 29, 2008, after a nonjury trial, Chenango Town Justice Thorold J. Smith found respondent guilty of the remaining charge of Dog Running at Large and set sentencing for April 16, 2008.

6. Respondent did not appear for sentencing on April 16, 2008, and did not request an adjournment or otherwise communicate with the court.

7. On April 17, 2008, Judge Smith sent a notice to respondent informing her that she had failed to appear for sentencing and setting April 23, 2008, as the new sentencing date. The notice, which was marked "Final Warning," advised respondent that a bench warrant could be issued for her arrest based upon her failure to appear.

8. Respondent did not appear for sentencing on April 23, 2008, and did not request an adjournment or otherwise communicate with the court.

9. On June 24, 2008, Judge Smith sent a letter to respondent informing her that he had imposed a fine of \$50, to be paid no later than July 24, 2008.

10. Respondent did not pay the fine by July 24, 2008, and did not request an extension of time to pay the fine or otherwise communicate with the Chenango Town Court about the matter.

11. Two months later, on October 2, 2008, Judge Smith signed an order converting the unpaid fine to a civil judgment and directing the Broome County District Attorney to file a certified copy of the order in the Broome County Clerk's Office. The court's order was mailed to respondent on or about the same day. Respondent still did not pay the fine or communicate with the court.

12. Sometime in October 2008, W. Howard Sullivan, a Judge of the County, Family and Surrogate's Courts (Chenango County) who served as Supervising Judge for the Sixth Judicial District, met with respondent and discussed her failure to pay the fine. Despite this conversation, respondent did not pay the fine or communicate with the court.

13. On October 22, 2008, Judge Sullivan sent a letter to respondent, confirming their conversation and directing respondent to expedite payment of the fine because "as an officer of the court, it is important that court directives not be ignored."

14. Nearly three months later, on January 20, 2009, respondent satisfied the judgment against her by paying the \$50 fine.

As to Charge II of the Formal Written Complaint:

15. In January 2006, respondent was the Clerk of the Maine Town Court. As clerk, respondent reported to the Maine Town Court's two part-time justices, Howard Dingman and Donald Magill.

16. In November 2006, respondent became a candidate for Maine Town Justice when Judge Dingman decided not to run for re-election.

17. Prior to the election, in fall 2006, Judge Magill sent an undated letter to the Maine Town Board recommending that respondent continue as court clerk upon becoming a judge and receive her clerk's salary "separately from her salary as judge." Judge Magill also recommended that the Board reinstate the post of deputy clerk. The Board implemented Judge Magill's recommendations and appointed him the deputy clerk of the Maine Town Court.

18. Respondent was elected a Maine Town Justice and took office on January 1, 2007.

19. On January 10, 2007, the Maine Town Attorney sent a memorandum to respondent stating that he had spoken with Diane Schilling, a Deputy Counsel with the Office of Court Administration, who advised that it created a conflict of interest for a town justice to serve concurrently as that town's court clerk. The Town Attorney also stated that Ms. Schilling suggested that respondent obtain an opinion from the Advisory Committee on Judicial Ethics (erroneously referred to as the "Ethics Advisory Board") and refrain from serving as court clerk without an opinion.

20. Respondent did not obtain an opinion from the Advisory Committee. Rather, respondent served as a justice and a court clerk of the Maine Town Court for more than one year and nine months, from January 2007 to October 2008. During that time, respondent collected two annual salaries: a judicial salary of \$7,300 per year and a clerical salary of approximately \$9,000 per year.

21. In October 2008 Supervising Judge W. Howard Sullivan met with respondent and discussed the matter of her serving as both a judge and a court clerk in the same court. Judge Sullivan then sent a letter to respondent dated October 22, 2008, confirming their discussion that a judge may not serve as a clerk for another judge in the same court.

22. On October 28, 2008, respondent attended a meeting with Judge Magill, the Maine Town Attorney, Town Council members and Judge Deborah Jo Harter, Special Counsel to the Administrative Judge for Justice Courts, Sixth Judicial District. At the meeting, Judge Harter advised respondent that she could not serve as court clerk and judge of the court.

23. On October 30, 2008, the Maine Town Board notified respondent and Judge Magill that effective immediately, the positions of Court Clerk and Deputy Court Clerk would no longer be paid and that the judges would assume responsibility for operation of the court.

As to Charge III of the Formal Written Complaint:

24. On two occasions in late 2007 and early 2008, respondent personally participated in fund-raising activities on behalf of her son's sports teams in the Maine Town Hall, which houses the Maine Town Court.

25. In November or December 2007, respondent asked Michael Dopko, who was then the Maine Town Code Enforcement Officer, to purchase a raffle ticket to

benefit the Maine/Endwell Wrestling Club. Respondent's son was a member of the club. Respondent sold Mr. Dopko one raffle ticket at a cost of \$100.

26. In late 2007 or early 2008, respondent solicited Stephen Cornwell, then an Assistant District Attorney who regularly appeared before respondent, to purchase a raffle ticket costing approximately \$100 to benefit the Maine/Endwell Wrestling Club. When Mr. Cornwell responded that the District Attorney's office had a policy that prohibited him from purchasing a ticket, respondent suggested that Mr. Cornwell's wife purchase the ticket instead. Mr. Cornwell declined the offer.

27. On another occasion in August 2009, respondent participated in a fundraising car wash in the Town of Maine to benefit the Maine Women's Softball Team, of which respondent was a member. Respondent attended the car wash and allowed her vehicle, which bore a judge's license plates and was readily recognizable in the community, to be prominently displayed promoting the car wash.

Mitigating Factors

28. As to Charge 1, all relevant events occurred during a period of significant domestic and financial difficulties for respondent. Respondent recognizes that she nevertheless should have paid the fine promptly or contacted the Chenango Town Court in a timely manner to seek a payment schedule or some other accommodation, and that those actions were even more necessary once her Supervising Judge gave her an explicit directive to pay the fine.

29. As to Charge II, the payment of separate judicial and clerical salaries for each of the co-justices was a method proposed and adopted by the town board on the recommendation of respondent's experienced co-justice. Respondent acknowledges that she should have sought an Advisory Opinion concerning whether she was permitted to hold the positions of town justice and court clerk in the same court when the question first arose and that avenue was recommended to her, or that she should have resigned one of the positions.

30. As to Charge III, respondent acknowledges that she should not have approached anyone, least of all individuals who appear before her in court, to purchase raffle tickets, nor should she have been involved in any way in fund-raising activities on behalf of civic organizations.

31. Respondent's judicial position has been abolished by the Maine Town Board with the expiration of her term on December 31, 2010. Respondent avers that she will neither seek nor accept judicial office at any time in the future.

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), 100.4(A)(1), 100.4(A)(2), 100.4(A)(3), 100.4(C)(3)(b)(i) and 100.6(B)(4) 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. Charges I through III of the Formal Written Complaint are sustained, and respondent's misconduct is established.

Both on and off the bench, every judge is required to adhere to prescribed ethical standards of behavior in order to preserve the integrity and independence of the judiciary. Respondent's extra-judicial conduct, as set forth in the stipulated facts, did not comply with those standards.

After being convicted of a Dog Running at Large violation, respondent failed to appear for sentencing, even when she was advised that a warrant could be issued for her non-appearance, and failed for seven months to pay the \$50 fine imposed in her absence. Although failing to make prompt payment of a lawful fine might be mitigated by her personal and financial difficulties during this period, respondent significantly exacerbated the situation by not communicating with the court about the matter and completely ignoring the proceedings. Even after the fine was converted to a civil judgment, respondent failed to contact the court to attempt to arrange a payment schedule or some other accommodation to her circumstances. As her supervising judge advised her, it is unacceptable for an officer of the court to ignore court directives, and by ignoring the proceedings, she diminished her own authority to demand compliance with her directives as a judge. It is particularly serious that following the intervention of her supervising judge, who directed her to expedite the payment, respondent still did not contact the court and did not pay the fine until three months after his directive.

It was also improper for respondent to serve simultaneously for almost two years as judge and court clerk of her court, despite being advised that it was a conflict to do so. The two positions are incompatible under Section 100.6(B)(4) of the Rules, as the

Advisory Committee on Judicial Ethics has concluded (Adv Op 98-113, 03-22). In this regard, we note that it appears that respondent followed the lead of her experienced co-judge, who had proposed the plan, adopted by the Town Board, to pay separate judicial and clerical salaries for both judges. Nonetheless, having been placed on notice of the potential conflict, at the very least respondent should have sought an Advisory Opinion as to her own situation when that avenue was recommended to her by the Town Attorney.

Respondent's participation in fund-raising for her and her son's sports teams also violated well-established ethical standards. Judges are prohibited from lending the prestige of judicial office to advance private interests (Rules, §100.2[C]) and are specifically barred from "personally participat[ing] in the solicitation of funds or other fund-raising activities" (Rules, §100.4[C][3][b][i]). No matter how worthy the cause, judges must avoid such conduct since any involvement by a judge in fund-raising can have a considerable coercive effect. Attorneys and others cannot help but feel pressured to contribute to a charity promoted by the judge, and the public might believe that those who contribute to a favored charity of the judge's might be treated favorably in court. *See, Matter of Harris*, 72 NY2d 335, 337 (1988) (judge's participation in mock "Jail Bail for Heart" proceedings to benefit the American Heart Association "violated both the letter and the spirit" of the ethical prohibition). For decades the Advisory Committee on Judicial Ethics has warned judges not to engage in fund-raising (*e.g.*, barring such diverse activities as acting in a fund-raising play [Adv Op 92-79], participating in a fund-raising telethon [Adv Op 98-154], and modeling in a fund-raising fashion show [Adv Op 98-33]),

and the Commission has addressed the subject on numerous occasions in its annual reports.

It is especially improper to engage in such activities in or near the court or to solicit contributions from individuals who appeared in the judge's court, as respondent did by asking an assistant district attorney and the code enforcement officer to buy \$100 raffle tickets. *See, Matter of McNulty*, 2008 Annual Report 177 (Comm on Judicial Conduct)(judge was admonished for fund-raising activity on behalf of a civic organization, which included direct solicitations of attorneys who appeared before her and posting flyers and collecting checks in the courthouse). Respondent's suggestion to an assistant district attorney that his wife buy a raffle ticket, after he had said that his office policy prohibited him from doing so, was particularly coercive and insensitive to her ethical responsibilities.

In its totality, respondent's misconduct represents a significant departure from the high standards of conduct required of every judge. In considering an appropriate disposition, we note that respondent has acknowledged her misconduct and avers that she will neither seek nor accept judicial office in the future upon the expiration of her term on December 31, 2010. Accordingly, while we might otherwise consider a more severe sanction, we accept the negotiated disposition in this matter.

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

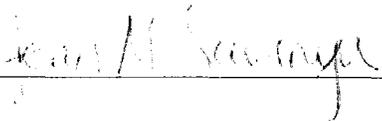
Judge Klonick, Mr. Coffey, Judge Acosta, Mr. Cohen, Mr. Emery, Ms. Hubbard, Ms. Moore, Judge Peters and Judge Ruderman concur.

Mr. Belluck and Mr. Harding were not present.

CERTIFICATION

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

Dated: October 12, 2010



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