

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

SHIRLEY B. HERDER,

a Justice of the Vienna Town Court,
Oneida County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Honorable Frances A. Ciardullo, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Kathryn J. Blake, Of Counsel) for the
Commission

Melvin & Melvin, PC (by Ronald S. Carr)

The respondent, Shirley B. Herder, a Justice of the Vienna Town Court,
Oneida County, was served with a Formal Written Complaint dated May 24, 2004,

containing two charges.

On July 1, 2004, the Administrator of the Commission, respondent and respondent's counsel 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 censured and waiving further submissions and oral argument.

On August 5, 2004, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a Justice of the Vienna Town Court, Oneida County, since January 1, 1980. Respondent is not an attorney.

As to Charge I of the Formal Written Complaint:

2. On or about July 30, 2002, Martin Droz appeared before respondent for his arraignment on an appearance ticket alleging a violation of the Town of Vienna's zoning ordinance. Mr. Droz appeared without an attorney and refused to enter a plea. John Anderson, the code enforcement officer who had written the appearance ticket and was Mr. Droz's adversary in the matter, attended the arraignment. Respondent questioned Mr. Droz about the alleged work performed on his property in putative violation of the zoning code. When Mr. Droz refused to respond to the inquiry, Mr. Anderson presented Mr. Droz with two additional appearance tickets for alleged zoning code violations. Respondent adjourned the proceeding to August 13, 2002.

3. Notwithstanding that Mr. Droz had not admitted to the original code violation and that respondent had not received any offer of proof as to the additional alleged zoning code violations, respondent ordered Mr. Droz to obtain a permit for “whatever” work he was performing on his property and to provide proof of such permit when he returned to court on August 13, 2002.

4. On at least one occasion between July 30, 2002, and August 13, 2002, respondent engaged in an unauthorized *ex parte* communication with Mr. Anderson, for the purpose of ascertaining whether Mr. Droz had in fact sought the permit in compliance with her order. When Mr. Droz appeared on August 13, 2002, respondent was aware that he had not obtained the permit.

As to Charge II of the Formal Written Complaint:

5. On August 13, 2002, Martin Droz appeared in the Vienna town hall to await his appearance before respondent in response to the zoning violations alleged against him. Code Enforcement Officer John Anderson was again present. Mr. Anderson approached Mr. Droz, who was reading notices posted on a bulletin board, and asked Mr. Droz to reveal the contents of a shopping bag in his possession, which Mr. Droz declined to do. Mr. Droz did not threaten Mr. Anderson or any other individual, and no court process was disrupted by the brief exchange.

6. Prior to the convening of the court, Mr. Anderson met with respondent in her office and, in an *ex parte* conversation, alleged that Mr. Droz had declined to disclose to him the contents of a shopping bag he was carrying. Respondent

agreed with Mr. Anderson that Mr. Droz should be reported to the State Police.

7. Thereafter, Mark Murray, the town supervisor, telephoned the State Police, and Trooper P. J. McCadden was dispatched to the Vienna Town Court. Trooper McCadden spoke to respondent about Mr. Droz, and respondent confirmed that she wanted him arrested for Contempt. Trooper McCadden then confronted Mr. Droz, determined that the shopping bag contained a tape recorder and note pad and arrested Mr. Droz. Trooper McCadden transported Mr. Droz to the State Police barracks, where he was detained for several hours awaiting arraignment on the Contempt charge.

8. During Mr. Droz's detention at the police barracks, Trooper McCadden telephoned respondent and, in an *ex parte* conversation, respondent advised Trooper McCadden to charge Mr. Droz with Criminal Contempt, Second Degree, pursuant to Section 215.50(1) of the Penal Law, for "disorderly, contemptuous or insolent behavior, committed during the sitting of a court, in its immediate view and presence and directly tending to interrupt its proceedings." Trooper McCadden so charged Mr. Droz.

9. Mr. Droz was returned to court for arraignment on the charge of Criminal Contempt later on August 13, 2002, at which time respondent failed to disqualify herself, although she was a potential witness and had conferred *ex parte* on the matter with both Mr. Droz's adversary in the zoning case and the arresting officer on the Contempt charge.

10. At arraignment, notwithstanding that respondent knew that the contents of the shopping bag were innocuous and that Mr. Droz had not disrupted the

court proceedings or otherwise been contemptuous, respondent committed Mr. Droz to jail for two weeks in lieu of \$500 cash bail. Respondent did not set bail in an alternative form, despite the requirement of Section 520.10(2) of the Criminal Procedure Law that a judge set bail in more than one form.

11. On or about August 27, 2002, Mr. Droz appeared before respondent on the Contempt charge, represented by assistant public defender Tina Hartwell, Esq., and, upon recommendation of the district attorney, respondent accepted the disposition of the Contempt matter by Adjournment in Contemplation of Dismissal.

12. On or about August 30, 2002, Mr. Anderson withdrew one of the zoning violations pending against Mr. Droz. Respondent subsequently disqualified herself from presiding over the trial of the remaining zoning violations, and the matters were transferred to another judge.

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), 100.3(B)(6) and 100.3(E)(1)(a) of the Rules Governing Judicial Conduct and should be disciplined for cause, pursuant to Article 6, Section 22 of the New York State Constitution and Section 44(1) of the Judiciary Law. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established.

Respondent's gross mishandling of proceedings involving Martin Droz constituted an abuse of judicial power and conveyed the appearance of bias.

When the defendant appeared as scheduled before respondent on zoning violation charges, respondent caused his arrest based on *ex parte* information that he had refused to disclose the contents of a shopping bag. Even after the police had detained the defendant and determined that the shopping bag contained only a note pad and tape recorder, respondent told the police that she wanted him arrested for Criminal Contempt. As a result, the defendant was charged, pursuant to Penal Law Section 215.50(1), with engaging in “disorderly, contemptuous or insolent behavior, committed during the sitting of a court, in its immediate view and presence and directly tending to interrupt its proceedings,” notwithstanding that he had not been disruptive and had not engaged in contemptuous behavior in the court’s “immediate view and presence.” Respondent had no reasonable basis to cause the defendant’s arrest, and she compounded her misconduct by arraigning the defendant on the Contempt charge and committing him to jail for two weeks in lieu of \$500 cash bail, although the Criminal Procedure Law requires that bail be set in more than one form.

The totality of respondent’s conduct toward Mr. Droz conveyed the appearance that she was biased against him, not only because of the “shopping bag” incident but also because of his failure to respond to questions at the arraignment and his lack of compliance with respondent’s order to obtain a permit. The requirement of impartiality and the protections of the law apply equally to all litigants, including those who may be annoying or difficult. Respondent’s conduct violated her duty not only to be impartial, but to avoid even the appearance of partiality (Sections 100.2 and 100.3[B][4]

of the Rules Governing Judicial Conduct).

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

Mr. Goldman, Judge Ciardullo, Mr. Coffey, Ms. DiPirro, Mr. Felder, Ms. Hernandez, Judge Peters, Mr. Pope and Judge Ruderman concur.

Mr. Emery dissents and votes to reject the agreed statement of facts on the basis that the disposition is too lenient.

Judge Luciano was not present.

CERTIFICATION

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

Dated: August 16, 2004

A handwritten signature in cursive script, appearing to read "Lawrence S. Goldman", is written over a horizontal line.

Lawrence S. Goldman, Esq., Chair
New York State
Commission on Judicial Conduct