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

CHARLES J. MULLEN,

Surrogate and Judge of the County Court and Family Court, Cortland County.

THE COMMISSION:

Mrs. Gene Robb, Chairwoman
John J. Bower, Esq.
David Bromberg, Esq.
Honorable Carmen Beauchamp Ciparick
E. Garrett Cleary, Esq.
Dolores DelBello
Victor A. Kovner, Esq.
Honorable William J. Ostrowski
Honorable Isaac Rubin
Honorable Felice K. Shea
John J. Sheehy, Esq.

APPEARANCES:

Gerald Stern (John J. Postel, Of Counsel) for the Commission

Edmund J. Hoffmann, Jr., for Respondent

The respondent, Charles J. Mullen, a judge of the County Court, Surrogate's Court and Family Court, Cortland County, was served with a Formal Written Complaint dated January 16, 1985, alleging that he held a proceeding in a case in the absence of one of the parties who had been granted an

adjournment and that he thereafter issued two warrants for that party's arrest. Respondent filed an answer dated February 27, 1985.

By order dated March 11, 1985, the Commission designated Shirley Adelson Siegel, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on June 6 and 7, 1985, and the referee filed her report with the Commission on October 7, 1985.

By motion dated November 11, 1985, respondent moved to confirm in part and disaffirm in part the referee's report. The administrator of the Commission opposed the motion on December 17, 1985, by cross-motion to confirm the referee's report and for a finding that respondent be censured. Respondent filed papers in support of his motion on January 23, 1986. The administrator filed a reply on February 5, 1986. Respondent filed a reply on February 12, 1986.

On February 14, 1986, the Commission heard oral argument, at which respondent appeared by counsel, and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent is a judge of the Cortland County Court, Surrogate's Court and Family Court and has been since January 1, 1976.

2. In the late summer and fall of 1983, Dawn Janack v. Larry E. Janack was before respondent in the Cortland County Family Court on issues of a family offense and child support.

3. After one appearance and several adjournments, the matter was scheduled to come before respondent on December 6, 1983.

4. On November 22, 1983, respondent issued a warrant for the arrest of Larry E. Janack.

5. Respondent issued the warrant based solely on ex parte communications from three sources.

6. A deputy sheriff or corrections officer whom respondent could not identify further had met respondent in a parking lot and told him that Larry E. Janack, an Army sergeant, had quit the military, was about to leave the jurisdiction and would not pay support for his three children.

7. In addition, respondent issued the warrant based on information from one of three named persons in the county support collections unit that Sergeant Janack was in arrears in his support payments.

8. Furthermore, respondent's court clerk, Marianne Marks, had told him that she had heard that Sergeant Janack was about to leave the area.

9. Sergeant Janack had appeared or had timely requested adjournments with respect to each scheduled court appearance since the proceedings were commenced.

10. Respondent did not contact Sergeant Janack; his attorney, Leslie H. Cohen; Ms. Janack, or her attorney, Frank E. Visco, in an attempt to verify the information.

11. Respondent conducted no proceeding prior to issuing the warrant.

12. On the warrant, respondent recommended an "undertaking" of $2,500.

13. Sergeant Janack was arrested on Thanksgiving Day, November 24, 1983, and arraigned before McGraw Village Justice Mardis Kelsen, who rejected respondent's recommendation and set bail at $500.

14. Sergeant Janack's mother posted bail the same day, and he was released from jail.

15. On November 25, 1983, respondent learned that Sergeant Janack had been released on $500 bail.

16. Respondent then issued a second warrant for Sergeant Janack's arrest solely because he felt that $500 bail was grossly inadequate to ensure his reappearance in court. Respondent again recommended an "undertaking" of $2,500.

17. At the time he issued the second warrant, respondent had no additional information concerning Sergeant Janack's alleged intentions to leave the area.

18. Respondent did not attempt to contact the parties or their counsel prior to issuing the second warrant.

19. Deputy Harold D. Peacock, Jr., of the Cortland County Sheriff's Department received the warrant from respondent's court. He called Sergeant Janack by telephone, and Sergeant Janack voluntarily surrendered.

20. Deputy Peacock then called respondent, explained that he knew Sergeant Janack and guaranteed that Sergeant Janack would appear in court as scheduled.

21. Respondent then released Sergeant Janack in Deputy Peacock's custody.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2 and 100.3(a)(4) of the Rules Governing Judicial Conduct and Canons 1, 2 and 3A(4) of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained insofar as it is consistent with the findings of fact enumerated above, and respondent's misconduct is established.

Section 428(a)(iii) of the Family Court Act authorizes a judge to issue an arrest warrant in a support proceeding when it appears that a party is likely to leave the jurisdiction. Respondent relies on this statute in justifying the issuance of the first warrant for Sergeant Janack's arrest.

However, respondent's information concerning Sergeant Janack's purported plans to flee was received outside of court.

Nothing official had come before him. His action was sua sponte and based on hearsay and, thus, was inherently unreliable. Respondent did not afford Sergeant Janack an opportunity to be heard on the matter, notwithstanding that he was represented by counsel. Since Sergeant Janack had appeared or duly requested adjournments for all previous court dates, respondent had no record upon which to base a belief that he would not again appear as scheduled.

Thus, contrary to the findings of the distinguished referee and the arguments of counsel, we find that respondent's issuance of the first arrest warrant was improper in that he considered ex parte communications and failed to afford the parties an opportunity to be heard. Section 100.3(a)(4) of the Rules Governing Judicial Conduct.

We also conclude, as did the referee, that respondent's issuance of the second warrant was improper. Although respondent had recommended bail of $2,500 on the first warrant, the arraigning judge had Sergeant Janack before her and presumably conducted a full inquiry before setting bail. She felt that $500 was adequate to ensure his appearance. While respondent may have disagreed and could have properly increased the bail after a new proceeding and a similar inquiry, he was wrong to simply issue another warrant. In doing so, his actions took on the appearance of an adversary, no longer independent and impartial. The ability to be and to appear impartial is an

indispensable requirement for a judge. Matter of Sardino v. State Commission on Judicial Conduct, 58 NY2d 286, 290 (1983).

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

Mr. Bower, Mr. Bromberg, Mrs. DelBello, Judge Ostrowski, Judge Rubin and Judge Shea concur.

Mrs. Robb and Judge Ciparick concur as to sanction but dissent as to the finding of misconduct with respect to the first warrant.

Mr. Cleary, Mr. Kovner and Mr. Sheehy dissent as to the finding of misconduct with respect to the first warrant and dissent as to sanction and vote that respondent be issued a confidential letter of dismissal and caution.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct, containing the findings of fact and conclusions of law required by Section 44, subdivision 7, of the Judiciary Law.

Dated: May 22, 1986

Lilemor T. Robb, Chairwoman
New York State
Commission on Judicial Conduct

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DISSENTING OPINION
BY MR. KOVNER
IN WHICH MR. CLEARY
AND MR. SHEEHY JOIN

I agree with Referee Shirley Adelson Siegel's conclusion that the issuance of the first warrant did not constitute misconduct. Respondent was informed by two sources, one the chief clerk of the Family Court, that they had received information that Sergeant Janack was about to flee the jurisdiction. In addition, respondent was informed, correctly, that Janack was then in arrears on his support payments (to the extent of $1,350 in two months, notwithstanding Janack's false testimony to the contrary).

As noted in the Introductory Practice Commentary to Article 4 of the Family Court Act, "The increasing numbers of women and children on the welfare rolls because of their husbands' or ex-husbands' failure to support them is stark proof of the Family Court's inability to enforce its mandate." In view of the wide authority vested in the Family Court to enforce support orders, reliance upon information from the governmental entity authorized to

collect support payments and to report arrearages, if any, and reliance on information from the chief clerk of the court did not, standing alone, constitute improper reliance on ex parte communications. The undisputed record of arrearages tended to corroborate the information from the court clerk and another uniformed officer of the court. Section 428 of the Family Court Act provides that a warrant may be issued where "it appears that...the respondent is likely to leave the jurisdiction." Although a summons would certainly have been preferable, the issuance of the first warrant did not constitute misconduct.

The issuance of the second warrant, coming after the fixing of $500 bail by Village Justice Kelsen, was improper and constituted misconduct. However, in light of the fact that the warrant was not executed and in effect withdrawn when respondent was called by the deputy sheriff, I do not believe a public sanction is warranted and would favor issuance of a letter of caution.

Dated: May 22, 1986

Victor A. Kovner, Esq., Member
New York State
Commission on Judicial Conduct