

BEFORE THE JUDICIAL INVESTIGATION COMMISSION OF WEST VIRGINIA

**IN THE MATTER OF
THE HONORABLE CYNTHIA BROCE-KELLEY
MAGISTRATE OF POCAHONTAS COUNTY**

COMPLAINT NO. 80-2016

PUBLIC ADMONISHMENT OF MAGISTRATE CYNTHIA BROCE-KELLEY

Complaint No. 80-2016 came before the Judicial Investigation Commission upon a matter filed by Stephen M. McNally (hereinafter "Complainant") on May 18, 2016, setting forth certain allegations against the Honorable Cynthia Broce-Kelley, Magistrate of Pocahontas County (hereinafter "Respondent"). Complainant alleged that Respondent failed to timely conduct his initial appearance upon his arrest for one felony and two misdemeanors. After a review of the complaint, Respondent's written reply, the information and documents obtained from the investigation, and the pertinent Rules contained in the Code of Judicial Conduct, the West Virginia Judicial Investigation Commission (hereinafter "Commission") found probable cause at its August 26 2016 meeting that Respondent violated Rules 1.1, 1.2, 2.1, and 2.5(A) and ordered that she be publicly admonished pursuant to Rules 1.11 and 2.7(c) of the Rules of Judicial Disciplinary Procedure.

STATEMENT OF FACTS

Respondent has served continuously as a Pocahontas County Magistrate since January 1, 2013. At all times relevant to the instant complaint, Respondent was serving in her capacity as Magistrate.

On April 18, 2016, Complainant was charged with one misdemeanor count of animal cruelty in Pocahontas Magistrate Court Case No. 16-M38M-00231. Respondent found probable cause to charge the Complainant with the misdemeanor and signed the complaint. She also

issued a warrant for arrest which required the arresting officer to bring Complainant before a magistrate “forthwith” and at the “officer’s discretion.”

On or about April 20, 2016, Complainant was charged with one misdemeanor count of keeping vicious dogs in Pocahontas Magistrate Court Case No. 16-M38M-00237. Pocahontas County Magistrate Carrie Wilfong found probable cause to charge the Complainant with the misdemeanor and signed the complaint. Magistrate Wilfong also issued a warrant for arrest which required the arresting officer to bring Complainant before a magistrate “forthwith.”

On or about April 28, 2016, Complainant was charged with one felony count of animal cruelty in Pocahontas Magistrate Court Case No. 16-M38F-00028. Magistrate Wilfong found probable cause to charge the Complainant with the felony and signed the complaint. Magistrate Wilfong also issued a warrant for arrest which required the arresting officer to bring Complainant before a magistrate “forthwith.” On May 9, 2016, Magistrate Wilfong authorized a search warrant to be executed by the Pocahontas County Sheriff’s Department on Complainant’s residence in Arbovale for “two large Black and Red and Tan dogs and/or any recording kept in relation to the dogs, to include records kept on computer, notebooks, papers, pictures or any other means that records would be kept to determine ownership.”

On Tuesday, May 10, 2016, the Pocahontas County Courthouse was officially closed because it was election day. Magistrate Wilfong had ended her on call shift for the prior week at 7:00 a.m. that morning. Respondent went on duty as the on-call magistrate at 7:00 a.m. on May 10, 2016. Her on call shift ran until 7:00 a.m., May 17, 2016. Rule 1(b) of the West Virginia Administrative Rules for Magistrate Courts governs on-call duty and provides in pertinent part:

On call. -- One magistrate in each county, on a rotating basis shall be on call at all times other than regular office hours. On-call duties shall extend, in criminal cases to initial appearances, to taking bond for someone who is in jail; and to

receiving and acting upon emergency search warrants, domestic violence matters and juvenile abuse and neglect matters.

- (1) *Initial appearances and taking bond in criminal cases.* – Within the time periods provided for below, the on-call magistrate shall contact the county or regional jail, whichever applies, and the juvenile detention facility that serves the county, and shall inquire whether any person has been arrested in the county since the close of regular business hours or since the last contact with the jail, or whether anyone confined to the jail is able to post bond. If an arrest has been made or if a prisoner is able to post bond, the magistrate shall proceed immediately to the magistrate court offices to conduct an initial appearance and to set bail for such person, or to accept bond for someone already in jail.

It shall be sufficient to comply with this rule if the on-call magistrate contacts the jail and juvenile detention facility:

- (A) Between 10:00 p.m. and 11:00 p.m. Monday through Friday;
(B) . . . [B]etween 10:00 p.m. and 11:00 p.m. on Saturdays and holidays;

At approximately 7:15 p.m. on May 10, 2016, the Sheriff and two of his deputies went to Complainant's house and executed the search warrant. They also arrested Complainant on the outstanding warrants and placed him in the back of a cruiser for transport to the Courthouse for arraignment. According to Complainant, while en route, one of the deputies called the dispatcher and advised that they were expected to arrive at the Courthouse at approximately 9:20 p.m. The dispatcher came back and indicated that the on-duty magistrate did not want to stay for an arraignment and was going home. Complainant stated that after arriving at the Courthouse, the deputies placed him on a bench next to the magistrate courtroom. Shortly thereafter, Respondent came down the stairs with a group of people. One of the deputies asked Respondent to arraign Complainant but she declined to do so. The deputies then transported Complainant to Tygart Valley Regional Jail where he spent the night. At approximately 9:00 a.m. on May 11, 2016, Respondent arraigned Complainant. Bond was set at \$9300.00 with 10% down and 90%

personal recognizance. Complainant was released from jail at approximately 4:00 p.m. after bond had been posted by a bail bondsman.

On May 18, 2016, Complainant filed the instant ethics complaint against Respondent. Complainant alleged that Respondent violated the Code of Judicial Conduct by “refusing to hold an immediate and timely arraignment when [she was] available. . . .” By letter dated July 8, 2016, Respondent replied to the allegation and provided in pertinent part:

On the 10th day of May, 2016, at 9:54 p.m., I received a text message from 911 dispatcher, Laura Combs. She stated that Deputy Shinaberry was en route with 1 male from Arbovale (which is approximately 40 minutes from the Pocahontas Courthouse). I informed the dispatcher to let the officer know that if he was going to be arriving after 10:00 p.m. at the Sheriff’s office he would need to transport the individual to TVRJ. I was at the courthouse on this evening to obtain election results. At approximately 10:30 p.m., I contacted TVRJ inquiring if there was anyone detained there that I needed to conduct initial appearances on. At approximately 11:00 p.m., I, my two children and my assistant, Pam Carpenter were having a conversation as we walked out of my office to leave for the night. Deputy Shinaberry and Cpl. Hammel walked up the hallway and seated a male individual on the bench by the assistant’s door. Deputy Shinaberry handed me the served copy of the warrants served on the individual. I looked at my phone to see the time and it was after 11:00 p.m. and I told the officer he would need to transport the individual to TVRJ and I would do his initial appearance in the morning. . . . We then left the courthouse.

CONCLUSIONS

The Commission by unanimous vote at its August 26, 2016 meeting found that probable cause does exist in the instant complaint and that the Honorable Cynthia Broce-Kelley, Magistrate of Pocahontas County, violated Rules 1.1, 1.2, 2.1, and 2.5(A) of the Code of Judicial Conduct which provide as follows:

Canon 1

A Judge Shall Uphold And Promote The Independence, Integrity, And Impartiality Of The Judiciary, And Shall Avoid Impropriety And The Appearance Of Impropriety.

Rule 1.1 Compliance With the Law

A judge shall comply with the law, including the West Virginia Code of Judicial Conduct.

Rule 1.2 Confidence in the Judiciary

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Canon 2

A Judge Shall Perform The Duties Of Judicial Office Impartially, Competently, And Diligently.

Rule 2.1 Giving Precedence to the Duties of Judicial Office

The duties of judicial office, as prescribed by law, shall take precedence over all of a judge's personal and extrajudicial activities.

Rule 2.5 Competence, Diligence, and Cooperation

(A) A judge shall perform judicial and administrative duties competently and diligently.

The Commission further determined that formal discipline was not appropriate under the circumstances. However, the Commission found that the violations were serious enough to warrant a public admonishment.

Rule 4(C)(1) of the West Virginia Rules of Criminal Procedure for Magistrate Courts states that a warrant "shall command that the defendant be arrested and brought before the nearest available magistrate of the county in which the warrant is executed." Rule 4(A) provides that the issuing magistrate "may restrict the execution of the warrant to times during which a magistrate is available to conduct the initial appearance." Rule 4(A) also gives the magistrate the discretion to issue a summons instead of a warrant. Rule 4(C)(2) states that a "summons shall be

in the same form as the warrant except that it shall summon the defendant to appear before a magistrate at a stated time and place.”

The warrant form has three options for bringing a defendant before a magistrate for arraignment: (1) forthwith, which means immediately; (2) between the hours of 9:00 a.m. and 4:00 p.m., Monday through Friday; or (3) other as specified. Respondent chose a mixture of options 1 and 3 in the warrant she issued against Complainant. She opted to have him brought “forthwith” and at the “officer’s discretion.” The warrants issued by Magistrate Wilfong also required Complainant to be brought “forthwith” for his arraignment.

The arresting officers complied with the dictates of the warrant. They radioed ahead to tell Respondent they were bringing the Complainant to the Courthouse for arraignment. While it appears that there may have been some misunderstanding in the radio communication about where the Complainant should have been taken following processing by the Sheriff’s Department, the confusion should not have occurred to Complainant’s disadvantage.

Respondent may have been at the Courthouse with family members to obtain election results, but she was also the on-call magistrate and her judicial duties take precedence. Respondent must be ever mindful of the legal maxim that “justice delayed is justice denied.” Had Respondent contacted the jail during the requisite time, learned that there were no defendants to arraign, and gone home before Complainant got to the Courthouse, she would not have had to return because she would have been in compliance with Administrative Rule 1. Had Respondent contacted the jail at 10:30 p.m. and been advised that there had been ten defendants for initial appearance, she would have been expected to arraign every one of them then and there and process the paperwork before going home. On this night, she had one defendant at the Courthouse. She was still there, and she was still on call. It was her duty to arraign him at that

time. By failing to do so, Respondent violated Rules 1.1, 1.2, 2.1, and 2.5(A) of the Code of Judicial Conduct.

Based upon the foregoing, it is the decision of the Judicial Investigation Commission that the Honorable Cynthia Broce-Kelley, Magistrate of Pocahontas County, be disciplined. Accordingly, the Judicial Investigation Commission hereby publicly admonishes the Honorable Cynthia Broce-Kelley, Magistrate of Pocahontas County, for her conduct as fully set forth in the matters asserted herein and warns her to refrain from engaging in similar behavior in the future.

Pursuant to Rule 2.7(c) of the Rules of Judicial Disciplinary Procedure, Respondent has fourteen (14) days after receipt of the amended public admonishment to file a written objection. If Magistrate Broce-Kelley timely files an objection, the Judicial Investigation Commission shall, pursuant to the Rule, file a formal charge with the Clerk of the Supreme Court of Appeals of West Virginia.


Ronald E. Wilson, Chairperson
Judicial Investigation Commission

September 1, 2016

Date

REW/tat