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May 29, 2019

Edythe Nash Gaiser, Clerk  
West Virginia Supreme Court of Appeals  
Room E-317, State Capitol  
Charleston, WV 25350

Via Facsimile: 304-558-3815

Supreme Court No. 19-0032  
JIC Complaint No. 35-2018  
In the Matter of:  
The Honorable David E. Ferguson  
Magistrate of Wayne County

Dear Mr. Gaiser:

Please find enclosed for filing with the Court is Respondent's Answer to Formal Charges, and please note that JIC Disciplinary Counsel has been served by email.

Very truly yours,

R. Lee Booten II

RLB/Enclosures

cc: Ancil Ramey, Commission Counsel  
Hon. Magistrate David E. Ferguson



BEFORE THE JUDICIAL HEARING BOARD OF WEST VIRGINIA

IN THE MATTER OF:  
THE HONORABLE DAVID E. FERGUSON      SUPREME COURT NO. 19-0032  
MAGISTRATE OF WAYNE COUNTY      JIC COMPLAINT NO. 35-2018

RESPONDENT’S ANSWER TO FORMAL CHARGES

Now comes your respondent by R. Lee Booten II, and pursuant to Rule 2.10 of the Rules of Judicial Disciplinary Procedure, he hereby files his response to the formal statement of charges filed herein. Counsel has conferred with disciplinary counsel concerning the delay in filing this response, disciplinary counsel has voiced no objection to the timing of this response, in that respondent’s counsel has previously hereto filed respondent’s disclosure of exhibits and witnesses, and otherwise respondent’s counsel and disciplinary counsel have fully cooperated with each other in regards to complying with the applicable rules, and with the ongoing investigation by both parties’ counsel. For that response find below the following representations so addressing those enumerated paragraphs set forth in the formal statement of charges, as follows:

1. In response to paragraph 1, respondent by counsel, admits to those representations set forth in paragraph 1, and stipulates for evidentiary purposes the accuracy of said representations.

2. Admitted procedurally, but specifically denied as towards representations that respondent, his father, "and another gentlemen" were fishing. Respondent denied that he and his father were accompanied by anyone as has been falsely alleged. Paragraph 2 is an incomplete statement of the predicate allegations set forth in the underlying complaint filed by DNR Captain Ballard, who possesses no first hand knowledge of any of the incidents so complained. The underlying complaint is not included in the statement of formal charges, and counsel has confirmed that it has not been lodged in the Supreme Court's file. Counsel has attached a copy of the complaint filed by Captain Ballard, against your respondent that underlies the formal charges.

### CHARGE I

3. The DNR officers cited therein are lying in regards to pertinent portions of their statements regarding those incidents cited by Captain Ballard's complaint. Those intentional misrepresentations are too numerous to list in a short summary fashion. Respondent will state his position upon those statements attributed to

each DNR officer as set forth in the formal charge. However, respondent intends to offer proof of additional misrepresentations by those DNR officers involved that are not set forth in the formal charge. [This reference in regards to those exhibits previously filed in this matter in respondent's disclosure of exhibits and witnesses.] Why were these officers in plain clothes, opposed to being visible as a reminder to fisherman of DNR rules to ensure compliance instead of issuing the citations.

Reference is made to the DNR's website of the visibility of their officers, and counsel questions what authority they possess to conduct official business out-of-uniform. DNR officers do not protect the public's interest as other law enforcement agencies, and to analogize their statutory duties to those of regular law enforcement is totally misplaced and possibly illegal on their part. If counsel's research supports this contention, then in that event he will supplement this response sufficiently prior to hearing. Respondent adamantly denies making the statement as DNR Officer Miller so accuses, but to also claim that alleged statement was seeking to aid others in violating DNR laws is absurd, and borders on ludicrous. Any DNR officer's testimony that tries to interpret statements attributed to respondent violates the Rules of Evidence, and will be the subject of a *Motion in Limine* prior to hearing.

4. Respondent denies he and father were fishing for two hours, and denies that they were accompanied by a 3<sup>rd</sup> party. Further, respondent denies that he exceeded the catch limit by giving one trout away to his dad, in that no DNR statute or C.S.R. section prohibits the number of trout caught.

5. This C.S.R. limitation by DNR is only constitutionally lawful if there is a rational basis, based upon a compelling state interest to limit fishermen to 6 trout. The Fishing Code limits cited in that paragraph correctly state that there is a 6 trout limit at East Lynn Lake per day. Counsel's investigation has revealed that the trout emptied into the East Lynn Lake spillway die shortly thereafter anyway, as being incapable of surviving in the warmer lake waters such as East Lynn's. Thus, these limitations are artificial and serve no rational basis to compel the State to formulate limitations that further no State compelling interest, and therefore any such sections of C.S.R. 60-5.2 that seek to regulate unnecessary limitations are constitutionally invalid, in that they are violative of principles of substantive due process.

6. There is no law about catching trout in excess, just possession. Further DNR officer's are lying about breaking the necks of trout and throwing them back into the lake. Lastly, there is nothing illegal about giving trout away once caught. Respondent has admitted that once he had his 6 trout limit that he caught another

for his father to complete his father's 6 trout limit. However, respondent, and a witness other than his father, will adamantly dispute that he caught additional trout, other than that one, and any statement by DNR Officers that he caught and gave additional trout to an unidentified man is categorically untrue. That "unidentified third man" has been identified as being an 80 year old East Lynn resident named Lindsey Napier. Counsel has spoken to Mr. Napier, and he will appear and refute numerous misrepresentations by DNR Officer's, in particular that he came to the lake to fish that day with the Fergusons. Counsel has provided Disciplinary Counsel with Mr. Napier's phone number.

7. No "they" didn't decide to leave together, because the third man, Mr. Napier, came on his own accord, left on his own accord, not with the Fergusons, and he will testify that he did not come with the Fergusons. Mr. Napier will specifically refute other false representations made by DNR Officers, such as the respondent breaking the necks of trout and throwing them back into the lake. DNR officers are absolutely lying in stating "you tipped me off that we were here." This statement attributed to respondent could actually have the opposite intent, that being to warn others to not violate laws, if such had actually occurred, which respondent denies.

8. Miller is lying concerning respondent producing his Supreme Court Id to Miller, although respondent did go thru his Id's to produce those requested, but never took his Supreme Court Id out of his wallet. Counsel is also of belief that Officer Miller, just as Harvey, knew exactly who he was dealing with the entire time. Why else was he concerned about embarrassing them over simple violations.

9. The third man, Mr. Napier, was never present during this incident. If he had been present Miller would have collected his ID along with the Ferguson's prior to Harey's arrival, and his identity would have been known. Nowhere in either Harvey's or Miller's statement did they provide any description of the "third [mystery] man". Mr. Napier is 80 years old, and how hard is that to describe. Again, they are lying.

10. Mr. Napier will testify that he never went down or up the hill with the Fergusons at any time, and the request to Id the 3rd man with them was met with disbelief, not refusal, and the quote contained in Paragraph 10 is correct, since there was never a third party with them, thus the elder Ferguson's inquiring statement.

11. Miller, then Harvey later, didn't get what was never there, a 3<sup>rd</sup> Id. Thus, the Ferguson's were not refusing to cooperate, they simply had no knowledge of what Harvey referred to as a third man.

12. If they had the legal limit why were they cited? Harvey knew exactly who he had before him, particularly the elder Ferguson who Harvey had interacted with through the numerous citations he wrote in Wayne County over a 15 year period while the elder Ferguson was a Magistrate until the Fall of 2016.

13. Admitted, as a statement made by the elder Ferguson.

14. Admittedly the elder Ferguson was visibly upset, but not the respondent, and respondent did go over to the picnic table. These lies by Harvey will be evident upon cross examination by counsel.

15. Denied.

16. Respondent absolutely denies he was intending to "get the ticket taken care of", and his no contest plea to one of the charges is affirmative proof of his intent, not what Officer Harvey speculates in his repeated attempts to defame the respondent.

17. Admitted, except that it was a no contest plea. However, counsel has concluded thru case law research that the respondent was never in violation, and Harvey's admission that respondent only had the legal limit is affirmative proof of his lack of intent to violate these unconstitutional and absurd limitations of trout that will die, whether if by being caught, or entering into a warm water lake where they cannot survive.

## CHARGE II

18. Counsel questions whether the Commission, made a finding that respondent lied. Any type of charge is only based on the belief that something might have occurred, that being a probable cause determination. A finding only occurs when an accused has been confronted with evidence, and then has the due process rights to defend. Counsel submits that the Commission simply is following Disciplinary Counsel's recommendation, and made little if any, attempt to review the statements in question. Two parties giving differing statements never provides a fact finder the ability to determine which is correct on paper. Only thru examination of evidence can a finding be ever lawfully made, and if in fact the Commission has predetermined this matter prior to Respondent's due process rights have been afforded, then counsel, questions the Commission's ability to provide respondent with a fair hearing. Thus, counsel reserves the right to move to recuse any Commissioner who has made a premature "finding that respondent lied", as being a blatant violation of respondent's due process rights.

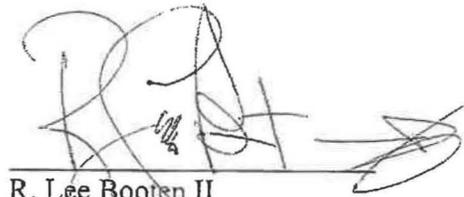
19. Same response as 18. Counsel will submit a Bill of Particulars to Disciplinary Counsel, so requesting exactly which portions of respondent's statement that he will be advocating as a false statement under oath. Further, counsel moves to dismiss subsection (d) as a violation of Judicial Code of Conduct.

The confidentiality provisions of the Commission's Rules are intended to protect an accused Judicial Officer during the Complaint stage from disclosures by others, not the accused. Any accused, any patient, anyone with confidentiality protections can so choose to divulge any information concerning themselves, if they so choose. So whether subsection (d)'s allegations did or did not occur are of no consequence if respondent was so inclined to waive his rights of non-disclosure. You can never be in violation of your own rights, how absurd!

In regards, to those statements of alleged violations contained in subsections (a), (b), and (c), respondent specifically denies each of those charges, and demands strict proof thereof.

#### **PRAYER FOR RELIEF**

Respondent having denied those allegations set forth in the Formal Statement of Charges, as stated hereinabove, so moves the Commission after it has heard all of the evidence in this matter, to dismiss all charges against your respondent and to award him his reasonable attorney fees, and costs incurred herein.



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