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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**IN THE MATTER OF:
THE HONORABLE DAVID E. FERGUSON,
MAGISTRATE OF WAYNE COUNTY**

**SUPREME COURT NO. 19-0032
JIC COMPLAINT NO. 35-2018**

FORMAL STATEMENT OF CHARGES

The West Virginia Judicial Investigation Commission, pursuant to Rules 2.7 (a) and (d) and 2.8 of the Rules of Judicial Disciplinary Procedure, has determined that probable cause does exist to formally charge Wayne County Magistrate David E. Ferguson (“Respondent”) with violations of the Code of Judicial Conduct and that formal discipline is appropriate based upon the following probable cause findings:

1. Respondent’s father, a Wayne County Magistrate for over 24 years, decided not to run for re-election in the May 2016 judicial elections. Respondent ran for the seat being vacated by his father and won the election but was not to officially take office until January 1, 2017. At some point thereafter, Respondent’s father retired. Respondent was appointed to fill the vacancy and began serving as a magistrate on or about November 1, 2016. On January 1, 2017, Respondent again took office per the election. His term is set to expire on December 31, 2020. Respondent has served continuously as a Magistrate since November 1, 2016.
2. On April 9, 2018, a complaint was filed against Respondent by Department of Natural Resources (“DNR”) Captain Terry A. Ballard and was given Complaint No. 35-2018. The complaint was predicated in part on a February 21, 2017 incident that occurred while Respondent, his father and another gentleman were fishing at East Lynn Lake spillway on trout stocking day.

After investigating and evaluating the Complaint, the Judicial Investigation Commission finds that there is probable cause to make the following CHARGES and FINDINGS:

CHARGE I

MAGISTRATE FERGUSON violated Rule 1.1 (Compliance With the Law); Rule 1.2 (Confidence in the Judiciary); Rule 1.3 (Avoiding Abuse of Prestige of Judicial Office); and Rules 3.1(C) and (D) (Extrajudicial Activities in General) of the Code of Judicial Conduct as set forth in the attached Appendix when he committed the following acts:

3. DNR Officers were undercover in plain clothes at the East Lynn Lake spillway during February 21, 2017, to make sure that no one was violating any West Virginia laws pertaining to fishing. The DNR Officers did not know Respondent and he did not know them. DNR Officer Jacob Miller was watching some men when Respondent approached him, leaned in and said, “Hey, you need to watch out. There’s some game wardens around here somewhere.”
4. Later, DNR Corporal Larry Harvey observed Respondent, his father and a third man fishing near one another. He continued to monitor them for two hours and watched as Respondent exceeded the statutory limit for catching trout.
5. W. Va. Code § 20-1-17(b)(7) gives the DNR Commission the authority to “fix by regulation . . . the open seasons and the bag, creel, size, age, weight and sex limits with respect to wildlife in this State. On or about February 21, 2017, the daily creel limit for brook, brown, rainbow and golden rainbow trout is “six (6) trout in aggregate and the possession limit is twelve (12) trout in aggregate. . . .” See 58 CSR 60-5.2 The term “aggregate” is defined as:

[T]he total creel or possession limit of similar kinds of game fish. For example, the daily creel limit for trout is six (6). This could be two (2) brown trout, two (2) brook trout, and two (2) rainbow trout, or any combination of six (6) trout, but not more than a total of six (6) per day nor more than a total of twelve (12) in possession.

See 58 CSR 60-2.1. Exceeding the creel limit on trout is a misdemeanor offense in West Virginia, and the penalty upon conviction is a fine of not less than fifty dollars (\$50.00) nor more than three hundred dollars (\$300.00) or imprisonment in the regional jail for not less than ten (10) nor more than one hundred (100) days or both a fine and imprisonment. *See* W. Va. Code § 20-2-5b.

6. Respondent continued to catch trout in excess of the creel limit. Instead of releasing the excess trout back into the water, Respondent broke their necks and placed them back in the water near his feet. In addition to exceeding the limit of trout he was allowed to catch, Respondent also illegally gave some of his trout to his father and at least one fish to the unidentified third man in the party.
7. When the three men were finished fishing, they decided to leave. Corporal Harvey directed Officer Miller to intercept them. Officer Miller approached Respondent and asked him if he knew who he was. Respondent said that he had no idea. Officer Miller identified himself as a DNR officer and told Respondent that Corporal Harvey had witnessed his group violate DNR statutes. Officer Miller also said to Respondent, "You came up to me and tipped me off that we were here. Did you not know who I was?" Respondent replied, "No, I really did not know who you were."
8. Officer Miller told the men that he did not want to embarrass them in front of other fishermen at the lake so he was going to walk with them to their truck to issue citations. Officer Miller also asked for their drivers' and fishing licenses. When they arrived at

Respondent's truck, Officer Miller was provided with Respondent's driver's and fishing licenses. When Respondent removed the licenses from his wallet to give them to Officer Miller, he also included with his license his Supreme Court Identification. Officer Miller picked up the Supreme Court ID from where Respondent placed it and returned it to him.

9. Corporal Harvey soon caught up with the men and directed Officer Miller to return to the group that Miller had been watching along the spillway. Before leaving, Officer Miller gave Corporal Harvey the licenses that he thought he had collected from Respondent, his father and the third man. Corporal Harvey identified himself to the three men and told them that he had to retrieve his paperwork and citations from a picnic table located approximately 100 yards away. He told the men to not to move.
10. When Corporal Harvey returned, the third man was missing and only Respondent and his father remained. Corporal Harvey asked what happened to the third man. Respondent's father replied "Who are you talking about?" Respondent refused to provide Corporal Harvey with the third man's location.
11. Corporal Harvey looked through the IDs and licenses that Officer Miller had given him and learned that Officer Miller had failed to obtain licenses from the third man. Corporal Harvey then asked for the identity of the third man. Respondent and his father refused to provide it. Respondent and his father maintained that they did not know who Corporal Harvey was talking about.
12. Respondent and his father then demanded Corporal Harvey prove that they had caught more than the creel limit allowed by law. Respondent said to Corporal Harvey "I want you to prove that we've caught too many trout." Corporal Harvey looked in the back of Respondent's truck where the fish were located and discovered that some of the trout he

had seen Respondent catch in excess of the creel limit were missing. The amount of fish remaining in Respondent's truck was now within the legal limit.

13. Corporal Harvey did not argue with Respondent but started on the citations. Respondent told Corporal Harvey, "Well, you do what you need to do, but I'm telling you right now, this ain't going nowhere."
14. Respondent and his father then became belligerent, raised their voices, started to swing their arms while yelling and refused to follow Corporal Harvey's commands. Because of their unruly behavior, Corporal Harvey did not think he could safely write the citations at the truck. Corporal Harvey decided to finish the tickets at a nearby picnic table in order to better observe Respondent and his father while writing the citations. Corporal Harvey directed Respondent and his father to accompany him to the picnic table. Respondent replied "I ain't going nowhere. I'm going to stay right here by my truck."
15. Corporal Harvey left Respondent and his father by the truck and went to the picnic table to write the citations. While Corporal Harvey was at the picnic table, Respondent and his father repeatedly approached the area and interrupted the writing of the citations with threatening behavior. Corporal Harvey stated that it normally takes five minutes to write a citation but because of Respondent's behavior it actually took him thirty to forty-five (30-45) minutes to accomplish the task.
16. When Corporal Harvey finished writing the tickets, he returned to Respondent's truck and issued the citations. Respondent reacted by holding up the citation and asking Corporal Harvey who Respondent had to call to get the ticket taken care of. Respondent

said, “So who do I need to talk to about this, Sgt. Gary Amick?” and “Well, I need to talk to Sgt. Larry Ronkle about this?”

17. Corporal Harvey charged Respondent in the Magistrate Court of Wayne County with the misdemeanor offenses of illegal possession of trout and exceeding the limit for trout. On March 10, 2017, Respondent pleaded guilty to exceeding the limit for trout and was fined \$50.00. In exchange for the guilty plea, the prosecutor dismissed the illegal possession of trout charge.

CHARGE II

MAGISTRATE FERGUSON violated Rule 1.1 (Compliance With the Law), Rule 1.2 (Confidence in the Judiciary), and Rule 2.16(A) (Cooperation with Disciplinary Authorities) of the Code of Judicial Conduct as set forth in the attached Appendix when he committed the following acts:

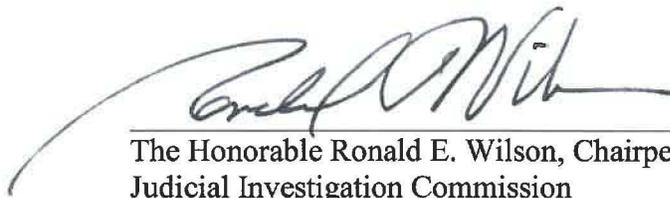
18. By letter dated April 30, 2018, the Judicial Investigation Commission asked Respondent to reply to the allegations contained in Captain Ballard’s ethics complaint. By letter dated May 3, 2018, Respondent sent his response. The Commission found that based upon the Respondent’s conduct in this matter that he lied in his response when he stated that he has “never nor will I ever treat any officer with disrespect.”
19. On October 24, 2018, Judicial Disciplinary Counsel took a sworn statement from the Respondent. In that statement, the Commission also found that Respondent lied under oath. The lies include but may not be limited to the following:
 - (a) Whether Respondent tipped off DNR Officer Miller about undercover DNR officers being at the East Lynn Lake Spillway on February 21, 2017;

- (b) Whether a third man was fishing with his father and he on February 21, 2017, and his knowledge concerning the identity of the third man;
- (c) His behavior when Officer Miller and Corporal Harvey interacted with him and issued the misdemeanor citation to him on February 21, 2017; and
- (d) Whether he engaged in any conversations with Wayne County Magistrate Billy Dell Runyon about the Judicial Investigation Commission investigation into Complaint No. 35-2018 and the nature of the discussions.

Magistrate Ferguson is advised that he has the right to file responsive pleadings to the charges made against him not more than 30 days after service of the formal charges upon him by the Clerk of the Supreme Court of Appeals of West Virginia. Rule 2.10 of the Rules of Judicial Disciplinary Procedure provides:

The judge may file responsive pleadings as provided in the West Virginia Rules of Civil Procedure. Any such pleadings shall be filed by the judge with the Clerk of the Supreme Court of Appeals and the Office of Disciplinary Counsel not more than thirty (30) days after the date of the formal charges. For good cause shown, the Office of Disciplinary Counsel may extend the time for filing of such pleadings.

STATEMENT OF CHARGES issued this 10 day of JAN., 2019.



The Honorable Ronald E. Wilson, Chairperson
Judicial Investigation Commission

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IN THE MATTER OF:
THE HONORABLE DAVID E. FERGUSON,
MAGISTRATE OF WAYNE COUNTY

SUPREME COURT No. _____
JIC COMPLAINT No. 35-2018

**RULE 2.8 NOTICE OF FILING OF
FORMAL STATEMENT OF CHARGES**

Comes now Judicial Disciplinary Counsel pursuant to Rule 2.8 of the Rules of Judicial Disciplinary Procedure and on behalf of the Judicial Investigation Commission and provides notice to David E. Ferguson, Magistrate for Wayne County, by facsimile transmission, email and United States Mail that on the 14th day of January 2019, he duly filed the attached Formal Statement of Charges in the above-captioned matter with the Clerk of the Supreme Court of Appeals of West Virginia by hand delivering the original and nine copies to the Clerk's Office located at the Capitol Complex, Building One, Room E-317, 1900 Kanawha Boulevard East, Charleston, West Virginia 25305.

Respectfully submitted,



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