

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

MARK J. GRISANTI,

a Judge of the Court of Claims and an
Acting Justice of the Supreme Court,
Erie County.

REPLY MEMORANDUM

(Judge Grisanti)

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INTRODUCTION

As Mark Grisanti has repeatedly conceded, his actions on June 22, 2020, fell short of the expectations of Rules of Judicial Conduct. Judge Grisanti's extra-judicial conduct during the confrontation with the Meles, his physical contact with Buffalo Police Officer Ryan Gehr, and his use of profane language during his interaction with the police, "detract from the dignity" of his judicial office. His conduct thus violated Rule 100.4(A)(2).

Long before the Commission investigation commenced, Judge Grisanti apologized and admitted that his conduct was inappropriate, expressed sincere remorse, and sought counseling to explain his conduct. Even on the very day of the incident, he recognized his wrongdoing and apologized to several law enforcement members for his actions. The facts developed at the hearing, including the relevant legal analysis, support finding a violation of Rule 100.4(A)(2), but not the other violations alleged by the Commission.

In its submission, the Commission repeatedly and often inaccurately summarizes the purported evidence to exaggerate and

embellish Judge Grisanti's culpability. Over the course of nine days of testimony over four weeks, the Referee undoubtedly came to perceive a figurative picture of Judge Grisanti and his actions on June 22, 2020. The portrait the Commission attempts to paint with its submission bears no resemblance to that picture. The Commission's portrayal overreaches, distorts and repeats the facts in an attempt to make Judge Grisanti appear more culpable. It ignores favorable testimony and mitigation evidence, and highlights discredited and unsupported accusations. Indeed, the Commission goes so far as to suggest that Judge Grisanti should be found guilty of misconduct not charged in the complaint.

Judge Grisanti accepts responsibility for his inappropriate conduct, his inappropriate language, and physical contact with a member of the police, but the evidence at the hearing did not prove the other accusations now levied by the Commission in its submission.

ARGUMENT

I. THE COMMISSION MAKES THE UNSUBSTANTIATED ALLEGATION THAT MARK GRISANTI INTENTIONALLY LIED TO THE POLICE, THEREBY IMPROPERLY SEEKING TO EXPAND THE CHARGES.

The Commission alleges that Mark Grisanti committed misconduct by making false statements to the 9-1-1 operator and to the police personnel who responded following the incident. The evidence at the hearing, however, did not establish by a preponderance of the evidence that Judge Grisanti intentionally made any false statements. Furthermore, by seeking a determination that Judge Grisanti engaged in misconduct by these purported false statements, the Commission would violate Judge Grisanti's due process rights to fair notice of the charges against him.

A. Judge Grisanti Did Not Make Any Intentional Misstatements to the Police.

As mentioned, when Judge Grisanti and his wife returned home after going out for dinner and running some errands, they found a large, four-door truck parked some feet away from the curb directly in front of their driveway, thereby obstructing their ability to turn into their driveway from that direction. Hearing Transcript ("Tr.") at 1163. This followed a familiar pattern on the street whereby the Meles, for

years, intentionally blocked or crowded the driveways of the Grisanti and multiple other neighbors. Tr. at 430-31, 479-99, 970-71, 1164-65. The Meles had ignored prior requests not to block or crowd the other driveways on the street, and often responded with profanity or threats. Tr. at 1166.

On the night in question, Judge Grisanti decided not to confront the Meles, but to ignore them, as his longtime friend Buffalo Mayor Byron Brown had advised him. Tr. at 1223; Exhibit 11, 11-A Page 22. Instead, Judge Grisanti called his local police precinct. Tr. at 1180. He was advised that he needed to call 9-1-1. Tr. at 1180. He did so and explained the situation to the 9-1-1 operator. Tr. at 1181-82; Exhibits 1 and 1-A. Judge Grisanti told the 9-1-1 operator that the neighbor across the street had multiple cars parked on his side of the street. He asked the 9-1-1 operator to send a police car to inspect the vehicle and requested that they be ticketed. Exhibit 1, 1-A Pages 1-2. Judge Grisanti made no reference to his judicial position.

The Commission alleges that Judge Grisanti made a false claim by telling the 9-1-1 operator that the Mele cars were “blocking my driveway.” In light of the hearing evidence, including the photographic

evidence, it is respectfully submitted that it is a matter of opinion whether the Mele vehicles were in any way “blocking” the Grisanti driveway. Judge Grisanti and his wife both testified that it was difficult for Judge Grisanti to pull his car in the driveway that night, and he had to take a wider turn to avoid one of the two Mele trucks (the one belonging to Theresa Dantonio). Tr. at 994, 1163. The truck was not only crowding the Grisanti’s driveway apron (with ample room to pull forward), but it was also parked a couple feet away from the curb, thus providing even more obstruction for the Grisantis as they turned into their driveway. *See Exhibit LLL.*



Officer Gehr testified that the truck's placement blocked the entrance of the Grisanti driveway from the direction that the Grisantis were traveling. Tr. at 199. Officer Muhammad testified that he and Officer Richard Hy agreed that the Meles parked the truck that way to annoy and "fuck with the Grisantis." Tr. at 274. In any event, Judge Grisanti's request was that the police come to his street, where the police would see the vehicle for themselves, and determine if it was properly or improperly parked. In light of the hearing evidence, Judge Grisanti's statement to the 9-1-1 operator about the Mele vehicles blocking his driveway was, at most, harmless hyperbole.

The Commission further alleges that after the altercation Judge Grisanti made false statements to the police about his role in the altercation. In making this argument, the Commission pulled several statements out of context from lengthy conversations Judge Grisanti had with multiple police officers in the aftermath of a confusing and tumultuous series of events. Before the police arrived, Judge Grisanti was insulted, challenged, and physically confronted by the Meles, saw his wife assaulted and choked by these neighbors and had his shirt ripped from his body while the Meles reinitiated the confrontation

several times. When the police arrived, Judge Grisanti watched as his wife, who was standing on her own property, was confronted by a police officer who ran across the street and forcefully threw her to the ground. Judge Grisanti was then verbally confronted by an aggressive police officer (Officer Richard Hy), challenged and insulted by that officer,¹ who then handcuffed him and placed him in a police car in front of his neighbors.

Judge Grisanti testified that in light of all of these events, he was upset, concerned and emotional when he spoke to the police. In this context, it is simply not fair for the Commission to cherry-pick certain statements, and criticize them as confused, incomplete or inconsistent, much less intentionally false.

In order to demonstrate that Judge Grisanti committed judicial misconduct by making a false statement to either the 9-1-1 operator or the police officials after the incident, the Commission had the burden of

¹ The Commission chose not to call Officer Richard Hy as a witness, even though he was at the scene, and was the officer who handcuffed Judge Grisanti. Nevertheless, the evidence reflects that Richard Hy interrupted Judge Grisanti's conversation with Officer Gehr, told Grisanti to "shut the fuck up," "shut your goddamn mouth," "shut up . . . you old geezer," and "so, let's be quiet, Dad, so son can get some words in." Exhibits 11, 11-a, 12, 12-a. Officer Hy's tone was extremely sarcastic and insulting as he confronted Judge Grisanti. Officer Gehr testified that Officer Hy did nothing to de-escalate the interaction with Judge Grisanti. Tr. at 210-14, 220-21.

proving by a preponderance of evidence that Judge Grisanti made an intentional false statement.

There is no basis in the Rules of Judicial Conduct, other professional disciplinary rules or the substantive law in New York to punish someone for statements that are not intentionally false. The Rules of Judicial Conduct contain no such specific provision, nor is one cited by the Commission. The comparable New York Rules of Professional Conduct, applicable to attorneys, prohibit an attorney from making false statements, but clarify that the statement must have been intentionally false, made with an intent to deceive. For example, the term “fraud” is specifically defined in the New York Rules of Professional Conduct. *See* Rule 1.0(i) (“‘Fraud’ or ‘fraudulent’ denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction or has a purpose to deceive, provided that it does not include conduct that, although characterized as fraudulent by the statute or administrative rule, lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another.”). The Comment to Rule 1.0(i)’s definition of fraud clarifies that it “does

not include merely negligent misrepresentation.” *See* Rule 1.0, Comment 5.

Furthermore, as the Fourth Department noted in *In re Bissell*, 141 A.D.3d 150, 32 N.Y.S.3d 790 (4th Dep’t 2016), an attorney’s generalized opinions, even if not factually accurate, do not constitute professional misconduct. In *Bissell*, the Respondent attorney was charged with conduct involving fraud, deceit, dishonesty, and/or misrepresentation when offering sworn testimony regarding his prior disciplinary history. *Id.* at 153-54. In offering sworn testimony, the attorney incorrectly stated that he was suspended “for, I guess, mishandling my client trust account...” *Id.* The hearing referee determined that the Respondent violated Rule 8.4(c) by giving this answer. *Id.* at 154. In declining to sustain a violation of Rule 8.4(c), this Court held that “Respondent’s testimony concerned his *generalized opinion* of the basis for the suspension, rather than a false statement of law or fact.” *Id.* (emphasis added). This Court further noted that “evaluat[ing] the overall context in which the statements were made... is integral to a determination whether the statements constitute conduct involving dishonesty or deceit.” *Id.* at 154.

Similarly, under New York law the crime of perjury requires not only proof that the statements are literally false, but also “that the false testimony was given willfully and knowingly.” *See People v. Dwyer*, 234 A.D.2d 942 (4th Dep’t 1996); *see also* Criminal Jury Instructions PL § 210.15 (“A person swears falsely when that person intentionally makes a false statement which he or she does not believe to be true while giving testimony.”). “Thus, it must be proven that defendant intentionally made a false statement and that defendant’s ‘conscious objective’ was to tell a falsehood.” *Dwyer*, 234 A.D.2d at 942; *see also, People v. Tyler*, 46 N.Y.2d 251, 262 (1978) (the People have “the inescapable burden to provide [proof] which demonstrates that the witness ... testif[ied] falsely intentionally, rather than mistakenly”).

As recognized by the United States Supreme Court, there are many innocent reasons why a witness’s answers may be incorrect. “Under the pressures and tensions of interrogation, it is not uncommon for the most earnest witnesses to give answers that are not entirely responsive. Sometimes the witness does not understand the question, or may in an excess of caution or apprehension read too much or too

little into it.” *Bronston v. United States*, 409 U.S. 352, 358, 93 S.Ct. 595, 600 (1973).

Thus, because the Commission had the burden to prove that statements made by Judge Grisanti were deliberately and intentionally false and made with the purpose to deceive, it is respectfully submitted that the Commission failed in this burden.

B. Judge Grisanti’s Due Process Rights Would Be Violated by Finding Him Guilty of Misconduct Not Charged in the Formal Written Complaint.

The Commission explicitly seeks a finding by the Referee that Judge Grisanti committed judicial misconduct by making false statements to the 9-1-1 operator and police officials. These alleged acts of judicial misconduct were not charged in the Formal Written Complaint.

As the Commission itself indicated, the Formal Written Complaint alleged, as to Charge I, that the respondent engaged in judicial misconduct on June 22, 2020 in several ways relating to his confrontation with the Meles and later interaction with the police. See Comm. Mem. at 4. None of the specifications of the Formal Written

Complaint refer to false statements to the 9-1-1 operator or other officials.

At the point that the Formal Written Complaint was authorized by the Commission, the Commission staff had fully investigated this matter and obtained all of the video and audio evidence, including the recording of the 9-1-1 call, the Mele home security footage and the police body cam videos. Thus, there can be no claim that this purported conduct was only discovered after the Formal Written Complaint was authorized. Having all of video, audio and other evidence, the Commission did not authorize a charge of misconduct relating to any purported false statements and gave Judge Grisanti no notice of any charge based on purported false statements.

Professionals subject to administrative disciplinary processes are entitled to certain due process rights. *See Block v. Ambach*, 73 N.Y.2d 323 (1989). Indeed, the New York Court of Appeals has specifically held that judges subject to disciplinary proceedings must be afforded due process. *Matter of Gelfand*, 70 N.Y.2d 211 (1987). The United States Supreme Court has deemed attorney disciplinary proceedings – similar to judicial conduct proceedings – to be “adversary proceedings of a

quasi-criminal nature.” *Matter of Ruffalo*, 390 U.S. 544, 551 (1968). Consequently, a respondent in such proceedings is entitled to “procedural due process, which includes fair notice of the charge.” *See Ruffalo*, 390 U.S. at 550. “The charge must be known before the proceedings commence. [The proceedings] become a trap when, after they are underway, the charges are amended . . .” *See Ruffalo*, 390 U.S. at 551; *see also Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 627, 671-72 (1985) (“Where there is an absence of fair notice as to the reach of the grievance procedure and the *precise* nature of the charges, so that the attorney is not given a meaningful opportunity to present evidence in its defense, the proceedings violate due process.”) (emphasis in original) (internal quotation marks omitted); *Matter of Dondi*, 63 N.Y.2d 331, 339 (1984) (“[A]n attorney subject to discipline is entitled to due process . . .”). In *Gelfand*, the Court of Appeals said it would be “improper” and in violation of due process to discipline a judge on the basis of conduct not charged. 70 N.Y.2d at 216. “Due process requires that [respondent judge] not be deprived in this proceeding of his interest in continuing as a Judge because of . . . uncharged misdeeds.” 70 N.Y.2d at 216.

Because the Formal Written Complaint did not charge Judge Grisanti with committing misconduct by making false reports to 9-1-1 or the police – and indeed never mentions any allegation of false statements in any way – any finding of misconduct based upon these statements would be in violation of Judge Grisanti’s State and Federal constitutional right to due process and fair notice.

II. THE COMMISSION INACCURATELY CONTENDS THAT JUDGE GRISANTI INITIATED AND ESCALATED THE CONFLICT WITH THE MELES.

The Commission alleges that Judge Grisanti initiated the confrontation with the Meles and escalated the verbal and physical confrontation. *See* Post-Hearing Memorandum to the Referee and Proposed Findings of Fact and Conclusions of Law (“Comm. Mem.”) 8, 11, 12-14, 51, 53-54.

The testimony at the hearing, including a video and audio recording as well as the live testimony, made clear, however, that it was the Meles who initiated the verbal and physical confrontation. Judge Grisanti, who believed that one of the Mele vehicles was again obstructing his access to his driveway, had called the police rather than confront or engage with the Meles. Tr. at 994. After the call, the

Grisanti were standing on their own property, looking at the Mele truck and waiting for the police, when the Meles began yelling at them from across the street. Tr. at 995-97. It is clear from the audio and the transcript (Exhibits 2 and 2-A) Judge Grisanti responded to the Meles by attempting to explain his issue with the location of the truck. He used no profanity, issued no challenges and did not invite any physical confrontation. In response, Gina Mele began profanely insulting Maria Grisanti. Exhibit 2-A at 1. Specifically, Gina Mele testified that – within the first six minutes of the incident – she said, “fuck you” several times to Maria Grisanti, called her a “motherfucker” several times, called her a “fucking cunt,” called her a “bitch,” and instructed Theresa Dantonio to “fucking choke her.” Tr. at 96-97. As Judge Grisanti continued to try to explain the parking problem, Joe Mele told him to “shut up” and called him an “asshole.” *Id.* at 1-3. Joe Mele then began provoking Judge Grisanti, repeatedly saying in an aggressive tone “come on Mark!” and calling Judge Grisanti a “cocksucker” (Tr. at 96), followed by Gina Mele joining in and calling Judge Grisanti a “chicken shit.” *Id.* at 3.

The Commission incorrectly asserts that Judge Grisanti initiated and “repeatedly escalated” the altercation with “two neighbors.” Comm. Mem. at 1. First, neither the video nor any witness supports the view that Judge Grisanti instigated the physical confrontation. Judge Grisanti and his wife both testified that it was Joe and Gina Mele who instigated the physical confrontation. Tr. at 998-1000, 1194. Gina Mele claimed that it was Maria Grisanti who initiated the physical confrontation by pushing Joe Mele. Tr. at 48. This is not supported by the video evidence and, without explanation, neither Joe Mele nor Theresa Dantonio, the sister of Gina Mele, were called as witnesses by the Commission. Second, the Commission’s assertion that the confrontation was between the Grisantis and two neighbors ignores the role of Theresa Dantonio who, according to all witnesses, was an active participant in the physical confrontation and actually choked Maria Grisanti, causing her to nearly lose consciousness. Tr. at 89, 363, 457, 1001, 1102-03, 1197-98. Indeed, it is clear from Exhibit 2 (approximately 1:57- 2:09) that both Meles and Dantonio are all attacking Maria Grisanti as Mark Grisanti is attempting to pull Maria’s arm to free her from the attack. Thereafter, Joe Mele initiates physical contact with Mark (Exhibit 2 at 2:10) by wrestling with him and

actually pulling off Mark Grisanti's shirt and throwing it to the ground (Exhibit 2 at 2:33). At this point, Mark and Maria Grisanti are in their own driveway while the Meles and Dantonio repeatedly initiate physical contact with them and ignore Mark Grisanti's demands that they leave his property. The Meles and Dantonio repeatedly leave and come back to the Grisanti property to continue the argument (Exhibit 2 at 5:45, 6:49 and 7:05).

Other neighbors who witnessed the events testified that the Meles were the instigators. See Tr. at 363-65, 421-22, 462-63, 467-68. The Meles' conduct that day was consistent with their ongoing pattern of harassing neighbors on prior occasions and often threatening physical violence.

In light of the preponderance of evidence that the Meles, and not Judge Grisanti, initiated and escalated the confrontation on June 22, 2020, the Commission's argument otherwise is without merit.

III. JUDGE GRISANTI NEVER THREATENED THE POLICE.

The Commission alleges that Judge Grisanti committed misconduct by verbally threatening the police. The evidence at the hearing, however, failed to support this allegation. As Judge Grisanti

testified, his statements to Officer Gehr – that he would be “sorry” if he arrested his wife, or would have “a problem” if he didn’t take the cuffs off of her – were not intended as a threat on Judge Grisanti’s part.

They are clearly not a threat of violence, or the exertion of any influence by Judge Grisanti. Rather, they were intended to emphasize for the officers that Judge Grisanti believed that Officer Gehr’s conduct, in particular, was inappropriate and unjustified. In fact, Officer Gehr admitted that he did not follow Buffalo Police Department policies and procedures by failing to de-escalate. None of the police officers took the statements as threats, or gave them much consideration at all. Tr. at 206-08, 215, 223-25, 227, 255, 267, 270-71.

While it is not necessary for the Referee to decide this particular issue, it is clear the factual record provides sufficient grounds to question the appropriateness of Officer Gehr’s conduct. *See* Respondent’s Memorandum in Support of Proposed Findings of Fact and Conclusions of Law (“Resp. Mem.”) at 18-20, 22-23. In light of what happened, any husband, including a judge of the New York State court system, would certainly be entitled to express to the officer that his conduct was unjustified and he might regret that conduct. Making such

statements, which are not “threats,” does not “detract from the dignity of judicial office,” or otherwise violate any of the Rules of Judicial Conduct.

CONCLUSION

The facts developed at the hearing paint a picture of Mark Grisanti that is woefully distorted by the Commission’s submission. The Commission repeatedly talks about Judge Grisanti lying – not after the incident or during the hearing – but in the heat of the moment while the incident was unfolding. The Commission seemingly relies upon this false narrative because it did not, and cannot, offer proof to rebut any of the following facts established during the hearing:

- Mark Grisanti never mentioned he was a judge during the incident on June 22, 2020;
- his conduct on June 22, 2020, did not involve judicial action;
- Mark understands that his conduct has an impact on the public perception of the Judiciary;
- Mark takes personal responsibility for his actions;
- he displayed the ability to recognize the seriousness of his misconduct immediately after it occurred;

- he recognized the role his decisions played in bringing about the incident and sought voluntary counseling to understand why he reacted the way he did and to help ensure that similar actions would not be repeated;
- there have been no further confrontations with the Meles;
- Mark has shown genuine remorse about his conduct;
- he has repeatedly apologized for his actions, even on the day of the incident and before the Commission became involved;
- shortly after the incident and continuing through the time of the hearing, he has voluntarily attended counseling/therapy sessions with licensed medical professionals;
- the incident took place within the context of multiple attacks on Mark's wife, and his judgment was clouded by his wife's involvement;
- his misconduct did not take place over a sustained period of time, it was during a brief, emotional incident;
- his actions were in the heat of passion and in response to physical harm being done to his wife;
- he has been contrite and cooperative with the Commission throughout the inquiry;

- he has no previous disciplinary record;
- there is no pattern of misconduct;
- he has a reputation in the Western New York legal community as an excellent judge with exceptional judicial temperament; and
- he never pointed to external factors or justification as excuses for his behavior, he only provided context regarding the incident.

All of these factors have been explicated and identified as mitigation in the decisions of the Commission.

For the reasons stated, and as detailed in our prior submission, it is respectfully requested that the Referee adopt our proposed findings of fact and conclusions of law.

DATED: February 21, 2023
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