

STATE OF NEW YORK
SUPREME COURT

COUNTY OF RENSSELAER

In the Matter of the Application of
C.B. SMITH,

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

DECISION
AND
ORDER

THE COUNTY OF RENSSELAER; HENRY F. ZWACK, As
Rensselaer County Executive; JACK MADDEN, and
STEPHEN A. PECHENIK, As Freedom of Information
Officers,

Respondents.

(Supreme Court, Rensselaer County, Special Term, April 26, 2000)
Index No. 192505
(RJI No. 41-1224-97)

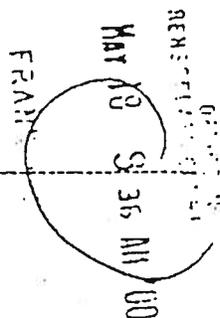
(Justice James B. Canfield, Presiding)

APPEARANCES: Lee, LeForestier & Hanft, P.C.
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CANFIELD, J.:

Petitioner, C. B. Smith (Smith) seeks to hold respondents County of Rensselaer
(Rensselaer), Rensselaer County Executive Henry F. Zwack, (Zwack) and Rensselaer



County District Attorney Kenneth Bruno (Bruno) in civil contempt on the ground that they have disobeyed the previous orders of Justice George B. Ceresia, pursuant to Smith's Freedom of Information Law (FOIL) requests, to release documents relating to Rensselaer's paying Dirk Van Ort, allegedly a "no show" employee, during a period when Van Ort was residing and otherwise gainfully employed in Florida. Smith charges that in an effort to avoid revelation of their knowledge of and involvement in the scandal Zwack and the other respondents stalled in complying with his FOIL requests, sought to shelter public documents from disclosure by giving them to the District Attorney, and destroyed some documents.

Judiciary Law § 753, authorizes courts to punish civil contempt, that is "a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced" by fine and/or imprisonment under a number of circumstances, including "(3.) A party to the action or special proceeding, an attorney, counsellor, or other person, for ... any other disobedience to a lawful mandate of the court." To sustain a finding of civil contempt, the complaining party must establish that the order purportedly violated was in effect and unequivocally clear, and that the party alleged to have violated the order had actual knowledge of its terms (McCain v Dinkins, 84 NY2d 216, 226; Ulster Home Care Inc. v Vacco, 255 AD2d 73, 77).

Smith asserts that Rensselaer, through Zwack and Bruno intentionally violated the court orders by completely failing to comply with the orders to turn over documents for months until Smith actually served his prior contempt motion and then only complying

partially and refusing to deliver documents previously ordered to be produced in the December 17, 1998 decision. That decision ordered respondents to release material requested on June 6, 1997 and June 13, 1997:

"1. The statement issued to the news media by the county attorney's office on 5/5/97 concerning the allegations against Dirk Van Ort, the former 911 Public Education Coordinator.

2. Any and all correspondence to or from Rensselaer County from the N.Y. State Retirement office concerning the retirement and status of Dirk Van Ort Jan. 1, 1996 to date.

3. All of the 26 bi weekly payroll certifications for 1996 for Dirk Van Ort, 911 Public Education Coordinator.

4. Any and all letters or correspondence to or from Dirk Van Ort and Rensselaer County January 1, 1996 to date including but not limited to the correspondence seeking repayment for work not performed.

5. Any correspondence relevant to the county's determining when Mr. Van Ort was not available for work while he was in fact paid which in turn resulted in the letter referenced in item 4 being sent to Van Ort."

and material requested on June 26, 1997:

"1. A copy of any and all documents in the possession of the county executive's office, regardless of date, which establishes an "On call, as needed" classification for any county employees.

2. A copy of any civil service classification of so called "On Call as Needed" employees.

3. A copy of any record declaring Dirk Van Ort or the position he held as Public Education Coordinator for E 911 as "On call as Needed" employee status.

4. Any and all records which identify the names and titles of all county employees now or within the last two years who hold or have held the status of "On Call as Needed" for their employment status."

Respondents attempt to divert attention from their failure to comply with the prior order with a series of irrelevancies. Respondents accuse Smith of wrongdoing in focusing on the missing documents rather than highlighting the extent to which respondents have complied with the order. The CPLR does not require that litigants set forth all of the ways in which their opponents have behaved properly in order to seek contempt based on allegedly improper actions. Respondents also suggest that petitioner's ability to obtain some of the documents from other sources insulates their refusal to comply with FOIL from serving as the basis for contempt, but fail to support that proposition. Respondents also accuse Smith of "spending considerable amounts" when "holding press conferences and giving various members of the press interviews". Smith was and is not precluded from holding press interviews as a condition of requesting documents or prosecuting his rights under FOIL.

Zwack and Bruno have not submitted personal affidavits and rely on counsel's affirmation in opposing the contempt motion. Respondents' counsel presents conclusory statements and hearsay which are neither competent nor accurate. The bare affirmation of an attorney who demonstrates no personal knowledge of the manner in which the events occurred is without evidentiary value and thus unavailing (Zuckerman v City of N.Y., 49 NY2d 557, 563; Columbia Ribbon & Carbon Mfg. Co. v A-I-A Corp., 42 NY2d 496, 500). Counsel alleges that he conversed with Zwack and others and states that "I believe that all named respondents have attempted to comply with this Court's previous decision and order in good faith and with due diligence". Counsel also concludes that the failure to comply has not been "willful". Counsel's opinion of his clients is not competent evidence.

Respondents' opposition is also noteworthy for the complete failure to explain what happened, deny Smith's accusations or address the charges. For example, petitioner submitted Exhibit G, a press release issued by the County Attorney. In refusing petitioner's accusation that respondents failed to provide the press release, respondents' counsel presents conclusory hearsay "The County Attorney Robert A. Smith also informed me that he does not issue nor does his office preserve press releases" (emphasis added), without even acknowledging that the first part of the hearsay is certainly untrue.

Smith also asserts that the respondents destroyed some of the documents. Respondents' counsel blithely ignores the charge and reports that they merely did not "preserve" the requested documents during the nearly three years since Smith first requested the documents, and during which Rensselaer has stated that the records exist, but repeatedly refused to release them. Rensselaer fails to explain where the documents were and who possessed them when it failed to "preserve" them and the means by which the documents ceased to exist. While Rensselaer does not attempt to explain how "failing to preserve" differs from "destroying" requested documents, it is a distinction with no difference. Destruction of records during the years that respondents refused to turn them over to Smith, prolonged this litigation, took advantage of the automatic stay afforded by the appeal they never prosecuted, and most recently delayed responding to Smith's demands that they comply with the decision after their appeal was dismissed is flagrantly contemptuous.

Respondents' counsel also does not respond to Smith's claim that Zwack and Bruno conspired to avoid release of some of the documents to Smith as part of a scheme

to insulate Zwack and Bruno during their election campaigns by shifting blame for the Van Ort matter through a grand jury inquiry directed at other persons and providing an excuse for refusing to release the documents. Instead of denying Smith's charges, respondents' counsel proceeds to take maximum advantage of Zwack and Bruno's alleged "keep away" scheme by declaring that Bruno may not release the documents pursuant to CPLR § 190.25(4)(a) and Penal Law § 215.70 and belatedly denying that respondents or petitioner even have standing to apply for release of the evidence. Willful concealment of the documents pursuant to the alleged scheme would be contemptuous.

The documents having been given to Bruno for safekeeping and having ostensibly been presented to the grand jury, the next question is whether they may be recovered by the respondents in order to permit compliance with Judge Ceresia's order. Contrary to respondents' argument, Ruggiero v Fahey, 103 AD2d 65 does not suggest that respondents or Smith have no standing to apply for return or release of county records. As public documents not prepared as part of a criminal investigation prior to being submitted to the grand jury the records have not lost their public character (Jones v State, 62 AD2d 44, 49; King v Dillon Supreme Court, Nassau County, December 19, 1984, presented as Exhibit K) and should be released. Respondents and Bruno have cited no case that endorses the spurious strategy for circumventing FOIL alleged by Smith, fail to suggest how return of Rensselaer's documents, after the grand jury inquiry and unsuccessful criminal prosecution of the individuals would violate grand jury secrecy (Ruggiero v Fahey, supra p 67). The documents were subject to disclosure pursuant to FOIL at the time of their transfer to Bruno. Respondents could and should have kept

copies of the public documents before shipping them to Bruno. Respondents and Bruno may not take advantage of their failure to make those copies originally. Accordingly, the Court finds that petitioner has demonstrated a compelling and particularized need for the records and orders Bruno to immediately release the county records now held by him to Rensselaer, so that Rensselaer may immediately comply with Judge Ceresia's order.

In the absence of any denial of Smith's charges or reasonable explanation by respondents of what happened to the missing documents, the Court reluctantly concludes that Rensselaer and Zwack willfully ignored the mandates of both this Court and FOIL by failing to retain and protect the requested documents and instead destroyed them or improperly attempted to place them beyond Smith's reach by transferring them to Bruno for safekeeping. Rensselaer and Zwack actions were calculated to and actually did defeat, impair, impede and prejudice the rights and remedies of Smith to exercise his rights pursuant to FOIL. Therefore, I hold Rensselaer and the individual respondent Zwack in civil contempt. I impose a fine on Rensselaer in an amount of \$1000.00 and a fine on Zwack individually in an amount of \$1000.00, and a further fine of \$50.00 per day against Rensselaer and a further fine of \$50.00 per day against Zwack individually, to accrue from the date of this decision and order. The fines will continue to accrue until the respondents obtain copies of the missing requested documents from Bruno and all other sources and deliver them to petitioner in compliance with the prior order and file their sworn explanation of exactly what became of the other requested and now missing documents, and identify who created the documents originally, who had possession of them, who examined them in connection with the County's determinations regarding Van

Ort, who examined them in connection with Smith's FOIL requests and defense of this action, who had possession of the documents following Smith's requests, the date the documents were destroyed and by whom they were destroyed. These fines are intended to compensate the petitioner for the respondents' arrogant abuse of his rights pursuant to FOIL. The fines shall be paid directly to the petitioner within 15 days of the service of a copy of the settled order with notice of entry, and on the first day of each successive month thereafter. Respondents and Bruno are further ordered to assemble and preserve all documents related to the information listed above until further order of this Court.

Judge Ceresia previously determined that Smith is entitled to attorneys fees and this Court finds that he is also entitled to additional attorneys fees, costs and disbursements in connection with this and the previous contempt motion. An award of fees is appropriate on the prior contempt motion, even though the motion was withdrawn, in as much as respondents made it necessary for Smith to make the motion before partially complying with the order. After reviewing his submissions and considering respondents' general arguments for limiting the award, Smith is awarded counsel fees in the amount of \$14,003.24 for the services of his counsel prior to April 24, 2000, half of the amount to be paid by Rensselaer and half of amount to be paid by Zwack individually.

In the event that respondents do not clear themselves of their contempt sooner, a hearing shall be held on June 20, 2000 to monitor respondents and Bruno's compliance with this order. At that hearing, respondents and Bruno are directed to present themselves and the County employees who were responsible for producing, holding,

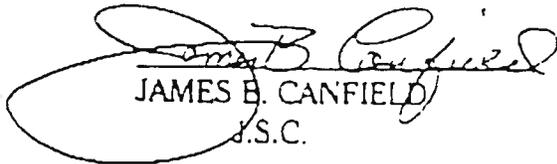
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identifying and destroying the missing requested documents to testify under oath regarding the role that they played in thwarting FOIL and the orders of this Court. The Court may impose additional penalties against the respondents and others for further contempt if steps have not been taken to comply with this order or further wrongdoing is revealed.

This Memorandum constitutes the Decision and Order of the Court. All papers including this Decision and Order are returned to the petitioner. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.

SO ORDERED!
ENTER.

Dated: Troy, New York
May 17, 2000


JAMES B. CANFIELD
J.S.C.

Papers Considered:

- (1) Notice of motion dated April 4, 2000;
- (2) Affidavit of C.B. Smith dated April 4, 2000;
- (3) Affidavit of Richard A. Hanft dated April 4, 2000, with exhibits annexed;
- (4) Affirmation of Stephen A. Pechenik dated April 19, 2000;
- (5) Affidavit of C.B. Smith dated April 25, 2000;
- (6) Affidavit of Richard A. Hanft dated April 25, 2000, with exhibits annexed.