

STATE OF NEW YORK
DEPARTMENT OF STATE
OFFICE OF ADMINISTRATIVE HEARINGS

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In the Matter of the Complaint of

DEPARTMENT OF STATE
DIVISION OF LICENSING SERVICES,

Complainant,

DECISION

-against-

EMANUEL KOHN,

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on June 15, 1999 at the office of the Department of State located at 270 Broadway, New York, New York.

The matter had originally been calendared for June 1, 1999. By telefax dated May 28, 1999 the respondent had stated that he was in the process of retaining counsel and had requested a two week adjournment, which request was granted. On June 11, 1999 the respondent telephoned the tribunal and requested a further adjournment. He stated that he had first contacted an attorney about one week after the adjournment had been granted (contrary to his prior stated that he was in the process of retaining counsel), and that the attorney whom he chose to retain, Edward Panzer, Esq., had back problems that made it impossible to appear. The respondent was advised that the matter would not be adjourned, and that he should retain other counsel. However, he appeared at the hearing without counsel and again requested an adjournment, which request was denied in view of the respondent's clear record of neglecting and attempting to delay the matter. Accordingly, the matter proceeded with the respondent *pro se*.

The complainant was represented by Litigation Counsel Laurence Soronen, Esq.

COMPLAINT

The complaint alleges that the respondent notarized a forged signature on a document without the purported signatory appearing before him and taking an oath, failed to indicate the purpose for which his notary stamp was affixed to the document, and refused to cooperate with the complainant's investigation of the matter.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was sent to the respondent on April 19, 1999 by certified mail addressed to him at his address appearing in the records of the Department of State, and was returned by the Postal Service marked "unclaimed" after the respondent intentionally failed to claim it (State's Ex. 1 and 2, transcript, pp. 30-31). A second copy sent to him by regular first class mail on May 5, 1999 (State's Ex. 3) was received by him (transcript, p. 10).

2) The respondent is, and at all times hereinafter mentioned was, a duly commissioned notary public (State's Ex. 1).

3) On April 24, 1998 the respondent's notary stamp and his purported signature were affixed twice to a document (hereinafter "the document") bearing the purported signatures of Dr. Elliott Ostro and his ex-wife, Gayle P. Ostro. The document, directing Merrill Lynch to sell all of the mutual funds owned by the purported signatories, contains no language indicating that it was either sworn to or acknowledged by the signatories, and there is no other indication of the reason for which the respondent's stamp and signature were placed on the document (State's Ex. 1).

4) On May 25, 1998 Ms. Ostro submitted an unsworn "Preliminary Statement of Complaint" to the complainant in which she stated that she had not signed the document and implied that she had not appeared before the respondent (State's Ex. 4).

5) On November 13, 1998 the complainant received a letter from Ms. Ostro dated October 28, 1998. The letter, which is un-sworn and, ironically, bears the stamp and signature of an Illinois notary public without any indication of the reason for their presence on the letter, states that Ms. Ostro neither signed the document nor authorized the respondent to notarize her signature (State's Ex. 5). In an interview, apparently conducted by telephone, she stated to the complainant's investigator, Eric Gerwitz, that she had not been in New York on the date of the notarization.

6) Investigator Gerwitz provided the respondent and his then attorney, Charles Finkelstein, with copies of the complaint and notarized document, and made an appointment for the respondent to meet with him on November 18, 1998 (State's Ex. 6). On November 16, 1999 the respondent called Investigator Gerwitz and asked to postpone the appointment until the end of December, as, he said, he would be out of town. Investigator Gerwitz agreed, and he sent the respondent a letter making an appointment for December 29, 1998 (State's Ex. 7). At least once prior to the December 29th appointment the respondent telephoned Investigator Gerwitz and questioned the need for the appointment, and Investigator Gerwitz

insisted that the respondent appear for a personal interview. Investigator Gerwitz also had a conversation with Frank Gould, Esq. in which he told him that it would be fine for Mr. Gould to be present at the interview with the respondent as Mr. Gould had requested. However neither the respondent nor Mr. Gould appeared on the appointed date, and they never contacted Investigator Gerwitz again.

OPINION AND CONCLUSIONS OF LAW

I- The respondent sought an adjournment of the proceedings to enable his chosen counsel to appear on his behalf. He had previously been granted, under what it subsequently became evident were false pretenses, the two week adjournment which he had requested to obtain counsel. He delayed contacting an attorney for a week after that, and then chose to retain an attorney who was physically unable to appear. That occurred after he had delayed the investigation of the matter (in which he was represented by counsel) by requesting and obtaining a substantial delay in his appointment to be interviewed by the complainant's investigator and then had failed to appear for the interview on the adjourned date.

The respondent had ample opportunity to obtain counsel for the hearing. Whether intentionally or negligently he delayed acting on that opportunity and then chose to retain an attorney who was not available. The right to counsel of one's choice is not absolute, being limited by the proviso that the chosen counsel must be able to appear on behalf of the respondent. See, *Greene v Greene*, 47 NY2d 447, 418 NYS2d 379 (1979). Accordingly, it was proper to deny the respondent's request for a further adjournment.

II- The respondent testified that he has no recollection of notarizing the document, and claims that it is possible that his signature on the document may have been forged at a time that his stamp was missing, having been misplaced in the busy stationary store in which he worked. A comparison of the signatures on the document with those on the respondent's May 28, 1999 request for an adjournment and on the signature exemplar provided by him at the hearing (State's Ex. 8) support that possibility.

The only evidence supporting the complainant's contention that the respondent notarized the document is the presence of the respondent's stamp and purported signature on the document. While in many cases that evidence would be conclusive, in the light of the dissimilarity of signatures and of the respondent's testimony that his notary stamp had been misplaced, in this case the evidence is extremely flimsy. As the party which initiated the hearing, the burden is on the complainant to prove, by substantial evidence, the truth of the charges in the complaint. State Administrative Procedure Act (SAPA), §306(1). Substantial evidence is that which a reasonable mind could accept as supporting a conclusion or

ultimate fact. *Gray v Adduci*, 73 N.Y.2d 741, 536 N.Y.S.2d 40 (1988). "The question...is whether a conclusion or ultimate fact may be extracted reasonably--probatively and logically." *City of Utica Board of Water Supply v New York State Health Department*, 96 A.D.2d 710, 465 N.Y.S.2d 365, 366 (1983)(citations omitted). Based on the evidence before me, I cannot fairly conclude that the respondent's stamp and signature were affixed to the document by the respondent. Accordingly, the charges that the respondent notarized the forged signature of Gayle P. Ostro when she did not appear before him and take an oath, and that he failed to indicate the purpose for which his notary stamp was affixed to the document must be, and are, dismissed.¹

III- The respondent is also charged with failing to cooperate with the complainant's investigation, and there is ample evidence to support that charge. A notary public is a public officer. *People v Wadhams*, 176 NY 10 (1903); *People v Rathbone*, 145 NY 436 (1895); *Patterson v Department of State*, 35 AD2d 616, 312 NYS2d 300 (1970). As such, even absent a specific statutory provision, he or she has the obligation to cooperate in the proper administration of a governmental function, particularly where that function involves the statute under which he or she was appointed. Had the respondent done so in this case it is possible, even likely, that no formal charges would have been brought and these proceedings would have been avoided, thereby saving the State from a substantial expense. I conclude, therefore, that the respondent's non-cooperation with the investigation was misconduct warranting the imposition of a disciplinary sanction.

¹ While in view of the foregoing findings the issue of whether Ms. Ostro appeared before the respondent is moot, it should be noted that the only evidence on that issue is hearsay: Two unsworn statements by Ms. Ostro, and a telephone conversation the investigator had with a person purporting to be Ms. Ostro. All relevant, material, and reliable evidence which will contribute to an informed result is admissible in an administrative hearing, *Sowa v Looney*, *supra*, even where that evidence consists of hearsay, *Gray v Adduci*, 73 NY2d 741, 536 NYS2d 40 (1988), which, if sufficiently probative, may constitute substantial evidence. *In the Matter of Ribya "BB"*, 243 Ad2d 1013, 663 NYS2d 417 (3rd Dept., 1997); *A.J. & Taylor Restaurant, Inc. v New York State Liquor Authority*, 214 AD2d 727, 625 NYS2d 623 (2nd Dept., 1995). However, the purported statements of Ms. Ostro bear no real indicia of reliability, and, therefore, have little, if any, evidentiary value.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Emanuel Kohn has engaged in an act of misconduct and, accordingly, pursuant to Executive Law §130, his commission as a notary public is suspended for a period commencing on August 1, 1999 and terminating three months after the receipt by the Department of State of his notary public identification card, which he is directed to send to Usha Barat, Customer Service Unit, Department of State, Division of Licensing Services, 84 Holland Avenue, Albany, NY 12208.

Roger Schneier
Administrative Law Judge

Dated: June 23, 1999