

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2003-484

MAY TERM, 2004

Jane P. Heal	}	APPEALED FROM:
	}	
(Office of Child Support)	}	Windham Family Court
	}	
v.	}	DOCKET No. 267-8-94 Wmdm
	}	
John A. Hirsch	}	Trial Judges: Katherine A. Hayes, Francis
	}	B. McCaffrey
	}	

In the above-entitled cause, the Clerk will enter:

Defendant John A. Hirsch appeals from a contempt order and compensatory fine imposed by the Windham Family Court, as well as from several orders of the administrative judge denying his motions to recuse the presiding family court magistrate. We affirm the orders of the administrative judge, reverse the finding of contempt, and remand for recalculation of the compensatory fine.

The parties were divorced in April 1995. In July, they entered into a child support stipulation and order for their two children, then aged six and two. The order, signed by magistrate Gartner, provided that defendant would pay child support of \$1200 per month until September, after which the obligation would be reduced to \$900 per month. In November 2001, defendant moved to modify the child support order, and plaintiff Jane Heal B with the assistance of the Office of Child Support B moved to enforce the order.

At a hearing on the matter in October 2002, magistrate Gartner ordered defendant to provide copies of his income tax returns and business records. Later that month, plaintiff served requests to produce certain additional records. In February 2003, plaintiff moved to compel responses to her requests to produce, and defendant moved to recuse magistrate Gartner. Following a hearing, the administrative judge denied the motion to recuse. At the rescheduled merits hearing in May, the magistrate again ordered defendant to produce certain financial documents, while acceding to his request that certain proprietary information be sealed. The deadline for disclosure was June 20.

Defendant failed to meet the June 20 deadline, and plaintiff, in response, filed a motion for contempt. Defendant filed a second motion to recuse magistrate Gartner. Following a hearing in July, the administrative judge denied the motion to recuse. On July 22, the contempt motion came on for hearing before Judge Hayes. Defendant produced the requested discovery information at the hearing, but the matter was continued for further hearing to address the issue of contempt and plaintiff' s request for attorney' s fees. Following a hearing in August, the court issued a written decision, holding defendant in contempt for failure to timely comply with the court' s discovery order, and imposing a compensatory fine \$1066.50 for the attorney' s fees incurred by plaintiff. See V.R.F.P. 16(c)(3) (in addition to coercive fines or imprisonment for contempt under Rule 16(c)(1) & (2), if loss or injury has been caused by contempt, court may award aggrieved party a sum of money sufficient A to satisfy the costs and disbursements, including reasonably attorney' s fees@ ). Defendant appealed the contempt and fine to this Court.

Thereafter, defendant filed third and fourth motions to recuse magistrate Gartner from the merits hearing which was still pending. The administrative judge denied both motions, as well as a motion for permission to file an interlocutory appeal. On January 5, 2004, this Court issued an order indicating that it would hear defendant' s appeal of the recusal

order in conjunction with the contempt issues. Both the modification and enforcement motions remain pending.

Defendant first contends the court erred in holding him in contempt and imposing a fine of \$1066.50 for the attorney's fees incurred by plaintiff. While holding defendant in contempt, the court acknowledged that he had produced numerous documents at the contempt hearing on July 22, 2003, and there appears to be no dispute that, by the second contempt hearing of August 22, 2003, defendant had complied with the discovery order and requests to produce. The contempt having thus been purged B in the sense that its coercive intent had been satisfied B we are compelled to conclude that the contempt finding must be reversed. See V.R.F.P. 16(d) (respondent may demonstrate that A contempt has been purged@ by showing that conditions in order have been met or terms of order violated have been complied with); Mayo v. Mayo, 173 Vt. 459, 463 (2001) (mem.) (civil contempt order focuses not on punishment but on compelling compliance with preexisting court order, and therefore must contain means for respondent to purge contempt).

This conclusion does not, however, invalidate the compensatory fine for the attorney's fees incurred by plaintiff in her effort to obtain the documents. The family court rules specifically provide that, A [i]f the court finds that the contempt has been purged, the respondent will be relieved of any coercive sanctions imposed under paragraph (c)(1) or (2).@ V.R.F.P. 16(d) (emphasis added). By specifically relieving the respondent of any coercive fines imposed under 16(c)(1) and (2), but not of any compensatory fines under (c)(3), the Rules make it clear that purging the contempt does relieve defendant of the compensatory fine imposed by the court in this case.

Nor has defendant adduced any persuasive evidence or argument that the court abused its discretion in imposing the attorney's fee fine. Defendant asserts that he reasonably, mistakenly, or in A good faith@ believed that his motions to recuse magistrate Gartner and quash the discovery order relieved him of the obligation to comply with order. The trial court rejected the claim, finding that defendant's violation was wilful, deliberate, and contumacious, and we discern nothing in defendant's arguments or the record to suggest that the court's finding was clearly erroneous or an abuse of discretion. See Mayo, 173 Vt. at 462 (in reviewing civil contempt judgment, we will not disturb court's decision unless discretion was entirely withheld or clearly untenable, or findings of fact unless clearly erroneous). Nor does defendant's claim that he believed the order to be invalid because it was drafted by opposing counsel, or involved some form of alleged ex parte communication with the court, represent a persuasive defense. See Socony Mobil Oil Co. v. Northern Oil Co., 126 Vt. 160, 164 (1966) (contempt proceeding based on violation of court order does not open to reconsideration legal or actual basis of order). Defendant also contends that he was excused from compliance with the discovery order because it omitted an express provision reflecting the magistrate's decision to seal the business records produced. The court here correctly observed that defendant's concern could have been addressed through a motion to amend the order, and did not excuse his noncompliance.

Defendant also maintains that the award of attorney's fees was excessive because it included fees incurred in connection with matters unrelated to the discovery and contempt proceedings. Under V.R.F.P. 16(c)(3), the court may award a sum of money sufficient to compensate the aggrieved party for any loss, including attorneys' fees, A caused by the contempt.@ The court's award of \$1066.50 was based on an invoice submitted by plaintiff's counsel. The invoice set forth a total of 7.9 hours billed at \$135 per hour. Defendant correctly points out, however, that several of the billed hours were for matters unrelated to the discovery or contempt proceedings, including time spent in preparation for the various motions to recuse and review of plaintiff's financial disclosure form. Accordingly, we conclude that the case must be remanded to the trial court to recalculate the compensatory award.

Defendant further claims that the court's contempt order contains several misstatements of fact. We need not consider the claim, as none of the alleged factual errors are material to the court's decision or prejudicial to defendant.

Defendant next contends the administrative judge erred in denying his motions to recuse magistrate Gartner. As noted, defendant filed four separate motions to recuse magistrate Gartner over the course of these proceedings, each of which was denied by the administrative judge. Defendant raises numerous claims of error relating to aspects of each of the court's rulings. We review disqualification decisions of an administrative judge for abuse of discretion, and will disturb its ruling only if the record reveals no reasonable basis for the decision. State v. Putnam, 164 Vt. 558, 561 (1996). A judicial officer subject to a disqualification motion is accorded a presumption of honesty and integrity. Id. It is the moving party's burden to make a clear and affirmative showing of bias and prejudice. Id. at 563.

Viewed in light of these standards, defendant' s arguments are entirely unpersuasive. Defendant contends the administrative judge erred in ruling that the tape of an unrelated proceeding involving magistrate Gartner was irrelevant, but defendant offers no persuasive rationale that the proceeding was relevant to the magistrate' s impartiality in this proceeding. Defendant also contends the administrative judge erred in declining to address in any detail defendant' s claim that the magistrate committed numerous procedural errors. The administrative judge correctly ruled, however, that legal errors do not demonstrate prejudice, see Gallipo v. City of Rutland, 163 Vt. 83, 96 (1994), and B contrary to his claim B defendant has not proven a A pattern@ of error demonstrating bias.

Defendant also claims that the magistrate was necessarily biased because she had approved the parties' original child support stipulation, but the administrative judge correctly rejected the claim as legally and factually unsupported. Defendant additionally cites several questions and comments by the magistrate at a number of hearings, suggesting that they A were not only pointless but bizarre and possibly for psychological effect,@ as well as A gratuitous,@ an improper A signal@ to opposing counsel, and proof that the magistrate was A less than honest.@ The cited questions and comments, however, do not remotely support defendant' s claims. Finally, defendant contends the magistrate demonstrated bias by failing to sanction opposing counsel for drafting the discovery order without a provision sealing the records to be disclosed, and by engaging in ex parte communications with opposing counsel. The administrative judge correctly noted that the alleged omission may have been a legal or procedural error but did not demonstrate bias, and the alleged ex parte communication has not been demonstrated. Accordingly, we discern no basis to disturb the administrative judge' s rulings on the recusal motions.

The orders denying defendant' s recusal motions are affirmed. The finding of contempt is reversed, and the matter is remanded for recalculation of the compensatory fine.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice