

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

E. DAVID DUNCAN,

DETERMINATION

a Judge of the Albany City Court, Albany County.

THE COMMISSION:

Honorable Eugene W. Salisbury, Chair
Henry T. Berger, Esq.
Jeremy Ann Brown, C.A.S.A.C.
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Frederick M. Marshall
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the Commission

William J. Gray for Respondent

The respondent, E. David Duncan, a judge of the Albany City Court,
Albany County, was served with a Formal Written Complaint dated July 2, 1999, alleging
that respondent conveyed the appearance of bias in two vehicle and traffic cases and

failed to decide motions in the matters in a timely manner. Respondent filed an answer dated November 18, 1999.

By order dated September 21, 1999, the Commission designated Maryann Saccomando Freedman, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held in Albany, New York on January 18 and 19 and March 1, 2000, and the referee filed her report with the Commission on August 18, 2000.

The parties filed briefs and replies with respect to the referee's report. On October 23, 2000, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a part-time judge of the Albany City Court since 1983.
2. At the time of these events, respondent was assigned to Albany Traffic Court, where he sat in alternate four-week periods. In the weeks he was assigned to Traffic Court, respondent sat one morning each week for arraignments and one afternoon each week for trials.
3. On September 8, 1995, JoAnn Pitman, a cab driver, received a Speeding ticket in the City of Albany, returnable in the Albany City Court on September 19, 1995. On September 11, 1995, she pleaded not guilty by mail and checked the box

requesting a supporting deposition.

4. On October 4, 1995, Robert Libertucci, a cab driver and Ms. Pitman's fiancé, received two tickets in the City of Albany, one for Speeding and one for a red light violation, returnable in the Albany City Court on October 24, 1995. Mr. Libertucci pleaded not guilty by mail and requested a supporting deposition.

5. The Speeding violation with which Mr. Libertucci was charged allegedly occurred on New Scotland Avenue at Harding Street. Respondent resides on Harding Street.

6. Mr. Libertucci called the Traffic Court Clerk's office and asked to appear on the same day as Ms. Pitman. The Clerk approved this request, and both matters were calendared for November 21, 1995.

7. November 21, 1995, was a scheduled arraignment day for respondent; November 22, 1995, was a scheduled trial day.

8. On November 21, 1995, Mr. Libertucci and Ms. Pitman appeared in the Albany City Court; neither appeared with counsel, and neither had received the supporting deposition that had been requested.

9. When Mr. Libertucci's case was called, he moved for dismissal of the October 4 tickets for lack of a supporting deposition. After reviewing the papers before him, respondent granted the motion and dismissed the tickets in accordance with Criminal Procedure Law 100.40(2), which provides that charges are facially insufficient

if the arresting officer has failed to provide a supporting deposition within 30 days. Mr. Libertucci then went to the back of the courtroom to wait for Ms. Pitman's case to be heard.

10. Immediately following Mr. Libertucci's case, Ms. Pitman's case was called. Ms. Pitman moved for dismissal of the September 8 ticket for failure of the arresting officer to supply a supporting deposition. Respondent reviewed the papers, then asked Ms. Pitman to wait while he checked something. After conferring with the court clerk and the Assistant Corporation Counsel, respondent instructed Ms. Pitman to return the next day and also directed her to tell Mr. Libertucci to return the next day. Respondent did not rule on Ms. Pitman's motion to dismiss.

11. After Ms. Pitman had related respondent's message to Mr. Libertucci, Mr. Libertucci approached the bench and asked respondent why he had to return to court since his tickets had been dismissed. Respondent replied that he had a question about when the time to provide a supporting deposition begins to run. When Mr. Libertucci asked whether he should return with a lawyer, respondent replied that it would be a good idea to have a lawyer. Respondent directed Mr. Libertucci and Ms. Pitman to return the following day.

12. Prior to Mr. Libertucci's appearance the next day, respondent researched Mr. Libertucci's prior record in the Albany Court. Mr. Libertucci had received multiple Speeding tickets within a few years.

13. On November 22, 1995, Mr. Libertucci and Ms. Pitman appeared in City Court with their attorney, John T. Biscone.

14. Mr. Biscone and Assistant Corporation Counsel William S. Goldstein met in chambers with respondent. Also present was Officer Whitney, who had issued the Pitman ticket. During this conference, respondent said that he would accept a three-point Speeding charge in satisfaction of the charges against the defendants. Respondent commented that the Libertucci speeding violation had occurred in respondent's neighborhood. Respondent also referred to Mr. Libertucci's extensive prior record in the court.

15. After relating the plea offer to the defendants, Mr. Biscone returned and advised respondent that his clients refused the offer since they would suffer a loss or suspension of their licenses with any resolution short of dismissal. Respondent then stated that he would direct that the tickets be reissued. When Mr. Biscone objected that respondent did not have the authority to do so, respondent agreed and said that he would not and could not do that.

16. When the matter resumed in open court, Mr. Biscone moved to dismiss the Libertucci and Pitman tickets. Respondent again commented on Mr. Libertucci's extensive driving record and the fact that he had previously had traffic charges dismissed for lack of a supporting deposition. Respondent stated that although he had tried to do so, he could not direct reissuance of the tickets and it was up to the police

whether or not to reissue them. Respondent dismissed the Pitman ticket. The tickets against Libertucci remained dismissed.

17. Mr. Biscone told respondent that if the tickets came back, he would ask that respondent recuse himself. Respondent replied that if the tickets came back, he would take a disqualification request under advisement at the appropriate time.

18. Officer Whitney, who was present in court, reissued the Pitman ticket on November 22, 1995, before Ms. Pitman left the courthouse. The Libertucci tickets were reissued in February 1996.

19. On November 28, 1995, Mr. Biscone filed a motion to dismiss the reissued Speeding charge against Ms. Pitman. On December 15, 1995, the Assistant Corporation Counsel asked for an extension of time to respond to the motion until "after the new year," but he never filed any response to the motion. Mr. Biscone wrote a letter to respondent in July 1997, inquiring about the status of the motion and noting that no opposition had been filed.

20. Although respondent had the Pitman motion to dismiss under advisement at least by the spring of 1996, he did not decide it until October 1997, when he denied the motion.

21. On February 15, 1996, Mr. Biscone filed a motion to dismiss the reissued Libertucci tickets. No opposition was interposed until June 3, 1996. Although respondent had this motion under advisement by the spring of 1996, respondent did not

decide it until July 2, 1997, when he denied the motion.

22. There is no reasonable explanation in the record to excuse respondent's delay in disposing of the motions to dismiss the reissued Pitman and Libertucci tickets.

23. Respondent's delay in deciding the Pitman and Libertucci motions was in violation of the 60-day disposition rule of CPLR 2219(a). In March 1997, respondent reported the pending Libertucci motion to dismiss to his Administrative Judge as undecided for more than 60 days. This was the only occasion respondent had ever reported a case as undecided for more than 60 days.

24. Mr. Biscone appealed the Pitman and Libertucci orders denying the motions to dismiss. After an appellate court remanded the matters for special circumstances hearings, respondent held a special circumstances hearing in the Pitman matter on January 26, 1999. On May 19, 1999, respondent issued a decision dismissing the reissued Pitman ticket.

25. In anticipation of a special circumstances hearing in the Libertucci matter, plea negotiations were held as to the reissued Libertucci tickets as well as additional tickets Mr. Libertucci had received during the pendency of these matters. In August 1998 Mr. Libertucci agreed to plead guilty to the October 4, 1995 Speeding charge, a plea which allowed him to retain his license.

26. During the pendency of these matters, respondent was on notice that

his recusal was being sought. By letter to respondent dated July 17, 1997, Mr. Biscone asked for respondent's recusal in the Libertucci matter. By letter to respondent dated September 28, 1998, Mr. Biscone asked for respondent's recusal in the Pitman matter, a request which respondent denied on October 6, 1998. Respondent's failure to confront the recusal issue during the pendency of these matters exacerbates the impression of bias conveyed by his actions.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(4), 100.3(B)(7) and 100.3(E)(1) of the Rules Governing Judicial Conduct. Charge I of the Formal Written Complaint is sustained insofar as it is consistent with the above findings of fact. Paragraphs 4(e) and 4(f) of Charge I are dismissed.

Respondent's handling of the Libertucci and Pitman matters conveyed the unmistakable impression of bias.

By law, both defendants were entitled to dismissal of the charges against them due to the failure of the arresting officers to furnish the requested supporting depositions (CPL §100.40[2]). As a judge since 1983, respondent had handled many such cases in which he routinely granted motions to dismiss on that basis. Yet, after dismissing the charges against Mr. Libertucci, respondent took a series of extraordinary steps which not only effectively insured that the two cases would not end with a prompt,

statutorily required dismissal, but conveyed the clear impression that respondent favored a different result. By directing Mr. Libertucci to return to court the next day along with Ms. Pitman notwithstanding that his case had been dismissed, by researching Mr. Libertucci's driving record although it was irrelevant to the motion to dismiss under Section 100.40(2), and by stating in the presence of the arresting officer in Pitman that he wanted the charges in both cases reissued, respondent acted in a manner which created an appearance of bias. That appearance was compounded by respondent's disapproving remarks about Mr. Libertucci's driving record and by his inappropriate comment that Mr. Libertucci's alleged Speeding violation had occurred in respondent's neighborhood. Unfortunately for Ms. Pitman, who was Mr. Libertucci's fiancée, her case was apparently linked in respondent's view with Mr. Libertucci's (they appeared together, made the same motions and had the same attorney). As the referee concluded, the totality of respondent's behavior as to both matters "conveyed the impression that he was biased, had a personal interest in the outcome of the cases and could not render an impartial decision."

Despite such behavior, respondent continued to sit on the cases after the charges were reissued. His conduct violated Section 100.3(E)(1) of the Rules Governing Judicial Conduct, which requires that a judge "shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned...."

Respondent's ongoing failure to confront the recusal issue exacerbated the impression of

bias, as did his failure to decide motions to dismiss the reissued charges within 60 days, as required by CPLR 2219(a). In Libertucci, respondent took over a year to decide the motion; in Pitman, the delay was even longer. While such delay, standing alone, would not constitute misconduct (*see* Matter of Greenfield, 76 NY2d 293), here the delay cannot be separated from the impression of bias permeating respondent's handling of these cases. Moreover, by not reporting the pending Libertucci motion to his administrative judge until March 1997 (well past the 60-day reporting period), and by apparently never reporting the Pitman motion, respondent effectively removed his conduct from administrative scrutiny.

In its totality, respondent's conduct violated the requirement that every judge must not only be impartial, but act "in such a way that the public can perceive and continue to rely upon the impartiality of those who have been chosen to pass judgment on legal matters involving their lives, liberty and property." Matter of Sardino, 58 NY2d 286, 290-91 (1983).

By reason of the foregoing, the Commission determines that the appropriate disposition is admonition.

Mr. Berger, Mr. Goldman, Ms. Hernandez, Judge Marshall, Judge Peters, Mr. Pope and Judge Ruderman concur.

Judge Salisbury and Judge Luciano dissent as to paragraph 4(b) and vote to

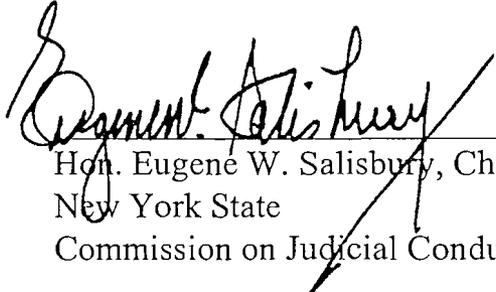
dismiss the allegation concerning respondent's comment that the Speeding charge against Mr. Libertucci occurred on respondent's street.

Ms. Brown and Mr. Coffey were not present.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: December 29, 2000



Hon. Eugene W. Salisbury, Chair
New York State
Commission on Judicial Conduct