

**State of New York**  
**Commission on Judicial Conduct**

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In the Matter of the Proceeding Pursuant to Section 44,  
subdivision 4, of the Judiciary Law in Relation to

DUNCAN S. MacAFFER,

a Justice of the Village Court of  
Menands, Albany County.

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**Determination**

BEFORE: Mrs. Gene Robb, Chairwoman  
Honorable Fritz W. Alexander, II  
David Bromberg, Esq.  
Honorable Richard J. Cardamone  
E. Garrett Cleary  
Dolores DelBello  
Michael M. Kirsch  
Victor A. Kovner  
Honorable Isaac Rubin  
Honorable Felice K. Shea  
Carroll L. Wainwright, Jr., Esq.

APPEARANCES:

Gerald Stern (Jack J. Pivar, Of Counsel)  
for the Commission  
Victor A. Caponera for Respondent

The respondent, Duncan S. MacAffer, is a part-time justice of the Village Court of Menands, Albany County, and is an attorney permitted to practice law in this state. He was served with a Formal Written Complaint dated October 31, 1979, alleging that he sought special consideration for the defendants in five traffic cases, granted two such requests and practiced law before other part-time lawyer-justices in Albany County in violation of the Rules Governing Judicial Conduct. Respondent filed an answer dated November 26, 1974.

By order dated January 10, 1980, the Commission designated Richard M. Daily, Esq., referee to hear and report proposed findings of fact and conclusions of law. The hearing was held on March 7, 1980, and the referee filed his report to the Commission on January 5, 1981.

By motion dated January 21, 1981, the administrator of the Commission moved to disaffirm the referee's report, for a finding that respondent's misconduct was established and for a determination that respondent be censured. Respondent cross-moved on February 17, 1981, to confirm the referee's report, for a finding that respondent's misconduct was not established and for dismissal of the Formal Written Complaint.

The Commission heard oral argument on the motions on April 23, 1981. Respondent appeared with his counsel. Thereafter, the Commission considered the record of the proceeding and now makes the determination herein.

Charges I and VI of the Formal Written Complaint are not sustained and therefore are dismissed.

With respect to Charges II through V, the Commission makes the following findings of fact.

1. Charge II: On September 25, 1975, Werner Kopp received a ticket for speeding in the Town of Moreau. Mr. Kopp had been a law client of respondent's. Some time between September 25 and October 10, 1975, respondent communicated ex parte with the clerk of the Moreau Town Court regarding Mr. Kopp's ticket.

On October 10, 1975, respondent caused an ex parte letter to be sent to Justice Robert Vines of the Moreau Town Court, seeking special consideration on behalf of the defendant. The letter was prepared on respondent's judicial stationery and signed in respondent's name, with his knowledge and permission, by his secretary.

2. Charge III: On April 15, 1976, Robert R. Catlin received a ticket for speeding in the Town of Lake George. Mr. Catlin was a trustee of the Village of Menands and a friend of respondent's. Some time between April 15 and 19, 1976, respondent communicated ex parte by telephone with Ralph E. Brown, clerk of the Lake George Town Court, regarding Mr. Catlin's ticket. On April 19, 1976, respondent signed and sent an ex parte letter on his judicial stationery to Mr. Brown, confirming the telephone conversation and seeking special consideration on behalf of the defendant.

3. Charge IV: On June 17, 1975, Christopher Coward received a ticket for speeding in the Town of Lake George. Mr. Coward was a client of a lawyer with whom respondent was then sharing law offices. On June 23 and 26, 1975, two ex parte letters bearing respondent's name on his judicial stationery were sent to Justice Robert Radloff of the Lake George Town Court, seeking special consideration on behalf of the defendant. Respondent had authorized both letters to be signed with his name.

4. Charge V: On July 15, 1975, respondent reduced a charge of speeding to driving with an unsafe tire and granted an

unconditional discharge to the defendant in People v. Robert Herb as a result of an ex parte request he received from Poestenkill Town Court Justice Donald A. Gutbrodt, seeking special consideration on behalf of the defendant.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 33.1, 33.2, 33.3(a)(1) and 33.3(a)(4) of the Rules Governing Judicial Conduct and Canons 1, 2 and 3A of the Code of Judicial Conduct. Charges II through V of the Formal Written Complaint are sustained and respondent's misconduct is established.

With respect to Charges VII and VIII of the Formal Written Complaint, the Commission makes the following findings of fact.

5. Charge VII: From March 9 to March 29, 1976, respondent, a part-time lawyer-justice, represented the plaintiff before Justice Philip S. Caponera in Hull v. Ostrander in the Colonie Town Court, Albany County. Judge Caponera is and was at that time a part-time lawyer-justice in the same county as respondent's own court.

6. Charge VIII: In September 1973, respondent represented Elliot A. Leberman in a traffic matter pending before Albany Traffic Court Judge John E. Holt-Harris. Judge Holt-Harris was at that time a part-time lawyer-judge in the same county as respondent's own court. On September 19, 1973, respondent sent an ex parte letter to Judge Holt-Harris, confirming their conversation earlier that day and seeking special consideration for the defendant.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 33.1, 33.2, 33.3(a)(1), 33.3(a)(4) and 33.5(f) (formerly Section 20.18) of the Rules Governing Judicial Conduct and Canons 1, 2 and 3A of the Code of Judicial Conduct. Charges VII and VIII of the Formal Written Complaint are sustained and respondent's misconduct is established.

It is improper for a judge to seek to persuade another judge, on the basis of personal or other special influence, to grant special consideration to a defendant. By making ex parte requests of other judges for favorable dispositions for defendants in traffic cases, and by granting such a request, respondent violated the Rules enumerated above, which read in part as follows:

Every judge...shall himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. [Section 33.1]

A judge shall respect and comply with the law and shall conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. [Section 33.3(a)]

No judge shall allow his family, social or other relationships to influence his judicial conduct or judgment. [Section 33.2(b)]

No judge...shall convey or permit others to convey the impression that they are in a special position to influence him.... [Section 33.2(c)]

A judge shall be faithful to the law and maintain professional competence in it.... [Section 33.3(a)(1)]

A judge shall...except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceedings.... [Section 33.3(a)(4)]

Courts in this and other states, as well as the Commission, have found that favoritism is serious judicial misconduct and that ticket-fixing is a form of favoritism.

In Matter of Byrne, 47 NY2d(b) (Ct. on the Judiciary 1979), the court declared that a "judicial officer who accords or requests special treatment or favoritism to a defendant in his court or another judge's court is guilty of malum in se misconduct constituting cause for discipline." In that case, ticket-fixing was equated with favoritism, which the court stated was "wrong and has always been wrong." Id. at (c).

As an experienced lawyer, respondent should have been fully aware of the applicable standards of conduct, with respect to both his seeking special consideration for traffic defendants and his accomodating similar requests.

As a part-time judge permitted to practice law while holding office, respondent was obliged to adhere to the applicable rule governing such practice. Section 33.5(f) of the Rules Governing Judicial Conduct specifically prohibits a part-time lawyer-judge from practicing before another part-time lawyer-judge in the same county as his own court. By twice representing clients before other part-time lawyer-judges in Albany County, respondent violated the applicable rule.

In addition to the misconduct alleged in the Formal Written Complaint and herein sustained, the Commission notes that although Charge I was not sustained, respondent's testimony with respect thereto requires comment.

Charge I alleged that a letter had been sent by respondent to another judge, seeking special consideration for a traffic defendant. During the Commission's investigation of the matter, respondent stated that "through a mix-up in the office...due to the inexperience of our secretary, the letter was sent out on my court stationery without my knowledge" (Hearing Exhibit 2). It appears, however, that when he made that statement to the Commission, respondent knew that the letter had been authorized and sent over his name by his law partner. At the hearing, when asked about the inaccuracy of his earlier explanation, respondent said that since his "partner was also under investigation [by the Commission] for his conduct as an attorney justice...I didn't feel that I had to reveal all of the details involved" (Tr. 42-43).

Respondent's earlier statement evinced a lack of candor and hindered the Commission's investigations of both respondent and his partner at the time. Respondent was obliged to be candid and cooperative with the Commission.

By reason of the foregoing, the Commission determines that the appropriate sanction is censure.

The Commission records the following votes in this matter.

Charge I is dismissed by vote of 10 to 1. Mrs. DelBello dissents and votes to sustain the charge.

Charge II is sustained by vote of 7 to 4. Judge Cardamone, Mr. Cleary, Mr. Kovner and Mr. Wainwright dissent and vote to dismiss the charge.

Charge III is sustained by unanimous vote.

Charge IV is sustained by vote of 7 to 4. Judge Cardamone, Mr. Cleary, Judge Rubin and Mr. Wainwright dissent and vote to dismiss the charge.

Charge V is sustained by unanimous vote.

Charge VI is dismissed by vote of 8 to 3. Mr. Bromberg, Mrs. DelBello and Mr. Kirsch dissent and vote to sustain the charge.

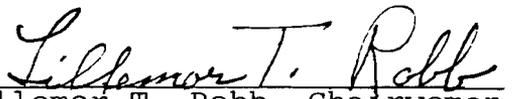
Charges VII and VIII are sustained by unanimous vote.

With respect to sanction, all concur that the appropriate sanction is censure.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct, containing the findings of fact and conclusions of law required by Section 44, subdivision 7, of the Judiciary Law.

Dated: June 11, 1981

  
Lillemor T. Robb, Chairwoman  
New York State Commission  
on Judicial Conduct.