

STATE OF NEW YORK  
COMMISSION ON JUDICIAL CONDUCT

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

THOMAS HABERNECK, :  
a Justice of the Newstead Town Court :  
and the Akron Village Court, :  
Erie County. :

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PRESENT: Mrs. Gene Robb, Chairwoman  
Honorable Fritz W. Alexander, II  
David Bromberg  
Honorable Richard J. Cardamone  
Dolores DelBello  
Michael M. Kirsch  
William V. Maggipinto  
Honorable Isaac Rubin  
Honorable Felice K. Shea  
Carroll L. Wainwright, Jr.

The respondent, Thomas Haberneck, a Justice of the Town Court of Newstead and the Village Court of Akron, Erie County, was served with a Formal Written Complaint dated July 27, 1978, setting forth 51 charges of misconduct relating to the improper assertion of influence in traffic cases. In his answer, dated September 22, 1978, respondent admitted the factual allegations set forth in the charges by his failure to deny them (Section 7000.6[b] of the Commission's Rules, 22 NYCRR 7000.6[b]), and denied that the factual allegations constituted violations of the ethical standards cited in the Formal Written Complaint. At the same time, respondent asserted certain affirmative defenses.

The administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts on March 6, 1979, pursuant to Section 44, subdivision 5, of the Judiciary Law, waiving the hearing provided for by Section 44, subdivision 4, of the Judiciary Law and stipulating that the Commission make its determination on the pleadings and the facts as agreed upon. The Commission approved the agreed statement of facts as submitted on March 22, 1979, determined that no outstanding issue of fact remained, and scheduled oral argument with respect to determining (i) whether to make a finding of misconduct and (ii) an appropriate sanction, if any. The administrator and respondent submitted memoranda in lieu of oral argument.

The Commission considered the record in this proceeding on May 22, 1979, and upon that record finds the following facts:

1. On December 15, 1972, respondent reduced a charge of speeding to driving with unsafe tires in People v. Wesley F. Glantz as a result of a written communication he received from Trooper Don Girven, seeking special consideration on behalf of the defendant.

2. On March 23, 1973, respondent reduced a charge of speeding to driving with unsafe tires in People v. Noria Frasca as a result of a communication he received from Justice George Barody of the Manchester Town Court, seeking special consideration on behalf of the defendant.

3. On June 21, 1973, respondent reduced a charge of speeding to passing in a no passing zone in People v. August Spaziano as a result of a written communication he received from Detective Sergeant John F. Kennerson of the Monroe County Sheriff's Department, seeking special consideration on behalf of the defendant.

4. On June 21, 1973, respondent reduced a charge of speeding to driving with unsafe tires in People v. Lawrence Stirpe as a result of a written communication he received from Justice Edward Mazur of the Lancaster Town Court, seeking special consideration on behalf of the defendant.

5. On June 27, 1973, respondent reduced a charge of speeding to driving with unsafe tires in People v. Roland McVige as a result of a written communication he received from Justice Neil Cramer of the Chili Town Court, seeking special consideration on behalf of the defendant.

6. On July 16, 1973, respondent reduced a charge of speeding to driving with unsafe tires in People v. Mary Cerame as a result of a written communication he received from Michael Cerame, Commissioner of the Monroe County Civil Service Commission and Office of Personnel, seeking special consideration on behalf of the defendant.

7. On July 18, 1973, respondent reduced a charge of speeding to driving with unsafe tires in People v. Patricia Randolph as a result of a written communication he received from Amherst Town Court Clerk Frank V. Grillo, seeking special consideration on behalf of the defendant.

8. On July 19, 1973, respondent reduced a charge of speeding to driving with unsafe tires in People v. Robert Gerlach as a result of a written communication he received from Justice Joseph Pyszczynski of the Cheektowaga Town Court, seeking special consideration on behalf of the defendant.

9. On August 10, 1973, respondent reduced a charge of speeding to driving with unsafe tires in People v. Joseph Ingoglia as a result of a written communication he received from James R. Burke, Town and Village Court Case Screener for the Monroe County District Attorney's office, seeking special consideration on behalf of the defendant.

10. On August 28, 1973, respondent reduced a charge of speeding to driving with unsafe tires in People v. Margaret Bennison as a result of a written communication he received from Judge William Bennison of Municipal Court No. 6 of Dallas, Texas, seeking special consideration on behalf of the defendant, his daughter.

11. On September 26, 1973, respondent reduced a charge of speeding to driving with unsafe tires in People v. Robert Holt as a result of a written communication he received from Judge Donald Gutbrodt of the Poestenkill Town Court, seeking special consideration on behalf of the defendant.

12. On September 26, 1973, respondent imposed an unconditional discharge in People v. Myles Kittner as a result of a written communication he received from officers who were not the arresting officers, seeking special consideration on behalf of the defendant.

13. On September 26, 1973, respondent reduced a charge of speeding to driving with unsafe tires in People v. Melvin L. Lieberson as a result of a communication he received seeking special consideration on behalf of the defendant.

14. On October 31, 1973, respondent reduced a charge of speeding to driving with unsafe tires in People v. Paul Babitz as a result of a written communication he received from James Burke, Town and Village Court Case Screener for the Monroe County District Attorney's office, seeking special consideration on behalf of the defendant.

15. On December 15, 1973, respondent reduced a charge of speeding to driving with unsafe tires in People v. Carlton Squier as a result of a written communication he received from Investigator Rick Flis of the New York State Police, seeking special consideration on behalf of the defendant.

16. On December 19, 1973, respondent reduced a charge of speeding to failure to keep right in People v. Edward Lockwood as a result of a written communication he received from James R. Burke, Town and Village Court Case Screener for the Monroe County District Attorney's office, seeking special consideration on behalf of the defendant.

17. On March 13, 1974, respondent reduced a charge of speeding to driving with unsafe tires in People v. Edward J. Smith as a result of a written communication he received from Justice Joseph Polonsky of the Wawarsing Town Court, seeking special consideration on behalf of the defendant.

18. On June 26, 1974, respondent reduced a charge of speeding to illegal parking in People v. Jeffrey Stengel as a result of a written communication he received from Justice Charles Schohl of the Orchard Park Town Court, seeking special consideration on behalf of the defendant.

19. On September 20, 1974, respondent reduced a charge of speeding to illegal parking in People v. Frederick Rueger as a result of a written communication he received from James R. Burke, Town and Village Court Case Screener for the Monroe County District Attorney's office, seeking special consideration on behalf of the defendant.

20. On September 25, 1974, respondent reduced a charge of speeding to driving with unsafe tires in People v. Larry Manges as a result of a written communication he received from Justice Donald Mills of the Oakfield Town Court, seeking special consideration on behalf of the defendant.

21. On September 26, 1974, respondent reduced a charge of speeding to driving with unsafe tires in People v. Michael G. Whisker as a result of a written communication he received, seeking special consideration on behalf of the defendant.

22. On September 27, 1974, respondent reduced a charge of speeding to illegal parking in People v. Florence Maugere as a result of a written communication he received from Justice Sylvester Albano of the Coeymans Town Court, seeking special consideration on behalf of the defendant.

23. On September 30, 1974, respondent reduced a charge of speeding to driving with an inadequate muffler in People v. Ida Ruscitti as a result of a written communication he received from Justice Harry Mills of the Montgomery Town Court, seeking special consideration on behalf of the defendant.

24. On December 10, 1974, respondent reduced a charge of speeding to illegal parking in People v. Robert Campbell as a result of a written communication he received from Justice Sebastian Lombardi of the Lewiston Town Court, seeking special consideration on behalf of the defendant.

25. On December 17, 1974, respondent reduced a charge of speeding to illegal parking in People v. Samuel D'Angelo as a result of a written communication he received from Trooper J.R. Loncher, seeking special consideration on behalf of the defendant.

26. On February 19, 1975, respondent reduced a charge of speeding to driving with unsafe tires in People v. Salvatore V. DiMeo as a result of a communication he received, seeking special consideration on behalf of the defendant.

27. On February 28, 1975, respondent reduced a charge of speeding to driving with unsafe tires in People v. David Mand as a result of a communication he received from Trooper R.W. Maines, seeking special consideration on behalf of the defendant.

28. On April 14, 1975, respondent reduced a charge of speeding to driving with unsafe tires in People v. Joseph Castlevetere as a result of a written communication he received from Justice John Modder of the Tuxedo Town Court seeking special consideration on behalf of the defendant.

29. On August 26, 1975, respondent reduced a charge of speeding to failure to keep right in People v. Francesco Verrelli as a result of a written communication he received from Patrolman F. DiTullio, seeking special consideration on behalf of the defendant.

30. On September 15, 1975, respondent reduced a charge of speeding to failure to keep right in People v. James Conway as a result of a written communication he received from Justice Carlton Chase of the Chittenango Village Court, seeking special consideration on behalf of the defendant.

31. On September 19, 1975, respondent reduced a charge of speeding to driving with unsafe tires in People v. George Tonas as a result of a written communication he received from James R. Burke, Town and Village Court Case Screener for the Monroe County District Attorney's office, seeking special consideration on behalf of the defendant.

32. On September 23, 1975, respondent, who is not an attorney, personally appeared before Judge Lawrence Schultz of the Batavia City Court and requested that the charge of speeding against the defendant be dismissed in People v. Robin Haberneck, a case then pending before Judge Schultz.

33. On October 15, 1975, respondent reduced a charge of speeding to driving with unsafe tires in People v. James Winterhalt as a result of a written communication he received from Justice William Sivecz of the Alden Town Court, seeking special consideration on behalf of the defendant.

34. On January 22, 1976, respondent reduced a charge of speeding to driving with unsafe tires in People v. James Wagner as a result of a written communication he received from Trooper T.J. Schultz, seeking special consideration on behalf of the defendant.

35. On January 28, 1976, respondent reduced a charge of speeding to failure to keep right in People v. William Scoville as a result of a written communication he received from Justice William Farr of the Avon Town and Village Courts, seeking special consideration on behalf of the defendant.

36. On January 28, 1976, respondent reduced a charge of speeding to driving with unsafe tires in People v. Antonio L. Simao, Jr., as a result of a written communication he received from Justice James Jerome of the Geddes Town Court, seeking special consideration on behalf of the defendant.

37. On February 3, 1976, respondent reduced a charge of unsafe starting to driving with unsafe tires in People v. Dorothy Schrub as a result of a communication he received from Amherst Town Court Clerk Frank Grillo, seeking special consideration on behalf of the defendant.

38. On February 13, 1976, respondent reduced a charge of speeding to driving with unsafe tires in People v. Meyer Tubin as a result of a written communication he received from Trooper R.F. Szczepanski, seeking special consideration on behalf of the defendant.

39. On February 17, 1976, respondent reduced a charge of speeding to driving with unsafe tires in People v. Anthony L. Panzarella as a result of a written communication he received from Ed Caypless, seeking special consideration on behalf of the defendant.

40. On March 17, 1976, respondent reduced a charge of speeding to driving with unsafe tires in People v. George Mruk, Jr., as a result of a written communication he received from Senior Investigator V.A. Tobia of the New York State Police, seeking special consideration on behalf of the defendant.

41. On March 20, 1976, respondent imposed an unconditional discharge in People v. Helen M. Bartosek as a result of a written communication he received from officers who were not the arresting officers, seeking special consideration on behalf of the defendant.

42. On March 26, 1976, respondent reduced a charge of speeding to driving with unsafe tires in People v. Franklin Zophy as a result of a written communication he received from Justice Robert Forsythe of the Vernon Town Court, seeking special consideration on behalf of the defendant.

43. On April 7, 1976, respondent reduced a charge of speeding to driving with unsafe tires in People v. Walter Klein as a result of a communication he received, seeking special consideration on behalf of the defendant.

44. On April 20, 1976, respondent reduced a charge of speeding to failure to obey a traffic control device in People v.

Charles J. Francemone, Jr., as a result of a written communication he received from Justice Robert Smolinski of the Solvay Village Court, seeking special consideration on behalf of the defendant.

45. On May 27, 1976, respondent reduced a charge of speeding to driving with unsafe tires in People v. Dennis Bamberg as a result of a written communication he received from Trooper R.F. Szczepanski, seeking special consideration on behalf of the defendant.

46. On August 19, 1976, respondent reduced a charge of speeding to failure to keep right in People v. John H. Horton, Jr., as a result of a written communication he received from Justice Michael Taddonio of the Irondequoit Town Court, seeking special consideration on behalf of the defendant.

47. On August 24, 1976, respondent reduced a charge of speeding to driving with unsafe tires and then dismissed the charge in People v. Luigi Maltese as a result of a written communication he received from Trooper Sam Thorpe, seeking special consideration on behalf of the defendant.

48. On September 9, 1976, respondent reduced a charge of speeding to illegal parking in People v. Gilles Vaillancourt as a result of a written communication he received from Justice Anthony Ellis of the Tupper Lake Village Court, seeking special consideration on behalf of the defendant.

49. On November 30, 1976, respondent reduced a charge of speeding to driving with unsafe tires in People v. John J. Markwica as a result of a written communication from Walt Lemza, seeking special consideration on behalf of the defendant.

50. On February 16, 1977, respondent reduced a charge of speeding to driving with unsafe tires in People v. Joseph Penque as a result of a written communication he received from Justice George Harris of the Angelica Town and Village Courts, seeking special consideration on behalf of the defendant.

51. On April 21, 1977, respondent reduced a charge of speeding to driving with unsafe tires in People v. Arlene M. Polowy as a result of a communication he received, seeking special consideration on behalf of the defendant.

Based 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, Canons 1, 2 and 3A of the Code of Judicial Conduct, and Canons 4, 5, 13, 14, 17 and 34 of the Canons of Judicial Ethics. Charges I through LI of the Formal Written Complaint are sustained, and respondent is thereby guilty of misconduct.

It is improper for a judge to seek to persuade another judge, on the basis of personal or other special influence, to alter or dismiss a traffic ticket. A judge who accedes to such a request is guilty of favoritism, as is the judge who made the request. By making a request of another judge and by granting ex parte requests from judges and others with influence, 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 33.2(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 state and other jurisdictions have found that favoritism is serious judicial misconduct and that ticket-fixing is a form of favoritism.

In Matter of Byrne, N.Y.L.J. April 20, 1978, vol. 179, p. 5 (Ct. on the Judiciary), the Court on the Judiciary 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.

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

This determination constitutes the findings of fact and conclusions of law required by Section 44, subdivision 7, of the Judiciary Law.

All concur.

Mr. Kirsch's concurring opinion follows.

Dated:

APPEARANCES:

Diebold, Bermingham, Gorman, Brown & Bridge (By Michael J. Brown)  
for Respondent

Gerald Stern for the Commission (John W. Dorn, Edith Holleman,  
Of Counsel)

Mr. Kirsch concurs in the following opinion:

It appears to me appropriate to make some observations regarding the particularly high number of "ticket-fixing" incidents (51) with respect to which respondent is guilty.

The essence of the wrongdoing in ticket-fixing, of course, is not the number of times a judge has done it but that he has done it at all. The applicable Rules Governing Judicial Conduct are violated the first time a ticket is fixed, and every time thereafter.

There is no dispute that a judge who is guilty of misconduct by virtue of asserting or acceding to special influence in traffic cases should be punished, and in many instances, public censure is appropriate. Nevertheless, when a judge engages in ticket-fixing so often that his actions evince a continuing pattern of misconduct, the sanction imposed should be more severe.

In the instant matter, by engaging in a continuous pattern of misconduct, respondent exhibited something more serious than poor judgment in a limited number of incidents. He has given the impression that the prestige of his office may readily be lent to advance the private interests of others, merely for the asking. He has aggravated the impropriety inherent in even a single incident of ticket-fixing by engaging in it so frequently as to amount to a flagrant, repeated disregard of the applicable ethical standards. As such, respondent's conduct is particularly unacceptable.

In determining the sanctions to be imposed in earlier ticket-fixing cases, both the State Commission on Judicial Conduct

and the Court on the Judiciary have given considerable thought to the appropriate weight to ascribe to the number of ticket-fixing incidents committed by a particular judge. The Commission has censured judges for as few as two and as many as 24 incidents (Matter of Aurigemma, N.Y.L.J. Feb. 20, 1979, p. 14, col. 3, and Matter of Vines, March 31, 1978, unreported), and the Court has censured judges for as few as eight and as many as 98 incidents (Matter of Wittenburg and Matter of Thomson, N.Y.L.J. Nov. 13, 1978, p. 6, col. 1). Indeed, the Court stated in Matter of Kuehnel et al., that "numbers alone should not determine the sanction to be imposed" (N.Y.L.J. Nov. 13, 1978, p. 6, col. 1).

Numbers, however, should not be discounted in the determination of an appropriate sanction. They serve to distinguish between the judge who made an isolated mistake and the judge whose misconduct is flagrant and continuous. To render the same sanction on both the judge who is guilty of 51 ticket-fixing incidents and the judge who is guilty of two, might give the erroneous impression that if a judge intends to fix one ticket, he may as well fix a hundred, because the penalty will be the same. Certainly that is not the position of either the Court on the Judiciary or this Commission.

I have voted with the majority for censure in the instant case, in part to be consistent with the standards set by the Commission and the Court on the Judiciary in earlier ticket-fixing cases, and in part because of the difficulty in determining the threshold number between censure and removal. (For example, do 50 incidents of ticket-fixing misconduct justify removal while 49

justify censure?) Unfortunately, the Constitution and the Judiciary Law do not provide for any sanction in between.

My vote for censure in this case should be viewed in the foregoing context.

Dated: July 10, 1979