To be Argued by:
ROBERT F. JULIAN, ESQ.
(Time Requested: 15 minutes)

JCR-2018-00004

Court of Appeals

of the

State of New York

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

LETICIA D. ASTACIO,

a Judge of the Rochester City Court, Monroe County.

REPLY BRIEF FOR PETITIONER

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July 31, 2018

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I. THE UNFAIRNESS OF THE HEARING AND THE FACTS WARRANT CENSURE AND NOT REMOVAL

Judiciary Law Section 44(7)(9) gives an accused judge a substantive right to argue a case before the Commission on Judicial Conduct with the objective of achieving a determination by the Commission that is less than removal. Under the construct of this Section of the Judiciary Law, if censured the Judge could avoid an appeal to this court and the consequent risk of removal. That was the objective of the petitioner in the case at bar and a common objective in many judicial discipline cases before the Commission. The conduct of the Commission during the oral argument deprived the Petitioner of a fair chance to achieve censure, the discipline the Petitioner requested.

Gerald Stern, the Commission on Judicial Conduct's former Administrator and General Counsel explained a Judge's rights pursuant to Judiciary Law Section 44(7)(9) as follows:

> "Under the law, only a Judge who is the subject of a Commission determination for removal, censure, or admonition may request review of the Commission's determination by the New York State Court of Appeals, NY Jud. L. §44(7), (9), (2002). So, if a Judge does not seek review, the Commission's determination takes effect. When a Judge seeks review of a Commission determination, the Court of Appeals, after hearing the matter on

> the record before the Commission, may take any disciplinary action provided by law. *See, In Re: Schilling*, 415 N.E.2d 900, 903 (NY, 1980). (Judge facing censure sought review and was removed from office by the Court of Appeals). Stern, Gerald, [2004] Judicial Error That is Subject to Discipline in New York, p.16, FN 67, Hofstra Law Review, Vol. 32, Iss. 4, Art. 19.

In the case at bar, the Chair wrongly introduced prejudicial information during the Petitioner's hearing and argument before the full Commission that was not in the record which so tainted the proceeding that the Petitioner was deprived of the chance to have a fair hearing and to be censured and avoid the risk of removal. That misconduct trampled Petitioner's chance to achieve censure and not removal. If this Court agrees that the Commission hearing was tainted and exercises its broad plenary powers to determine the facts and impose the sanction of removal, the Petitioner will be prejudiced by said removal. *Matter of Quinn*, 54 NY2d 386, 391 (1984). This Court is asked to apply the sanction of censure as the only proper means to give the Petitioner a fair outcome given the prejudice created during the oral argument before the Commission. If a fair hearing was conducted before the full Commission, the Petitioner had a chance to achieve a determination of censure and avoid removal. The facts in this case warrant censure only and not removal.

The Commission in a footnote stated that its determination was reached based only on the facts in the record. (R. 40; N7) The Commission did not affirmatively represent that it was not impacted, influenced, biased, or prejudiced by the extra record information introduced by its own Chair at the oral argument of this case. The footnote is an inadequate assurance that there was not actual prejudice to the Petitioner, particularly because the Chair participated in the deliberations and signed the Determination.

In a remarkable exchange during Petitioner's argument to the full Commission, the Chair questioned the Petitioner verbally about statements he said she had made in public but were not in the record. (R. 68-70) The Chair accused the Petitioner of being dishonest and untruthful and accused her of saying in public that she was not going to "take the Commission's shit". The Chair promised the Petitioner she would be given the source of his comments and a chance to respond. (R. 70) At no time did the Chair or any member of the Commission give the source of the information or when the alleged statement was made. Given this prejudicial event, the Petitioner was entitled to:

1. Be confronted with the alleged statement as was promised at the argument and permitted to acknowledge, deny or explain; (Tr. 70)
2. A representation that the Commission was not influenced by the Chair's allegations;

3. A representation by the Commission that they not only discounted that allegation but accepted petitioner's denial that she was critical of the Commission or made the alleged statement;
4. A representation by the Commission that in their deliberations they assumed that the statement was not made, and;
5. A recusal by the Chair and the prohibiting of his participation in the deliberations.

None of the foregoing occurred even though the Commission Chair on the record told Petitioner that she would be allowed to learn the source of the alleged comment and that she would be given a chance to explain. (R. 70) The Commission both failed to provide the Petitioner that fundamental due process right and to fulfill their promise. (R. 70) Rather Petitioner and her Counsel were dismissed on that day with no opportunity to further argue or explain the damaging and unsupported accusations.

In the mainstream, there can be little doubt that the Commission on Judicial Conduct proceedings are lopsided events. A judge who is charged, usually with his or her privately retained lawyer faces the competent, specialized, well-funded Counsel of the Commission on Judicial Conduct in a proceeding which is conducted with relaxed rules of evidence, to be conducted in the same manner as a non-jury trial. (22 NYCRR 7000.6(i)(2)) The burden of proof is merely a

preponderance of the evidence. (22 NYCRR 6(i)(1) The cost to the judge both financially and emotionally is tremendous.

The Judiciary Law and the Rules of the Commission provide safeguards for the accused Judge:

1. The State Constitution created a specialized forum to litigate allegations of judicial abuse and judicial misconduct. Article 6, Section 22 of the Constitution of the State of New York
2. Commission rules permit the Petitioner minimal rights in the selection of the hearing officer.
3. The Statute and the Rules permit some discovery (although in this case, the Commission laudably opened its entire file to petitioner). (22 NYCRR 2000.6(h))
4. The petitioner is granted the assurance that the determination would be based upon a record consisting of transcript and received exhibits. (Jud.L. Sec. 44(4))
5. The petitioner was granted the exclusive right to appeal to the court of appeals. Consequently if the petitioner received discipline that is not removal from office, the petitioner is granted the sole prerogative to accept that outcome and not appeal to this court, where the loss of office through removal could be ordered. (Jud.L. Sec. 44(7)(9))

This statutory scheme buttressed by the Rules of the Commission grant an accused judge like the Petitioner a significant property right to her job and to a fair hearing, including the right to seek and accept discipline less than removal by a Commission determination, thereby avoiding the jeopardy of the loss of the accused's judgeship.

The members of this court are well aware that holding a judgeship creates benefits and burdens, as well as risks and responsibility. The benefits are obvious- the salary, fringe benefits, respect and important duties associated with all judgeships. The burden is that the judge forsakes his/her prior source of income- private practice, full-time teaching, or public service and assumes a lifestyle of rectitude and scrutiny. Assuming a judgeship, therefore, has a component of economic peril when the Judge forsakes his/her practice or job to assume the bench. To be cast out of office by virtue of a failed re-election or non-reappointment is a risk. Removing a judge for disciplinary reasons adds the stigma of disrepute. The statutory scheme set forth in Judiciary Law recognizes the forgoing and allows a judge who is charged, such as the petitioner, the right to a hearing, and the sole discretion regarding whether to pursue an appeal or not from the Determination of the Commission.

In the case at bar the petitioner argued before the Commission (and indeed to the hearing officer) that she should be censured but not removed. Censure is a meaningful recognition of wrongdoing. Petitioner's counsel in this case at bar can cite to this court three recent cases in which he has represented the judge in

recent years wherein Commission Counsel argued strenuously for removal, the Respondent Judge argued for censure and the argument for censure prevailed in the Determination of the Commission. *Matter of Sullivan*, 2017 Ann. Report 247; *Matter of Popeo*, 2016 Ann Report 160; and *Matter of Aluzzi*, 2018 Ann. Report 63. There was no appeal to this Court in any of these cases because each censured Judge chose to accept that outcome rather than risk removal by appealing to this Court. This was the outcome Petitioner was seeking when she argued before the full Commission.

Furthermore petitioner's counsel will note that all members of the Commission, including the present Chair, treated Judges Popeo, Sullivan, and Aluzzi with proper respect to be accorded a litigant. The conduct in this case on the part of the Chair and the Commission is an aberration, but it is a very significant prejudicial event to this Petitioner. In the case at bar, the Commission Chair's obvious anger which was directed to the Petitioner before his fellow Commission members and the introduction of the extra-judicial, extra-record information into the proceeding created extraordinary prejudice. (R 68-70) The Commission in their brief barely acknowledged this transgression.

Remarkably, the Commission in the Determination and in their brief to this Court offer no evidentiary basis for the Chair's introduction of non-evidentiary matter into the proceeding.

The Chair's actions were contrary to the Rules of Evidence and Civil Procedure:

1) There was no good faith proffer for the information by the Chair when confronting the witness, and, in fact, he became a witness; Introduction of oral inconsistent statements as impeaching evidence requires asking the witness whether the statements were made, specifying the time and place, the person to whom made, and the language or substance of the language used. *Prince, Richardson on Evidence*, 11th Ed. P. 405-407 (1995)
2) There was no notice given to Petitioner that extra record information would be the basis of questioning. (As this Court is well aware, civil litigants in discovery routinely request oral or written statements by the litigants which are possessed by the adverse party). We know of no mechanism to so request that information from a tribunal member who gathered that information extra-judicially. There was no way for Petitioner or her counsel to be prepared for the confrontation that ensued;
3) There was no notice that a member of the Commission would take judicial notice of the accusations (while the accusations were not, we would argue subject to judicial notice, if that was to be the rationale, we were entitled to be advised prior to the proceeding);
4) Egregiously, there was no disclosure of just what was seen or heard by the Chair or other members of the Commission regarding the public statements which the Chair claimed undercut the Petitioner's credibility;
5) Equally egregious was the failure to accord Petitioner a chance to be heard after receiving the information, even though Petitioner asked for that right and was so promised; (R. 70)
6) The further obvious remedy was not pursued – recusal of the Chair by his choice or by vote of the Commission. While recusal is a personal

> decision, it was clearly indicated in this case. The Chair became a witness introducing new prejudicial information into the case. He had the absolute obligation to recuse. *See,* §6-111, *Prince, Richardson on Evidence*, p. 320-321 (1995).

This unfair prejudicial outburst from the Chair of the Commission assailing the Petitioner's credibility created an atmosphere in which the Petitioner lost her chance to have a fair hearing and receive censure as the Commission's Determination.

If a trial judge engaged in this activity and provoked this exchange with a litigant during the trial, the case would be sent back to a new Judge for trial. If a juror in jury deliberations brought non-record outside information into the jury room and deliberations, a new trial would likely be ordered. *People v. Newlander*, SLIP OP. 04925, June 29, 2018 (4th Department), Prince, Richardson on Evidence, *supra* at pp. 405-407 and pp. 320-321.

We are in an era where the twenty-four-hour television news cycle and electronic communications, social media sites and quasi private exchanges of information threaten fairness and due process in Judicial proceedings. Because of that Jurors now are instructed not to do exactly what happened in this case, independent investigations and utilizing information not in the record. *See* New York Pattern Jury Instructions (2018) §1.7, 1.10, and 1.11.

If this Court uses its plenary power and contemplates removal, it is depriving the Petitioner of her property right of the loss of her job without a fair hearing and to achieve censure and avoid appeal with the risk of removal consistent with the framework created in the Judiciary Law. Petitioner's right to a fair hearing as a public employee is safeguarded by the due process clause of the 14th Amendment. *Slochower v. Board of Higher Education of New York City*, 350 U.S. 551 (1956); *Weiman v. Updegraff*, 344 US 183 (1952). *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532 (1985). These cases hold that a public employee is granted a property right to their employment by virtue of the statutes, policies, and procedures which govern employment, discipline and removal. As a consequence, the office holder has a right to due process pursuant to the due process clause of the Fourteenth Amendment to the United States Constitution. *Cleveland Bd. Of Ed v. Loudermill (supra)*

Petitioner preserved her rights in this proceeding, counsel asked that she be provided the language and source that provoked the Chair to attack her credibility so that she could be given the opportunity to respond. That was promised in the proceeding. (R. 70) It did not happen. The Chair deliberated with the rest of the Commission. The Petitioner consequently was not accorded due process in this proceeding and her property rights were violated.

Commission Counsel cites *Daxor Corp v. Dept. of Health*, 90 NY2d 89, 101 (1997) for the proposition that Petitioner must show that the "bias was the cause" of the Commission's adverse decision. If that were truly the holding of that case, it creates an impossible burden. In that case there was no overt declaration of bias such as in the case at bar. Moreover, in *Daxor* the petitioner sought by an Article 78 proceeding alleging bias to overturn a decision of an administrative body to deny a license prospectively. The Court found that there was no property right, the regulators exercised their discretion fairly, and the decision was based on the weight of the evidence. In the case at bar, the Petitioner has a property right – her judgeship is protected by due process with specific rights as set forth in the Judiciary Law and the Rules of the Commission and the Common Law. Her right to a fair hearing and to achieve a censure and avoid appeal was violated by the unfair process before the Commission in this case.

There is no yardstick or measurement device to assess the damage created by the prejudicial actions of this type. The Court can protect the Petitioner's rights as well as the rights of all future Judges who will appear before the Commission, by deeming the process before the Commission as unfair and rendering a sanction of censure.

II. THE PETITIONER WAS NOT FOUND TO LACK CANDOR BY THE REFEREE AND HAS ACCEPTED RESPONSIBILITY FOR HER ACTIONS

The Hearing Officer had the right and opportunity to find that the Petitioner lacked candor with regard to her alcohol consumption and the other issues now before this Court. He observed her testimony over several days, including her explanation of her alcohol consumption on February 12 and her conduct on February 13, 2016, and thereafter when she violated the conditional order. In each instance, even though resolving many of the issues against her, he did not find that she lacked candor or was attempting to be misleading.

She accepted responsibility for her actions regarding Charge I and II. She initially, at 7 a.m. on February 13, 2016, was heading to the gym to work out. (R. 385-387) On February 13, 2016 she drove her car at that time believing she was not under the influence of alcohol. Even though she was convicted of that offense after a bench trial, that was and is her honest belief. She did apologize for her conduct and she acknowledged in the hearing and before the Commission that her actions were inappropriate as it pertains to all of the matters surrounding her DWI arrest, including her interaction with the State Police. (R. 80-81).

Regarding Charge III, as to her initial violation of the conditional order, the Commission Counsel's Brief at page 59 is inaccurate in that Petitioner apologized to Judge Aronson for her conduct, on the record, in front of a courtroom filled with press and people. (R-873, 426) She explained in her testimony that she did not intend to drive that evening, but only sought to comply with the breathalyzer so a companion could drive. (R. 516-519) The next morning the breathalyzer still registered alcohol on her breath when she attempted to start the vehicle. (R. 873) It is well understood that the device did not measure intoxication but rather simply the presence of alcohol. The Petitioner forthrightly pled to this violation of her Conditional Discharge, explaining to Judge Aronson that she did not carefully read the Conditional Discharge and did not know that she could not use alcohol at the time because "her world was falling apart". (R. 872-873)

As to Charge IV, the Petitioner acknowledged that setting bail for her former client was not ethically correct. (R574-575).

As to Charge V:

-Regarding *People v. T.L*, she acknowledged that her off-the-record comments that were recorded were inappropriate. (R.432-33)

-Regarding *People v. D.Y.*, the Petitioner acknowledged a poor choice of words. (R. 438)

-Regarding *People v. D.W.*, the Petitioner acknowledged that her comments were inappropriate particularly based on her own professional experience as an Assistant D.A. (R.439, 597). Her testimony that this outburst would cause her to be "mortified" if the victim or her family were present set forth in the record" (R. 441-442) demonstrates this was an anomaly and not a course of conduct or a matter of personal belief. This is unlike *Matter of Romano*, 93 NY2d 161 (1999) where Respondent Romano initiated an inappropriate comment and a joke on separate occasions. *Matter of Romano,* 93 NY2d 161 (1999). The Court stated in *Matter of Romano*:

> "Petitioner's conduct during these arraignments evinces his outspoken insensitivity concerning charges involving domestic violence and sexual abuse." *Matter of Romano*, supra at page 161.

Unlike Judge Romano, the Petitioner does not have an outspoken insensitivity to domestic violence or sex-related crimes. (*Matter of Romano*, *supra*) She does not have a pattern of telling off-color jokes or treat*ing* domestic violence or serial abuse victims badly. In the case of *People v. D.W.*, she made a mistake which she made worse by her comments.

Petitioner acknowledged at the time her words were inappropriate and she has testified so to the Commission twice her recognition of that mistake and her real remorse. (R-79) (R-439, 597)

Regarding Charge VI, the Petitioner acknowledged that in retrospect she would have sought clearance to leave the Country and would have handled the entire matter differently. (R-73-74) The Commission brief references the use of the word "inferential" attributing the same to the Petitioner incorrectly, seeking to have the Court conclude that the Petitioner is minimizing her conduct. (BR. 60) The fact is that Judge Aronson, in finding that the Petitioner had violated her conditional discharge, said in his decision as follows:

> The fact that he defendant absented herself from the jurisdiction intending it to be three months was not a technical violation of the conditional discharge. However, it was <u>inferentially</u> a violation if she absented herself intentionally from this jurisdiction with the understanding that she intended to be away from this jurisdiction for a period of three months. (R-970) (Emphasis added)

The Petitioner acknowledges she did not absent herself from the Country in a manner that permitted immediate compliance with the Conditional Discharge. The language contained in the Decision of Judge Aronson is offered in mitigation only

to demonstrate the non-specific nature of the conditional discharge. Petitioner did voluntarily return to the USA on June 4, 2017 in the evening but was not advised by her attorney to surrender herself immediately. (R. 928) She did appear at the Courthouse the next day to attend an ordered meeting with Judge Doran before surrendering. She was allowed to engage in the meeting by the police and Judge Doran prior to her arrest on that day. (R. 1208, R. 461)

III. THE PETITIONER IS FIT TO CONTINUE TO SERVE

Petitioner's confidential medical records demonstrate she has a mild alcohol abuse disorder. (R. 48) Her psychologist, Dr. Ragonese opines that the stress of her public scrutiny was a contributing factor to her conduct. (R. 1192) She fully complied with all rehabilitation programs and has been found by an Office of Court Administration Examiner, Dr. Anstadt to be fit to serve as a Judge. (R. 446-447, 1116-1119) She has complied with all ordered treatment programs and took an additional treatment which was not ordered, which she completed successfully. Her mental and physical fitness to serve as a Judge is well documented and undisputed in the record. She voluntarily submitted to a hair test which demonstrated that she had not consumed alcohol prior to her return from Thailand. (R. 319-321, 235-238, 1191)

The Commission cites *Matter of Vonder Heide*, 72 NY2d 658 (1988). and *Matter of Simon*, 28 NY3d 35 (2016), to support the removal of the Petitioner. We disagree that these cases are comparable to Petitioner's case. The disciplined Judge Simon was using his judicial office for political purposes, hectoring his enemies in Town Government and abusive to litigants and counsel. Judge Vonder Heide remanded witnesses to jail with no accusatory instrument, berated a teenager on a public street who he perceived was violating an open container law, sought out and routinely interviewed witnesses out of Court, heard two criminal cases to which he was a witness, and required a Defendant to sign a statement implicating a third-person in a crime that he had heard about through private conversations. Both Judges posed a risk to the public, breached the public trust and lacked an obvious understanding of their role. They inappropriately used their judicial position as a sword against others. This is not true of Petitioner.

In the *Matter of Going*, 97 NY2d 121, (2001), also cited by the Commission in support of Petitioner's removal, the Judge engaged in a lengthy pattern of inappropriate conduct regarding his law clerk, with whom he had a very tumultuous romantic relationship. He recruited the Court staff into the chaos resulting in actions on his part that were threatening to himself and others, and a

breach of the public trust. In addition, he literally represented a friend in a proceeding before the Court in which he was assigned, drawing papers and using Court staff to file the proceeding. His removal was warranted. Judge Going treated his public office like it was his living room, dating his employee, bullying his subordinates, seeking revenge upon those who did not comply with his wishes, and in fact, practicing law before his Court.

Petitioner's conduct does not approximate any of these individuals' actions. Two of the Petitioner's acknowledged in Court transgressions occurred during her first month on the bench. She has forthrightly acknowledged her comments during the arraignment in *People v. DW* were wrong and inappropriate. She acknowledged to Judge Aronson and apologized for her failure to adhere to the conditional discharge requirement that she not consume alcohol. Her trip to Thailand she acknowledged was ill-conceived, but the record demonstrates she was not intentionally avoiding her obligations pursuant to the conditional discharge. None of these rise to an irreparable breach of the public trust. The Petitioner was for all practical purposes suspended with pay by her superiors at the time she was in Thailand. She had no duties assigned and had not heard from the Administration of the Court System for months. (R. 453, Ex. I-R-1206, Ex. J-R-R. 1207) Consequently taking a vacation was not inconsistent with her de facto suspension

with pay. If her attorney had e-mailed her as she had instructed, rather than left her a cell phone message in May of 2017, she would likely have received notice of the May 25, 2017 hearing before Judge Aronson and have appeared, avoiding the default and the warrant and arrest. (R-309) Petitioner is not shifting blame. She acknowledged she should have notified her superiors of her trip but in mitigation she did have a plan in place to receive notice of further proceedings. (R. 309)

The Petitioner has exercised poor judgment. Unlike the cases cited above, she has not used her office in a pattern of conduct that demonstrates a lack of honor or integrity, or engaged in the use of her office against others. Her roadside arrest and arraignment occurred at the very time she was scheduled to be in Court. Petitioner referenced her position during the arrest in that context. It was not a pattern of conduct that extended over days, weeks or months like *VonderHeide, Simon* and *Going (supra)*. The issue of her lengthy arrest and interaction with the police is raised only to give the trier of fact context of her arrest and conduct. To the extent her lengthy arrest is a mitigating factor, it is offered for that purpose only. At no time has Petitioner asserted that her conduct on that day was appropriate for a Judge. Her conduct was not of the same severity as the cases cited in our initial Brief, such as *Matter of Cunningham*, 57 N.Y.2d 279 (1982), in which this Court determined the Judge should remain on the bench, notwithstanding a clear breach

of the public trust regarding his duties, where the Judge promised a lower Court Judge in writing that he would never again reverse him on appeal.

This court has previously observed that "Judicial misconduct cases are, by their very nature, sui generas." *Matter of Blackburne*, 7 NY3d 213 at 2001-21. Unlike Judge Restaino who incarcerated a staggering forty-seven people for a ringing cell phone, or the already discussed cases of *Simon, VonderHeide* and *Going*, the Petitioner's failures are not a significant abuse of her office. *Matter of Restaino*, 10 N.Y.3d 577 (2008) Rather, her failures reflect poor judgment for which Petitioner is sorry and remorseful.

Her youth and recency to the bench should be factors for this court to consider. The overall record does not suggest that her continuation on the bench would pose risk to the public. Her two failures to adhere to the conditional discharge were not defiant or petulant, but rather based on a failure to fully and completely comprehend the parameters of the conditional discharge. She was wrong. She acknowledges it. These are errors in judgment as were her courtroom failures.

Former Commission on Judicial Conduct member Emery in *Matter of Blackburne* referred to the act of judicial removal as "career capital punishment". *Matter of Blackburne*, 2006 Ann. Report, p. 111.

That will truly be the case for this Petitioner if she is removed.

CONCLUSION

By reason of the foregoing, it is respectfully submitted that this Court should censure the Petitioner based on the merits of the case and because she was not granted a fair hearing, suffering prejudice as a consequence of this unfairness.

Respectfully submitted,

Date: July 31, 2018

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word 2010.

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