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

LETICIA D. ASTACIO

a Judge of the Rochester City Court,
Monroe County.

RESPONDENT'S REPLY BRIEF

Date: February 7, 2018

Respectfully submitted,

Robert F. Julian, Esq.
Attorney for the Respondent
2037 Genesee Street
Utica, NY 13501
315-797-5610

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF RULES

RULES CONCERNING JUDICIAL CONDUCT

REPLY TO CHARGE I

FURTHER PROPOSED FINDINGS OF FACT

- The preliminary breath test result was not received into evidence at the Respondent's Trial. (Ex. 25) Trooper Kowalski acknowledged that the test result was not admissible in Court. (Tr. 83) The prevailing case on this issue *People v. Thomas*, 121 A.D.2d 73 (4th Dept. 1986) affirmed 70 N.Y.2d 823 holds the test inadmissible. The Commission has in prior decisions received the test result, although there does not appear to have been a dispute as to the Respondent Judge's intoxication in any of those cases. The Respondent in the case at bar has not contested the publishing of the claimed test result, but rather, it is argued with persuasiveness(?) that the test should not be given any weight for several reasons. No foundation was laid at the hearing regarding the test's reliability generally or that this specific test was conducted properly with a showing that the device that had been tested producing a reference standard, within a reasonable period prior to Defendant's test; that the device was properly calibrated (Tr. 83); that the device was properly functioning on the day that the test was administered (Tr. 83); that the device was purged prior to the test by properly qualified administrator. (Tr. 83) (See *People v. Hargobinel*, Crim. Ct. Kings Co. 2012 NYSLIPOP 50450(U) In the context of the facts in the case at bar, given Trooper Kowalski's obvious anger toward the Respondent, and his inconsistent if not untruthful testimony, accepting his report of the test outcome is not sound or reliable on its face. Because of the lack of a proper foundation showing that it was a reliable test, and given the lack of credibility of the party administering the test, the Referee finds that the test result is given no weight.

- There is insufficient evidence to prove that Respondent was under the influence of alcohol and should not have been operating a motor vehicle. The preliminary breath test result is not reliable as a matter of law, there was an insufficient foundation to prove its reliability, and apart from the accident which could also be attributed to weather conditions, Trooper Kowalski's credibility and Lt. Lupo's credibility as to their observations of the Respondent and their accounts of conversations with her are laced with inconsistencies and consequently are unreliable as a basis to determine she was under the influence of alcohol and therefore violated the Canons by operating her vehicle.
- Judge Astacio completed all required alcohol related courses and testing. (Ex. A, B, C, D, E, Ex. 89, Ex. 11) She is competent to return to work. (Ex. N)

FURTHER ARGUMENT

The Respondent in her testimony has acknowledged that she consumed alcohol the evening before her arrest. (Tr. 447) Her testimony was that she consumed one half a bottle of wine prior to 11:00 p.m. (Tr. 447)

The Commission counsel cites nine DWI cases decided by the Commission in Point I at Page 38 of their submission. Not one of the Respondent Judge's in the cases cited endured a one and one half hour roadside interrogation and one and a half hour processing at the police station. We have already directed the Referee to the time frame set forth in *Maney* where he was arrested and in the police station in 30 minutes. Judge Landicino was also arrested after a half hour. In the *Matter of Apple,* the Judge was arrested and breathalyzed within an hour and 40 minutes. *Matter v. Landicino*, 2016 Ann Report 129, *Matter v. Apple*, 2013 Ann Rep. 129

Moreover, there is no comparable fact situation with regard to alcohol consumption in the cases cited. There is no dispute that her consumption of alcohol was a half of a bottle of wine prior to midnight the morning of her arrest, an over 8 hour time frame before she drove. Judge Astacio had a reasonable basis to believe she was not under the influence of alcohol.

Likewise, there is no prior case where the candor and truthfulness of the police were at issue as they are in the case at bar. In the case at bar, Trooper Kowalski admitted that he lied to the Respondent's lawyer, and consequently to Respondent during the 1 ½ hours in the back seat of his car negotiation and question session to persuade her to take a preliminary breath test. (Tr. 360, Exs. 25 p. 73) He continued to question the Respondent even though her lawyer was present at the roadway and asked him not to. (Ex. 25, P 68) He was sarcastic and goading during his conversation with her. (Tr. 257) The only proof of the outcome of the preliminary breath test he administered is his word. No print out was obtained. The result was not shown to the Respondent or her lawyer. The Trooper duped her into taking a test, after her arrest, for the obvious purpose of obtaining probable case for an otherwise shaky arrest. Kowalski lacks credibility, and the Referee is asked to reject his testimony about her appearance and the test result. If indeed she had bloodshot eyes, smelled of alcohol, with her damaged car - - why in the world would he need the roadside chemical test after he arrested her and why would he engage in extensive negotiations and misrepresentation to achieve the taking of the test? And if the result were on the level, why didn't he show it to her attorney or to the Respondent?

The inconsistencies continue at the station. As of 10:03 a.m., Lieutenant Lupo reported by email in real time, she was being cooperative to his superior. (Ex. 84) There is no reference to her vulgarity or to her requesting special treatment in that email or in his notes. (Ex. 83 & 84) Trooper Kowalski testified she was unruly, irate, angry and swearing from the moment of her

arrival at the station up to 10:00 a.m. (Tr. 36) Lt. Lupo's notes likewise do not reflect any requests for special treatment. His notes quote her to say: *"Please don't do this. I have to go to work. I have arraignments. I have Court right now"* at 9:30. His notes further state that she was allowed to speak with her attorney, and "let her call Court Clerk". (Ex. 83, 84)

She unambiguously was concerned that a courtroom was waiting for her at 9:30 a.m. (Tr. 269-270) She properly told the State Police she needed to make that call, ultimately she was allowed to do so. (Tr. 137, 269-270) Trooper Kowalski, who spoke with her for 3 hours in the car and at the barracks, never notes that she had slurred or impaired speech as probable cause for her arrest. (Ex. 10, Tr. 139) Lt. Lupo said she did have slurred speech based on his brief encounter with her. (Tr. 139)

In summary, she properly contested that she was under the influence of alcohol. She had every right to discuss with the Trooper the bona fides of her arrest. (Rule 100.4(G)) There is little in objective credible proof that she was in fact under the influence of alcohol except for the fact that she was in a one car accident.

In the context of the Trooper's conduct, a lengthy arrest, a lengthy and dishonest interrogation, refusing to allow her to make a call to the Court until she was late, handcuffing her and tethering her to a bench, once they learned she was a Judge referring to her as your Honor even while she was restrained - - all of that would cause anger and an unwillingness to cooperate by taking a breathalyzer.

The credible testimony and facts do not support that she was driving under the influence of alcohol. The credible facts support that it was reasonable for her to believe she could safely drive at 7:00 a.m., having ceased alcohol consumption at or prior to 11:00 p.m., 8 hours before driving.

The inconsistencies of the police reports and police testimony are significant. Lt. Lupo wrote that her speech was slurred, Kowalski did not find her speech to be slurred. Kowalski tells her lawyer he will consider unarresting her, but admits that the representation was untrue, he had no intention of unarresting her. (Ex. 25, p. 73; Tr. 82) Kowalski arrests her at 8:43 a.m., but performs a field sobriety test at 9:17 a.m. Post arrest, Lt. Lupo says she is cooperative at 10:03 a.m., yet Kowalski testified she was abusive from the moment of her arrival at the station. (Tr. 36) In one part of his testimony Kowalski said she told him she was a Judge at the roadside at 8:00 a.m., later in his testimony, he stated he did not know she was a Judge until he processed her at the station. (Tr. 42, Ex. 10, Tr. 62)

The referee can, based on the totality of evidence, conclude that it has not been proven by a preponderance of the evidence that she was under the influence of alcohol at the time of her arrest and consequently not sustain Charge I. *Matter of Mills*, 2006 Ann Rep 164 The referee can find that her conduct was precipitated and caused by the misconduct of the State Police, and therefore, find that she did not violate any Canon of Judicial Conduct alleged in Charge I and Charge II. We respectfully urge the Referee to so find.

REPLY TO CHARGE II

FURTHER PROPOSED FINDINGS OF FACT REGARDING CHARGE II

The Commission counsel's proposed findings of fact regarding Charge II omits important facts. The facts omitted which should be found by the Referee are:

- The Respondent was headed to Elmgrove YMCA at the moment her motor vehicle became disabled, which was in the opposite direction from City Court, with the plan to attend an 8:00 a.m. workout class, to be followed by going to arraignments at the City Court at 9:30. (Tr. 249)
- At the time Trooper Kowalski asked Respondent where she was going at 8:00 a.m., her destination had changed, she was unable to make the 8:00 a.m. class and now she was going to City Court. (Tr. 249)
- Trooper Kowalski acknowledged he did not know Judge Astacio was a Judge until he was booking her at the Trooper barracks, over an hour and 40 minutes from the time of his first contact with her - - an hour and 40 minutes after she says he arrested her and one hour after the time of arrest that he recorded. (Ex. 10, Tr. 42, Tr. 62)
- Lt. Lupo's notes of his observations at the station indicated that so far she was cooperative at 10:04. (Ex. 84)
- Lt. Lupo and Trooper Kowalski both acknowledged that she was asking to call City Court to tell them she was detained. (Ex. 83, Tr. 137-138, Tr. 42)
- She testified she was concerned that a courtroom full of people were waiting for her at 9:30 a.m. (Tr. 269-270)

- Lt. Lupo's email notes state:
    - "He is presently processing her at SP Rochester."
    - "Her attorney is present and so far she's cooperative." (Ex. 84)
- Lt. Lupo's notes at 9:30 a.m. state:
    - "Crying, weeping, smell of alcohol"
    - "Pleading, begging"
    - "Please don't do this, I have to go to work. I have arraignments. I have court right now."
    - "Allowed to speak with attorney for 10 minutes"
    - "Let her call Court Clerk." (Ex. 83, Tr. 137-138)
- All of the foregoing confirm her comments were directed toward her need to advise the Court she could not do the morning arraignments.
- Lt. Lupo's Email at 11:03 a.m. to his superior states:
    - "She was supposed to work this morning!" (Tr. 137)
- Lt. Lupo at no point in his email to his superior or in his notes mentions she was swearing, uncooperative or asking to be let out of the arrest. (Ex. 83, Ex. 84)
- While Lt. Lupo wrote she had slurred speech, Trooper Kowalski did not even though Kowalski spoke with her for 1 ½ hours at the roadside and processed her at the station and Lt. Lupo saw her for only a few minutes. (Ex. 83, Ex. 10, Tr. 139-140)
- She was crying and that could have caused the finding of glassy or bloodshot eyes. (Ex. 83, Tr. 140)

- Trooper Kowalski testified at Page 42 of his testimony he did not know Judge Astacio was a City Court Judge until at the station when she was being processed. (Tr. 42)
- In response to the referee's question, Trooper. Kowalski stated he did not know she was a City Court Judge until he processed her. (Tr. – 42)
- Trooper Kowalski then inconsistently testified on Cross Examination that she "spouts" that she is a City Court Judge on the roadway at or around the time of her arrest. (Tr – 61)
- Trooper Kowalski in writing her statements as a part of formal discovery in Ex. 10 did not report that she identified herself as a City Court Judge during the hour and one half of her arrest. (Ex. 10, Tr. 62)
- The State Police were never asked by the Respondent to let her out of the arrest.
- The State Police were properly asked to allow her to call City Court to advise that she would be unable to do arraignments.
- While the Respondent was profane, and she candidly acknowledged it, the conduct of the Troopers provoked the profanity, and it was in that context she was profane.
- The State Police officers exaggerated her profanity and conduct during her three hour detention.

FURTHER PROPOSED CONCLUSIONS OF LAW CHARGE II

Judge Astacio did not violate Section 100.1, 100.2(A), 100.2(C) or 100.4(B)(2) of the rules as she was not asserting her judicial office for the purpose of impeding or avoiding her arrest. She did answer the Trooper's questions honestly at about 8:00 a.m. and at the station after her arrest. She was properly asking to call City Court to advise the officials there of her circumstances.

FACTS IN MITIGATION: CHARGE II

The following inconsistencies by the State Police are mitigating factors:

- Trooper Kowalski testified she was not cooperative from 9:30 to 10:00, that she was making statements, "being rude and obnoxious". (Tr. 59-60)
- Lieutenant Lupo wrote his superior at 10:04 that she was "cooperative so far". (Ex. 84)
- Lieutenant Lupo never advised his superior nor wrote in his notes that she was profane or abusive at the station. (Ex. 83, Ex. 84)
- Trooper Kowalski testified that as soon as he asked her about her use of alcoholic beverages, that's when she said she was uncomfortable. (Tr. 74) But previously, he testified that he had an extensive discussion with her about her use of alcoholic beverages and the possibility of an accident before she said she was uncomfortable in the car and concerned about him shooting her. (Tr. 75-76)

- Trooper Kowalski asked her a series of questions, he acknowledged she may have been frustrated, but refused to acknowledge she may have been frightened when advising him more than once "I don't have to talk to you". (Tr. 78)
- Trooper Kowalski had a discussion with Catalano about unarresting her. (Tr. 56) That discussion occurred to induce the Respondent to take the preliminary breath test, which was reported by Kowalski as a .19, which further aggravated the situation.
- Lt. Lupo said she had slurred speech, Trooper Kowalski never listed slurred speech as a cause or basis for her arrest. (Ex. 10)

FURTHER ARGUMENT: CHARGE II

In support of their position, Commission counsel cite *Matter of Edwards*, 67 N.Y.2d 163 (1986). In that case, Justice Edwards by letter and phone call attempted to fix a traffic ticket for his son. The facts in the case at bar are much different. The arresting officer did not know the Respondent was a Judge until her processing at the station. This case is hardly based on comparable facts with Edwards. Also cited by counsel is *Matter of Lonschein*, 50 N.Y.2d 569 (1980), in which a City Court Judge utilized his office to obtain a favorable contractual result for a friend. Again, this is an entirely different factual setting from the case at bar.

Commission Counsel cite *Matter of Hurley* 2008 Ann Rep 141 where a Town Judge intervened using his office on several occasions on behalf of his girlfriend against her estranged husband; they cite *Matter of Dumar*, 2005 Ann Rep. 151-152, where a Town Judge utilized his office to seek favorable treatment in various venues wherein he was pursuing a consumer

complaint; counsel also cites *Matter of Barr*, 1981 Ann Rep 139, a DWI case in which a County Court Judge:

1. Stated repeatedly to the arresting officer that he was a Monroe County Court Judge and wanted "consideration".
2. Asked a Trooper "Do you realize who I am", stated his reputation would be adversely affected by the arrest and if they Trooper did not arrest him, Respondent offered to give the Trooper "anything" to not be arrested.
3. Refused to take field sobriety test and a breathalyzer and
4. Told the Troopers he does not get mad he gets even.
5. Told the Troopers a County Court Judge should not be arrested.

None of the above cases are factually comparable to the case at bar.

It is therefore, based on the above, reasonable to conclude that if Commission Counsel can only cite the above cases, all clearly not factually comparable to the case at bar, the facts in this case have factual components of first impression for the Commission, to wit:

1. The duration of the "arrest" and conduct of the State Police during the arrest and the processing.
2. The apprehension of a Judge at or around the time that Judge is obligated to perform judicial duties, creating a circumstance where the Judge had to advise the police that a call to the Court was required.
3. Many hours elapsed between alcohol consumption and arrest, making the issue of the Respondent's conduct both in driving and in advocating for herself readily explained and mitigating factors at the very least.

In that context, Judge Astacio did not assert her office at the time of arrest. She answered factually, stating where she was going, but did not state she was a Judge during her 1 ½ hours at the roadside. Moreover, she was well within her rights under Rule 100.4(G) to advocate that she was not driving under the influence of alcohol.

It is persuasive that notwithstanding a one hour and thirty minutes in the car with Trooper Kowalski, he did not know she was a Judge until they arrived at the station and she was being processed. (Tr. 42)

Her assertion at the Trooper station of her judicial office was in the context that she was obligated to be at City Court at 9:30 a.m., asking to call the Court to advise of her fate. (Tr. 269-270) (Ex. 83, Ex. 84)

Commission Counsel's cross examination suggesting she did not have to assert her office at the barracks flies directly in the face of her obligation and duty to be present at 9:30 a.m. in City Court to do arraignments and to advise the Court staff if circumstances prevent her presence.

The goading and conduct of the State Police in the context of the duration of the arrest and the interaction which occurred all are significant mitigating factors with regard to Respondent's language. Moreover, the inconsistency of the police regarding her conduct, with one reporting her being cooperative and the other claiming she was not should lead the Referee to conclude that the police reports were exaggerated and unreliable, and that the Respondent's conduct was provoked by the police.

The Respondent did not violate the Canons alleged in Charge II.

REPLY TO CHARGE III

FURTHER PROPOSED FINDING OF FACT

With candor and honesty the Respondent acknowledges that she violated the Canons alleged in Charge III.

REPLY TO CHARGE IV

FURTHER ARGUMENT REGARDING CHARGE IV

JAMES THOMAS

The Respondent did not violate the Judicial Canons by arraigning Mr. Thomas, a former client and setting bail.

Judge Astacio openly advised both the D.A. and the defense of her conflict.

Judge Astacio acknowledged that she was inappropriate in asking that his case not go to Judge Johnson. She was in office for 20 days. (Tr. 280) However, she learned at that time that it would go to Judge Miller. (Tr. 280) Thereafter, she set bail as she would have for any litigant. (Tr. 280)

The only case cited by Commission counsel is *Matter of LaBombard*, where the Judge in question presided over the case of two step grandchildren not advising the District Attorney of the conflict. *Matter of LaBombard*, 2008 Ann Rep 151 In the case at bar, Judge Astacio fully disclosed her conflict, and if her action resulted in an unfair advantage to Mr. Thomas, the Assistant District Attorney who was fully aware of the conflict could have objected. There was no objection - - the practice of setting bail while the Defendant was being held on another charge

was a common practice. (Tr. 280-281) Moreover, Mr. Thomas had a right to have bail set on a misdemeanor, and he would have received credit from parole in any event. (Tr. 406-407)

REPLY TO CHARGE V

FURTHER PROPOSED FINDING OF FACT REGARDING CHARGE V: PEOPLE V. V[redacted]

The Respondent qualified her statement to the Defendant as follows:

> ***"Now, I'm not saying you did anything, but these accusations are horrible and you are wasting your time in school doing stupid stuff like this if it is true."***

Therefore, she made it clear that she had not prejudged the case.

FURTHER PROPOSED CONCLUSION OF LAW

1. The Respondent did not violate the Canons alleged to be violated. She qualified her comments to make it clear she was not presuming his guilt. (Ex. 74, P. 2)

FURTHER ARGUMENT IN REPLY

Commission Counsel cites *Matter of Herder* in support of their contention that the Respondent's speech at arraignment to V[redacted] constituted a violation of the Judicial Canons. 2005 Ann Rep 169

The Respondent in the case at bar candidly acknowledged that her comments may have given the impression that she had prejudiced the case and that she recognizes in retrospect that is undesirable. On the other hand, she did qualify her comments as set forth below.

In *Herder, supra.*, the Judge became the prosecutor, asking questions of the unrepresented Defendant directed toward the ultimate issues in the case. In effect, Judge Herder

took on the aura of the prosecutor, over and above her ex parte contact with the party adverse to the defendant.

That is not the case here - - Respondent did not ask V[redacted] any questions, she simply advised him that there were serious consequences for his alleged conduct, not only legally, but in terms of his mother and family. The question cited in the Counsel's Brief was a rhetorical question the Defendant did not answer. And it was stated in the context of the Respondent advising the Defendant that she was "not saying he did anything". (Ex. 74, P. 2)

Moreover, as noted below in the additional proposed findings of fact, Judge Astacio qualified her comments by stating "I'm not saying you did anything", and "if it is true". Judge Herder did nothing like this.

The Respondent did not in her initial proposed findings of fact note the following as both a fact and a mitigating factor. The Commission Counsel also did not note these comments. The Respondent qualified her statements to the Defendant as follows at Page 2 of Ex. 74:

> ***"Now I'm not saying you did anything, but these accusations are horrible and you are wasting your time in school doing stupid stuff like this if it is true"***

The Respondent did not violate any of the Canons as alleged by Commission Counsel.

FURTHER ARGUMENT REGARDING CHARGE V: PEOPLE V. D[redacted] Y[redacted]

It is noteworthy that no case or precedent is cited by counsel to support the notion that Judge Astacio's statements at sentencing breached the alleged Canons. Like any sentencing

Judge, she was advising the Defendant that his conduct had implications both for society and himself.

FURTHER ARGUMENT CHARGE V: PEOPLE V. D[redacted] W[redacted]

The Respondent acknowledges that her comments and laughter were inappropriate. The mitigating factors are covered in our initial Brief. Respondent candidly acknowledges that she was wrong.

REPLY TO CHARGE VI

FURTHER PROPOSED FINDINGS OF FACT: CHARGE VI

- Respondent told her attorney Edward Fiandach when she spoke with him on May 7, 2017 from Thailand to correspond through the internet as phone service wasn't the best. (Tr. 309) Thereafter, despite that request, Mr. Fiandach called her and texted her, but did not use the internet until May 27, 2017. The Respondent received his email message and answered immediately. (Tr . 309-310, Ex. 51, P. 8) The Respondent had a plan for communication with her attorney which broke down through an honest misunderstanding and mistake.
- The Respondent asked Mr. Fiandach to request an adjournment of the May 30, 2017 court date. When that was refused and a warrant for her arrest was

issued on May 30, 2017, she flew home on June 4, 2017 and presented to the Courthouse on June 5, 2017.

- The Commission Counsel in their Brief criticize the Respondent for not contacting her administrative Judge about her trip. She was relieved of her duties, did not have access to the Courthouse, and was under no instruction to report to anyone in the Court system or under any travel restriction. (See Exs. 22, Ex. J, Ex. K) Moreover, this is not charged as an ethical violation in this case, and it's insertion as an argument or aggravating factor is prejudicial in that context and therefore not considered by the Referee.
- When the Respondent was ordered to appear on May 30 at Judge Doran's office on June 5, 2017 at 9:00 a.m., she did appear for the dual purpose of attending the meeting with Judge Doran and surrendering pursuant to the warrant. Police were delegated to arrest her pursuant to the warrant, but first she was permitted to attend the meeting, undercutting the notion that her apprehension and arrest was immediately required. (Tr. 313) By appearing on June 5, 2017 at the Courthouse, she complied with the obligations to the Court system and responded properly to the arrest warrant.
- The Respondent, in mitigation, introduced evidence at this hearing that she had not used alcohol from the end of May through August, 2017. (Ex. G)
- There was no willful violation of the conditional order and the Respondent's conduct was appropriate. No Canons of Judicial Conduct were violated by the Respondent.

PROPOSED FINDINGS AS TO CANDOR AND COOPERATION

We ask the Referee to find that the Respondent has been candid in her testimony and cooperative with the Commission staff and this Tribunal.

Date: February 7, 2018

Respectfully submitted,

Robert F. Julian, Esq.
Attorney for the Respondent
2037 Genesee Street
Utica, NY 13501
315-797-5610