

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

DETERMINATION

DONALD W. BALLAGH,

a Justice of the Rose Town Court,
Wayne County.

THE COMMISSION:

Raoul Lionel Felder, Esq., Chair
Honorable Thomas A. Klonick, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission

Edward Fiandach for the Respondent

The respondent, Donald W. Ballagh, a Justice of the Rose Town Court,
Wayne County, was served with a Formal Written Complaint dated June 12, 2007,
containing one charge. The Formal Written Complaint alleged that respondent engaged

in improper *ex parte* communications regarding a pending matter and dismissed and reduced charges without basis in law and without notice to the District Attorney.

Respondent filed a Verified Answer dated July 11, 2007.

On September 26, 2007, the Administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts and that respondent be censured, and waiving further submissions and oral argument.

On November 1, 2007, the Commission accepted the Agreed Statement of Facts and made the following determination.

1. Respondent has been a Justice of the Rose Town Court since 1984. He is not an attorney.
2. On or about June 4, 2006, Sean Gardner, who was 21 years old, was charged with three misdemeanors in the Town of Rose: Driving While Intoxicated (DWI), Driving With A Blood Alcohol Content of .08 % or More (DWBAC), and Unlawfully Dealing With A Minor. The latter charge involved an allegation that the defendant provided an alcoholic beverage to a twenty year-old friend with whom he was driving.
3. Mr. Gardner was scheduled to appear before respondent on August

7, 2006, on the charge of Unlawfully Dealing With A Minor, and August 24, 2006 on the DWI and DWBAC charges. Respondent and Mr. Gardner have no relationship or association with each other except as judge and defendant.

4. In or around June 2006, Mr. Gardner communicated with Staff Sergeant Kevin B. Sligh, a recruiter for the United States Army, and decided to enlist in the Army, with an induction date of on or about July 19, 2006. On or about July 5, 2006, Mr. Gardner learned from Sergeant Sligh that an alcohol-related conviction would significantly delay the time of his enlistment.

5. At some time between July 5, 2006, and July 17, 2006, Sergeant Sligh communicated with respondent by telephone, advised him that Mr. Gardner was scheduled to enlist on July 19, 2006, and asked that the pending matters against Mr. Gardner be accelerated.

6. Respondent thereupon rescheduled Mr. Gardner's return date to July 17, 2006, as to all three charges. Respondent did not notify the Wayne County District Attorney of the new schedule.

7. On or about July 17, 2006, Mr. Gardner appeared in court before respondent, discussed the charges pending against him and indicated that although he was scheduled to enlist in the military, an alcohol-related conviction would delay his enlistment date. The District Attorney's Office was not present.

8. Respondent thereupon left the courtroom, telephoned Sergeant Sligh and discussed with him the effect that a reduction to Driving While Ability Impaired

would have upon Mr. Gardner's enlistment. Sergeant Slish informed respondent that a conviction for any alcohol-related offense would delay enlistment for a year from the conviction date.

9. Respondent thereafter returned to the courtroom, dismissed the DWI charge, dismissed the Unlawfully Dealing With A Minor charge, reduced the misdemeanor DWBAC charge to a traffic infraction, *i.e.* Failure To Obey A Traffic Control Device, and imposed a \$205 fine and surcharge. Respondent did so without basis in law and without notice to or the consent of the Wayne County District Attorney, contrary to the requirements of Sections 170.30, 170.40, 170.45, and 210.45 of the Criminal Procedure Law.

10. Respondent was aware that notice to and the consent of the District Attorney's office was required before reducing the DWBAC charge and dismissing the other charges. Respondent advanced the date of the defendant's appearance and disposed of the charges without notice to or the consent of the District Attorney so that the charges would not delay the defendant's enlistment in the United States Army.

11. Although respondent was motivated by a desire to give a young defendant the chance to straighten out and improve his life by entering military service, he acknowledges that it was improper for him to excise the District Attorney from the proceedings and otherwise to circumvent the procedures he was sworn to uphold. Respondent commits not to repeat such conduct.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(C), 100.3(B)(1) and 100.3(B)(6) of the Rules Governing Judicial Conduct (“Rules”) and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent’s misconduct is established.

It was improper for respondent to dismiss two charges against a defendant and reduce a third charge based on *ex parte* discussions with the Army recruiter and without notice to or the consent of the District Attorney’s office. By granting a disposition that was contrary to the statutory procedures (Crim Proc Law §§170.30, 170.40, 170.45, 210.45), respondent failed to meet his ethical duty to “be faithful to the law” (Rules, §100.3[B][1]) and to “accord to every person who has a legal interest in a proceeding... the right to be heard according to law” (Rules, §100.3[B][6]).

Such conduct warrants public discipline. *See, Matter of Cook*, 2006 Annual Report 119 (Comm on Judicial Conduct); *Matter of Hooper*, 1999 Annual Report 105 (Comm on Judicial Conduct); *Matter of More*, 1996 Annual Report 99 (Comm on Judicial Conduct).

It has been stipulated that respondent was motivated by a desire to give the youthful defendant an opportunity to improve his life by entering military service. Such motivation is no excuse for disregarding the statutory requirements and depriving the

District Attorney's office of an opportunity to be heard with respect to the disposition. Indeed, by moving up the court date without notice, respondent ensured that the District Attorney would not be heard. We note that respondent commits not to repeat such conduct.

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

Judge Klonick, Mr. Coffey, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Mr. Felder and Ms. DiPirro were not present.

CERTIFICATION

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

Dated: November 7, 2007

A handwritten signature in black ink that reads "Jean M. Savanyu". The signature is written in a cursive style and is positioned above a solid horizontal line.

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct