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

DETERMINATION

DAVID RAY,

a Justice of the Brookfield Town Court,
Madison County.

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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

Honorable David Ray, *pro se*

The respondent, David Ray, a Justice of the Brookfield Town Court, Madison County, was served with a Formal Written Complaint dated October 15, 2007, containing one charge. The Formal Written Complaint alleged that respondent convicted

the defendants in a code violation case without a trial or guilty plea. Respondent filed an Answer dated November 5, 2007.

On January 22, 2008, the Administrator of the Commission 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, recommending that respondent be admonished and waiving further submissions and oral argument.

On January 29, 2008, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Brookfield Town Court since January 1, 2004. He is not an attorney. He has been employed as a maintenance mechanic at Revere Inc., for the past ten years.

2. Prior to December 2004, Jacqueline McComber Harris took ownership of certain real property in Madison County, located at 2769 Vidler Road, West Edmonton, New York.

3. In December 2004, Christopher and Michele Bridge began residing as tenants at the Vidler Road property. At the time they moved in, there was a dilapidated garage and a large volume of used tires on the property, neither of which belonged to them.

4. On April 28, 2005, Ms. Harris, who still owned the Vidler Road property, entered into an access agreement with the New York State Department of Environmental Conservation concerning removal of the large volume of used tires from

the property.

5. The Vidler Road property was also the subject of a local property code violation proceeding, and in May 2005, the code violation proceeding was concluded with Ms. Harris's payment of a $500 fine to the town.

6. On July 19, 2005, Charles E. Sullivan, Jr., Director of the New York State Department of Environmental Conservation's Division of Environmental Enforcement, wrote to respondent providing him with a copy of the access agreement. The access agreement provided for the state to conclude its cleanup of the property before 2011.

7. On August 11, 2005, Madison County took possession of the Vidler Road property due to non-payment of delinquent taxes.

8. On January 3, 2006, Christopher and Michele Bridge were charged in the Brookfield Town Court with violating Local Law Number 1 (Section 3) of the Brookfield Town Code, as well as Sections 302, 303, and 305 of the New York State Property Maintenance Law, in connection with the dilapidated garage and the large pile of used tires that was still located on the Vidler Road property.

9. On January 10, 2006, Christopher and Michele Bridge were arraigned before respondent. Each defendant pleaded not guilty and declined counsel. Respondent told the defendants to keep the tires covered and adjourned the case until February 28, 2006.

10. On February 28, 2006, the defendants appeared before respondent and

reached an agreement with Geoffrey B. Wordon, the Town of Brookfield Code Enforcement Officer, to destroy the dilapidated garage by March 15, 2006. The agreement made no mention of covering any tires.

11. On March 14, 2006, Christopher and Michele Bridge took ownership of the property from Madison County. A copy of the resolution of the Madison County legislature was provided to respondent during the pendency of the code violation action.

12. On April 25, 2006, Officer Wordon appeared in court for a proceeding in the matter. The Bridges did not appear. Officer Wordon told respondent, *ex parte*, that he had driven past the Vidler Street property and observed that portions of the tires on the property were uncovered.

13. On May 7, 2006, respondent, based upon his *ex parte* communication with Officer Wordon, sent Christopher and Michele Bridge a letter stating that he was fining them $100 for not keeping the tires covered. Respondent did so because he believed that the Bridges were intentionally violating his direction to keep the tires covered pending the conclusion of the case.

14. On May 23, 2006, Ms. Bridge appeared in court and paid the $100 fine.

15. On June 30, 2006, Officer Wordon sent respondent a letter stating that he had visited the Vidler Street property and found that a portion of the tires were still uncovered.

16. On July 12, 2006, respondent sent Christopher and Michele Bridge a letter advising them that they had been convicted of the original charges, fining them an

additional $100, imposing a one-year conditional discharge and stating that payment was due to the court by August 11, 2006. Respondent also warned them that if their fine was not paid by the due date, their drivers' licenses would be suspended. Respondent did so notwithstanding that the Bridges had pleaded not guilty, and without affording them a trial or the opportunity to present a defense, cross-examine witnesses, testify on their own behalf or offer witnesses or other evidence.

17. The conditional discharge period concluded on July 12, 2007, without further action in the case. Respondent waived payment of the $100 fine. No further action has been taken in the matter.

18. As to both the fine for not keeping the tires covered and the imposition of a conditional discharge, respondent recognizes that he did not act pursuant to law. Respondent was confused as to when responsibility for the Vidler Road property transferred from the prior owner, Ms. Harris, to the current owners, the Bridges. He understands that this confusion would likely have been avoided had he not acted peremptorily against the Bridges, and he now has an enhanced appreciation of the significance of both avoiding unauthorized *ex parte* communications and according litigants the right to be heard according to law.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 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.

Respondent's handling of a code violation case reveals a misunderstanding of basic legal procedures. Without a trial or guilty plea, he convicted the defendants and imposed two consecutive fines and a one-year conditional discharge based on unsubstantiated *ex parte* information from the code enforcement officer. Such conduct violates well-established ethical standards and warrants discipline.

The record indicates that after the defendants had pleaded not guilty to charges involving uncovered tires on property where they resided, respondent adjourned the case and ordered the defendants to cover the tires. At the next scheduled court date, the defendants did not appear, and the code enforcement officer told respondent that the tires were still uncovered. Respondent sent the defendants a letter stating that he was adjourning the case for a month and imposing a $100 fine "for not covering the tires like I asked." Two months later, after the defendants had paid the fine, the code enforcement officer told respondent *ex parte* that the tires were still uncovered, whereupon respondent sent the defendants another letter imposing *another* $100 fine and a one-year conditional discharge. Respondent has acknowledged that he never afforded the unrepresented defendants the right to be heard and to present a defense, including the fact that at the time the original charges were filed, the defendants did not even own the property at issue.

It is the responsibility of every judge, lawyer or non-lawyer, to maintain

professional competence in the law (Rules, §100.3[B][1]) and to ensure that every defendant is afforded basic procedural due process. *Matter of Hise*, 2003 Annual Report 125 (Comm on Judicial Conduct) (judge convicted and sentenced a defendant charged with a zoning violation, without a trial or guilty plea). A judge is also required to accord to all interested parties a full right to be heard under the law (Rules, §100.3[B][6]). *See, e.g., Matter of Marshall*, 8 NY3d 741 (2007); *Matter of More*, 1996 Annual Report 99 (Comm on Judicial Conduct) (judge dismissed charges in three traffic cases without notice to the prosecutor and disposed of three other cases based on *ex parte* communications). Depriving defendants of well-established rights is not just legal error, but can be judicial misconduct. *See Matter of Reeves*, 63 NY2d 105, 109-10 (1984).

Respondent, who had served as a judge for two years at the time he handled this case, has acknowledged that his actions were inconsistent with the required procedures and that his confusion about the ownership of the property would likely have been avoided had he not acted so peremptorily against the defendants. Further, it has been stipulated that respondent now has an enhanced appreciation of the significance of both avoiding unauthorized *ex parte* communications and according litigants the right to be heard according to law.

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

Judge Klonick, Mr. Coffey, Mr. Harding, Judge Konviser, Judge Peters and

Judge Ruderman concur.

Ms. DiPirro and Mr. Emery dissent and vote to reject the Agreed Statement of Facts on the basis that the disposition is too lenient.

Mr. Felder and Mr. Jacob were not present.

CERTIFICATION

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

Dated: February 26, 2008

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

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DISSENTING OPINION
BY MR. EMERY, IN
WHICH MS. DIPIRRO
JOINS

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In my view entering into an Agreed Statement with Commission Staff should not be a "Get Out of Jail Free" card in a game of judicial misconduct. The sanction of admonition that Justice David Ray receives for fundamental breaches of due process – convicting citizens without any trial and fining citizens based only on *ex parte* conversations with a law enforcement official – is so inconsistent with our precedent and what the public expects of us that it betrays an expedient approach to judicial discipline not consistent with our constitutional obligations.

While it may on occasion be appropriate to negotiate Agreed Statements that accurately reflect the facts and allow for resolutions of allegations of judicial misconduct, the sanctions imposed pursuant to such resolutions should not be outliers in our jurisprudence. Clearly a judge should get credit for recognizing his/her misconduct and admitting to it in an Agreed Statement. But when the misconduct is so fundamental that it betrays a basic ignorance and insensitivity to a judge's most fundamental responsibility – to hear both sides before imposing punishment – even *post hoc*

recognition of wrongdoing should not compromise the sanction decision to the point of wrist-slapping.

I have complained previously about the expedient use of Agreed Statements. *See, Matter of Honorof*, 2008 Annual Report ___ (Emery Dissent); *Matter of Clark*, 2007 Annual Report 93 (Emery Dissent); *Matter of Carter*, 2007 Annual Report 79 (Emery Concurrence). I have also argued that *ex parte* evidence is corrosive of due process. *See*, *Matter of Marshall*, 2008 Annual Report ___ (Emery Opinion Concurring in Part and Dissenting in Part) (judge's "high-handed *ex parte* activity" showed "disregard for fundamental due process rights" which, standing alone, warrants removal); *Matter of Williams*, 2008 Annual Report ___ (Emery Dissent) (judge's *ex parte* conversation with a trooper, which appeared to influence his decision, was "inexcusable" and warrants removal, particularly after prior discipline for similar misconduct). In this case, however, the level of result-oriented resolution reaches unprecedented levels. Here a judge twice illegally imposed fines based on a verbal report of a local code enforcement officer on residents of land who had pleaded not guilty to the charges and were never afforded a trial or opportunity to present a defense. It appears he fined them twice for the same code violations and then entered a conviction with no notice whatsoever. This conduct, reminiscent of Politburo justice, has no place even in rural New York, where it seems we give more leeway than we should.

The fact that many justice courts suffer from the absence of lawyers presiding is no excuse for us to allow town justices to escape responsibility for fundamental violations of well-established individual rights. Many non-lawyer town

justices do fine work, scrupulously protecting the rights of the litigants who appear before them. In this case, the judge had presided for more than two years and certainly should have understood his obligation to be fair. Apparently he did not, and his betrayal of the trust invested in him requires more response from us than an admonition conveys.

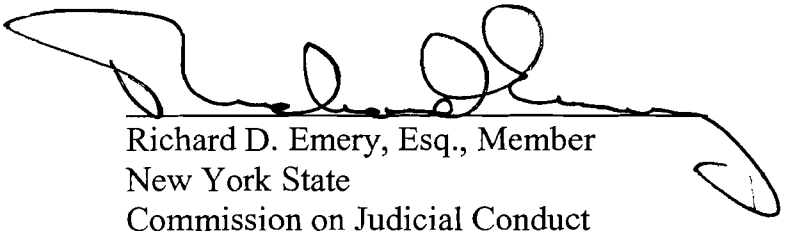
I have no doubt that if this judge had contested the charges he would have been removed. It cannot be that his willingness to enter into an Agreed Statement warrants such a severe reduction in sanction that admonition is appropriate. It may be that if we were convinced that he had learned from this process and was sincerely apologetic to the victims of his excess, a censure would be justified. But this record, comprised only of the Agreed Statement, does not support a result less severe than removal.

There is another troubling aspect to this case. Sadly, the qualifications for judicial office in town and village courts are so minimal that persons who should not be judges are. There is no educational or vocational prerequisite for service as a town or village justice. The result is that, among the many judges who serve, there are some who clearly would be unqualified if there were reasonable, minimum standards. Respondent's "Answer" in this case betrays such a poor facility with basic writing skills that it is glaringly reflective of the problem of having no minimum standards for judicial office. Current judicial training programs are, regrettably, not a solution to this problem since demonstrably unqualified judges regularly complete them successfully. We should all be deeply concerned with the easy escape route we have provided in this case to a judge who submitted such a troubling, but revealing Answer. Here, the Agreed Statement deprives

us of any information describing respondent's educational background or life experience. If the case had proceeded to a hearing at least we would know more than we know now about the respondent. On this record, it is clear to me that he should not continue to serve as a judge.

Therefore, I dissent and would reject the Agreed Statement and the negotiated sanction of admonition.

Dated: February 26, 2008



Richard D. Emery, Esq., Member
New York State
Commission on Judicial Conduct