

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

DIANE L. SCHILLING,

a Justice of the East Greenbush Town
Court, Rensselaer County.

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Nina M. Moore
Honorable Karen K. Peters
Richard A. Stoloff, Esq.

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci and S. Peter Pedrotty,
Of Counsel) for the Commission

E. Stewart Jones Law Firm PLLC (by E. Stewart Jones, Jr., and James C.
Knox) for the Respondent

The respondent, Diane L. Schilling, a Justice of the East Greenbush Town
Court, Rensselaer County, was served with a Formal Written Complaint dated May 3,

2011, containing two charges. The Formal Written Complaint alleged that respondent:

(i) improperly intervened in the disposition of a Speeding ticket issued to the wife of another judge and (ii) four years earlier, accepted special consideration with respect to a Speeding ticket issued to her. Respondent filed a verified answer dated May 23, 2011.

By Order dated June 1, 2011, the Commission designated Paul A. Feigenbaum, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on August 29 and 31, 2011, in Albany, and the referee filed a report dated January 6, 2012.

The parties submitted briefs with respect to the referee's report and the issue of sanctions. Counsel to the Commission recommended the sanction of removal, and respondent's counsel recommended admonition. On March 15, 2012, the Commission heard oral argument and thereafter considered the record of the proceeding. The vote in this matter was taken on March 15, 2012, and the Commission made the following findings of fact.

1. Respondent has been a Justice of the East Greenbush Town Court, Rensselaer County, since 2002.

2. Respondent is an attorney. Prior to becoming a judge, respondent was the East Greenbush Town Attorney. In that capacity, she prosecuted traffic violations in the East Greenbush Town Court.

3. Since 2003, respondent has been employed in various positions with the Office of Court Administration ("OCA"). She initially served as counsel in the

Training and Education Unit of the City, Town and Village Resource Center, which provides training and education to local judges. After a restructuring, the Resource Center became the Office of Justice Court Support, and respondent was appointed special counsel to the Deputy Chief Administrative Judge for the courts outside of New York City. In late June 2009 she became Director of the Office of Justice Court Support.

As to Charge I of the Formal Written Complaint:

4. At 5:40 AM on Saturday, May 30, 2009, East Greenbush Police Officer Brandon Boel issued a Speeding ticket to Lisa C. Toomey. Ms. Toomey is the wife of Sand Lake Town Justice Paul Toomey, who was then Director of the Office of Justice Court Support. Ms. Toomey was driving Judge Toomey's car, which had a license plate that included the letters "SMA," the acronym for the State Magistrates Association. The ticket was returnable in the East Greenbush Town Court on June 11, 2009, a date on which respondent's co-judge, Kevin Engel, was scheduled to preside.

5. Respondent knew Judge Toomey from their work together, from the fact that they were judges in adjoining towns and from social interactions. Judge Toomey had recommended that respondent be hired by OCA and was initially her supervisor. Their relationship was cordial and friendly.

6. In issuing the ticket, Officer Boel followed normal procedures, including notifying the police dispatcher of the stop, at which time he also conveyed the license plate number.

7. After the ticket was issued, Ms. Toomey immediately called Judge

Toomey, who told her that she should plead not guilty and let the process follow the ordinary course.

8. Officer Boel returned to the East Greenbush police station when his shift ended at 7:00 AM. The police station is located in the same building as the East Greenbush Town Court. Because Officer Boel had radioed the license plate number to the dispatcher, some officers at the station knew of the ticket issued to Ms. Toomey and were discussing the fact that the ticket had been issued to a car with a judge's license plate. Officer Boel, a relatively new officer at the time, had not known what "SMA" signified.

9. The traffic ticket is a five-page document in which writing on the first page is imprinted on the underlying pages. Following normal procedures, Officer Boel placed two copies of the ticket in a bin at the police station for the Town Court, gave one copy to the dispatcher for entry into the police department's computer, and put his officer's copy in a drawer; the fifth copy had been given to Ms. Toomey.

10. Officer Boel left the police station shortly after 7:00 AM. He testified that he did not see respondent that morning.

11. Respondent testified that she arrived at the police station at approximately 8:00 AM that same day, stopping briefly there on her way to court to do some paperwork. She testified further that when she arrived at the police station, Officer Boel was being teased by some officers, whom she could not identify at the hearing, for having issued a ticket to a car with an "SMA" license plate. She testified further that

Officer Boel approached her, asked her if she knew Judge Toomey, said that he had “made a mistake” and asked her to relay a message to Toomey that he (Officer Boel) would take care of the ticket with his sergeant. As did the referee who presided at the hearing, we find this testimony not credible.

12. At 8:17 AM, respondent sent an email message to Judge Toomey. The subject line of the message read: “I know,” and the message continued: “No sgt due in until tomorrow then it should be corrected.” Judge Toomey received respondent’s email message but did not respond to it.

13. At the hearing before the referee, respondent acknowledged that it was wrong to send the May 30 email to Judge Toomey. She testified that she sent the message as a “favor” to Judge Toomey and his wife because Judge Toomey was a colleague and judge and she “wanted to stay in his good graces.”

14. After receiving a copy of the Toomey ticket, the police dispatcher entered the ticket information into the police department’s computer system. Thereafter, pursuant to his normal practice, the dispatcher placed this copy of the ticket in a bin for the monthly mailing to Traffic Safety Law Enforcement and Disposition (“TSLED”), the agency that tracks tickets from their issuance to police until their final disposition.

15. Senior Court Clerk Joanne Millens received the court copies of the Toomey ticket. While she does not specifically recall what she did with the ticket, her normal practice is to sort the tickets received from the police department and to give to Judge Engel’s clerk the tickets with return dates on the nights Judge Engel was scheduled

to preside, and give to respondent's clerk the tickets with return dates on respondent's scheduled court nights. Judge Engel's clerk, Eileen Donahue, testified that she never received the court copies of the Toomey ticket.

16. Judge Toomey testified that on May 31, 2009, he received on his court-issued BlackBerry a text message from respondent that stated: "Need driver copy to void," and that he did not respond to the message. Respondent denies sending this text message to Judge Toomey. The referee did not make a specific finding as to whether respondent sent the text message to Judge Toomey since, in his findings and conclusions, he relied heavily on respondent's admissions of misconduct. Accordingly, we make no further findings with respect to this allegation.

17. Officer Boel testified that a day or two after he issued the Toomey ticket, Police Sergeant Michael Condo asked him for the officer's copy of the ticket and that he (Boel) gave this copy to Sergeant Condo. The whereabouts of this ticket is unknown. Sergeant Condo was not called as a witness at the hearing.

18. On two occasions in early June 2009, respondent and Judge Toomey discussed his wife's ticket. Respondent asked Judge Toomey for his wife's copy of the ticket and said that she needed that copy of the ticket so it could be destroyed. At the hearing, respondent admitted having incidental, private conversations with Judge Toomey about the ticket on at least two occasions in June. While her hearing testimony about the substance of those conversations was vague, respondent acknowledged that she asked when the ticket was returnable, and she acknowledged that her conversations with

Judge Toomey about the pending ticket were improper. Respondent denied that she asked for the ticket or discussed “destroying” the ticket.

19. On June 24, 2009, Judge Toomey learned that respondent was about to replace him as Director of the Office of Justice Court Support. Respondent testified that for about two or three weeks prior to that date, she had had discussions with OCA officials about the position. After June 24th, there was no further social relationship between respondent and Judge Toomey, who was assigned to another position with OCA.

20. On June 26, 2009, Lisa Toomey mailed her Speeding ticket to the East Greenbush court with a plea of not guilty. Since Judge Engel’s clerk had not received the court copy of the ticket from the police, she placed Ms. Toomey’s ticket in the “orphan” file of tickets that were not in the system.

21. On December 23, 2009, having heard nothing from the East Greenbush court about her ticket, Ms. Toomey sent a letter to the court by certified mail to ascertain the status of the ticket. She received a voice mail message in response, asking her to call the court. Ms. Toomey left a return voice mail message with the court asking for a written response to her letter. She then received another telephone message from a court clerk asking her to call to discuss the status of the ticket. Ms. Toomey did not call the court and since that time has had no other communication with the court about the ticket. The ticket was never prosecuted.

22. There is no record of the Toomey ticket in the East Greenbush Town Court except the copy of the ticket that Ms. Toomey sent to the court with her plea of not

guilty. The court copies of the ticket (received from the police department) are missing, and the court's copy of Ms. Toomey's letter of December 23, 2009, is missing. TSLED, the agency which would normally receive the dispatcher's copy of the ticket from the police, has no record of the ticket issued to Ms. Toomey.

23. In 2010, Judge Toomey requested an opinion from the Advisory Committee on Judicial Ethics with respect to whether he had an ethical obligation to report respondent's conduct to the Commission. After receiving an opinion from the Committee that he was obligated to report the matter, Judge Toomey sent a complaint to the Commission.¹

24. Respondent's attempt to attribute nefarious motives to Judge Toomey, by implying that he engaged in wrongdoing in complaining about respondent's actions in an effort to regain his former position, is unpersuasive and is rejected. In this regard we adopt the reasoning of the referee who conducted the hearing.

As to Charge II of the Formal Written Complaint:

25. On June 23, 2005, respondent was issued a ticket for Speeding by New York State Trooper C. Donovan. Respondent was driving her car, which had an "SMA" license plate.

26. Shortly thereafter, Trooper Donovan discussed the ticket with other

¹ Section 100.3(D)(1) of the Rules Governing Judicial Conduct states: "A judge who receives information indicating a substantial likelihood that another judge has committed a substantial violation of this Part shall take appropriate action."

troopers, who told him that “SMA” stands for State Magistrates Association and that he had given a ticket to a judge before whom the troopers appear in court. Thereupon, Trooper Donovan called respondent on her cell phone, having gotten the number from the police dispatcher, and told respondent that they had met on the side of the road that morning and that he wanted to come to her office. Respondent agreed, and the trooper arrived at her office about an hour later.

27. Trooper Donovan told respondent about his conversation with other troopers and asked that she return the Speeding ticket to him because he intended to void it. Respondent gave him the ticket. Respondent testified that she assumed the trooper was taking the ticket back because he knew that she was a judge.

28. Later that same day, the Speeding ticket issued to respondent was voided by State Police Sergeant Corso, to whom Trooper Donovan reported.

29. Sometime in late 2009 or early 2010, in a conversation with colleagues at the Office of Justice Court Support, respondent recounted that she had been issued a Speeding ticket several years earlier and that after the issuing officer learned what the “SMA” license plate meant, he came to her office and took back the ticket.

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(B), 100.2(C), 100.4(A)(1) and 100.4(A)(2) 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.

Charges I and II are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established.

Upon learning that the spouse of a judge had been issued a Speeding ticket returnable before respondent's co-justice, respondent intervened in the matter and engaged in a substantial effort to accord favoritism. This scheme to circumvent the normal judicial process, in which, to a significant extent, respondent has acknowledged participating, resulted in the disappearance of the ticket from the system and, thus, the absence of any prosecution. As depicted in this record, respondent's actions showed a complete disregard for her ethical responsibilities and for the legal process she was sworn to uphold, which "cannot be viewed as acceptable conduct by one holding judicial office." *Matter of VonderHeide*, 72 NY2d 658, 660 (1988).

As respondent acknowledges, within hours after the ticket had been issued to the wife of Sand Lake Town Justice Paul Toomey, respondent went to the East Greenbush police station – at 8:00 AM on a Saturday morning – and, shortly thereafter, sent an email message to Judge Toomey, her friend, colleague and former boss at the agency that provides advice and education to local justices. Respondent's email message (which stated in the subject line: "I know," and then continued: "No sgt due in until tomorrow then it should be corrected") clearly telegraphed respondent's participation in a scheme to extend favoritism in connection with the ticket and, at the very least, bestowed her judicial imprimatur on the conduct. Like the referee, we reject respondent's hearing testimony that in sending this email, she was merely relaying a message from the issuing

officer, who told her that he had “made a mistake” by issuing a ticket to the wife of a judge (Tr. 312). In crediting the testimony of Officer Boel, who denied seeing respondent that morning or asking her to relay a message about the Toomey ticket, the referee noted that Boel processed the ticket in the normal course before leaving the station when his shift ended at 7:00 AM, distributing a copy to the police dispatcher and two copies for transmittal to the East Greenbush Town Court (located in the same building as the police station); such conduct seems plainly inconsistent with an intent or plan by him to “correct” or void the ticket the following day. In either event, whether it was Boel who asked her to say that the matter would be “corrected” or whether that was her own observation, respondent’s conduct in sending that message to Toomey was clearly part of a wrongful scheme to accord favorable treatment to a defendant solely because of the defendant’s connection to a judge. At the very least, respondent’s actions indicated that she was complicit in the favoritism and, as her attorney conceded at the oral argument, conveyed to the participants in the scheme, including police who appeared before her, that she approved it (Oral argument, pp. 37-38, 40).

Respondent has also admitted that on at least two occasions shortly thereafter, she and Judge Toomey discussed the pending Speeding ticket. While her testimony at the hearing about the substance of these conversations was notably vague, respondent admitted asking about the return date of the ticket; though she denied that she asked for the ticket or discussed “destroying” the ticket, she acknowledged that any conversations with Toomey about the ticket, which was pending in the East Greenbush

court, were improper. We believe that the record, in its totality, supports a finding that respondent asked Judge Toomey for his wife's copy of the ticket so it could be destroyed.² At a minimum, her actions conveyed the appearance that she was following up on her email message to Judge Toomey about the ticket (which had advised him that "it should be corrected") in furtherance of the scheme to void the ticket and erase it from the system.

Under the circumstances, it is thus apparent that respondent tried to influence the outcome of the Speeding charge against Lisa Toomey. Respondent testified that she had no intention to influence the outcome of the ticket (Tr. 319-20). We refrain from concluding that her misguided view of her intentions constituted lack of candor (*see, Matter of Kiley*, 74 NY2d 364, 370-71 [1989]), but we are not persuaded that her testimony was credible as to certain facts in dispute.

The record establishes that ultimately the Toomey ticket was never prosecuted and, for all practical purposes, disappeared entirely from the system. Of the five copies of the ticket, only the defendant's copy of the ticket, which Ms. Toomey sent to the court with a not guilty plea, has been accounted for. The two court copies of the ticket, which were transmitted by the police to the East Greenbush Town Court, could not be located (Judge Engel's clerk testified that she never received them); the police dispatcher's copy, which would normally be sent to TSLED, was apparently never

² We note that in his discussion of the facts, the referee states that respondent "asked Judge Toomey for his wife's copy of the Ticket....[and] said she needed that copy to destroy the ticket" (Rep. 8).

transmitted since that agency has no record of the issuance of the ticket; and according to Officer Boel, the officer's copy, which he usually retains, was given to a sergeant a day or two later at the sergeant's request (it was not produced at the hearing). As stated by the referee: "Although the mechanics of the destruction of the Ticket are unclear, respondent's role in that process suffers from no such infirmity" (Rep. 9). By sending the May 30 email to Judge Toomey about "correct[ing]" the Speeding ticket, and by discussing the pending ticket with Judge Toomey, respondent was inextricably involved in subverting the normal judicial process, which ultimately led to the disappearance of the ticket.

As a former town attorney and as an experienced judge, there can be no question that respondent was familiar with the process surrounding the issuance and prosecution of traffic tickets. Respondent also knew from personal experience that a ticket could disappear since in 2005 a Speeding ticket issued to her was voided after she acquiesced in favoritism extended to her by the trooper. As recounted by respondent to OCA co-workers in a conversation at her office, the trooper who had issued the ticket contacted her by cell phone upon learning that she was a judge, asked to come to her office, and then asked to take back the ticket so it could be voided. Respondent returned the ticket to the trooper notwithstanding that she assumed that he was withdrawing the ticket because of her judicial status. Like the Toomey ticket, the Speeding ticket issued to respondent was never prosecuted. Notwithstanding that she did not initiate the favoritism that was afforded to her, her cooperation in the impropriety permitted it to occur. The

impropriety was compounded by telling her colleagues, in an agency which advises judges on the law, of her experience in cooperating with an effort to have her own ticket voided after the trooper learned she was a judge. Under the circumstances presented, we agree with the referee's conclusion that the example set by respondent "falls well short of the standard of behavior expected of a judge" (Rep. 16). As the Court of Appeals has noted, judges must be aware "that any action they take, whether on or off the bench, must be measured against exacting standards of scrutiny to the end that public perception of the integrity of the judiciary will be preserved" (*Matter of Lonschein*, 50 NY2d 569, 572 [1980]). "There must also be a recognition that any actions undertaken in the public sphere reflect, whether designedly or not, upon the prestige of the judiciary" (*Id.*).³

Ticket fixing strikes at the heart of our system of justice, which is based on equal treatment for all.⁴ As this Commission stated more than 30 years ago, ticket fixing results in "two systems of justice, one for the average citizen and another for people with.... the right 'connections'" ("Ticket-Fixing: The Assertion of Influence in Traffic

³ The Commission has repeatedly evaluated cases of judges attempting to use their judicial office to influence the disposition of traffic violations. This case represents a stark example of this problem and raises a systemic issue of how judicial license plates distort the normal process of enforcing traffic laws and the delicate position faced by law enforcement officers when they stop a vehicle with judicial plates. The Commission has decided that a public report is required to address the issue of whether or not the Rules Governing Judicial Conduct may be violated by the use of judicial license plates in the context of judges, in effect, using their judicial office to avoid the consequences of being stopped for offenses under the Vehicle and Traffic Law.

⁴ The Court of Appeals has used the term "ticket-fixing" to refer to "misconduct in connection with the disposition of ... Speeding tickets" (*Matter of Conti*, 70 NY2d 416, 417, 418 [1987]; *see also, Matter of Bulger*, 48 NY2d 32, 33 [1979] [censuring judge "for showing and seeking favoritism in the disposition of charges involving traffic violations"]).

Cases,” Interim Report, June 20, 1977, p. 16). Such favoritism “is wrong, and always has been wrong” (*Matter of Byrne*, 47 NY2d [b] [Ct on the Judiciary 1979]); indeed, it may be contrary to law.⁵ After the Commission uncovered a widespread pattern of ticket fixing throughout the state in the late 1970’s, more than 140 judges were disciplined for engaging in this misconduct. Subsequent incidents of ticket fixing were regarded with particular severity, since judges now had the benefit of a significant body of case law concerning the impropriety of this behavior. In 1985 the Court of Appeals stated that even a single incident of ticket fixing “is misconduct of such gravity as to warrant removal” (*Matter of Reedy*, 64 NY2d 299, 302 [1985]). In view of these precedents, every judge should be well aware that such conduct is strictly prohibited.

We thus conclude that respondent has engaged in serious misconduct. In reaching this conclusion, we accord due deference to the findings of the referee who conducted the hearing. We note that the referee, after carefully weighing the witnesses’ credibility and evaluating the evidence, concluded that respondent’s testimony as to her purported discussion with Boel was not credible but determined that respondent’s lack of candor at the hearing was not established. Based on our own thorough examination of the entire record, we find no basis to reject the referee’s findings and conclusions. (*Compare, Matter of Marshall*, 2008 Annual Report 161 [referee’s findings were “unclear” and

⁵ Section 207, subdivision 5 of the Vehicle and Traffic Law provides that disposing of a traffic ticket “in any manner other than that prescribed by law” constitutes a misdemeanor. While there is no indication that respondent committed a crime, the statute represents a public policy against any form of ticket fixing or unauthorized disposition of a ticket.

inconsistent on their face], determination accepted, 8 NY3d 741 [2007].)

In weighing the sanction to be imposed, we are guided by the principle that “as a general rule, intervention in a proceeding in another court should result in removal,” though mitigating factors may warrant a reduced sanction (*Matter of Edwards*, 67 NY2d 153, 155 [1986] [judge’s intervention in his son’s case was mitigated by several factors, including that his “judgment was somewhat clouded by his son’s involvement” and he “forthrightly admitted” his misconduct]). *See also, Matter of Reedy, supra; Matter of Kiley*, 74 NY2d 364, 370 [1989] [judge’s intervention was motivated by sympathy for his friends’ “emotional trauma,” with no “element of venality, selfish or dishonorable purpose”]). We note that with respect to the Toomey ticket, there can be no excuse that respondent’s judgment was “clouded,” and there was plainly a “dishonorable purpose” in doing a favor for a colleague that would result in erasing all traces of his wife’s Speeding ticket from the system. While we have duly considered the mitigation presented in this case, including respondent’s public service, her previously unblemished record and her admission of wrongdoing, the nature and gravity of the proven impropriety in this case cannot be overlooked. As the Court of Appeals has stated, in certain cases “‘no amount of [mitigation] will override inexcusable conduct’ (*Bauer*, 3 NY3d at 165)” (*Matter of Restaino*, 10 NY3d 577, 590 [2008]). Significantly, as an experienced judge and as an attorney with expertise in providing advice, support and training to local justices, respondent should have recognized and avoided any taint of favoritism.

While we are mindful that removal is an extreme sanction and should only

be imposed in the event of truly egregious circumstances (*Matter of Steinberg*, 51 NY2d 74, 83 [1980]), we note that judges “are held to higher standards of conduct than the public at large, and thus what might be acceptable behavior when measured against societal norms could constitute ‘truly egregious’ conduct” requiring a severe sanction (*Matter of Mazzei*, 81 NY2d 568, 572 [1993] [citations omitted]). We believe that respondent’s actions showed a serious lack of judgment and an indifference to the special obligations of judges that are unacceptable for a member of our state’s judiciary. *Matter of Conti*, 70 NY2d 416, 419 (1987). Such behavior jeopardizes public confidence in the integrity of the judiciary as a whole, which is indispensable to the administration of justice in our society (*Matter of Levine*, 74 NY2d 294, 297 [1989]), and warrants removal from office.

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

Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Cohen, Mr. Emery, Mr. Harding, Ms. Moore, Judge Peters and Mr. Stoloff concur.

Mr. Belluck was not present.

CERTIFICATION

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

Dated: May 8, 2012


Jean M. Savanyu

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