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

ANDREW NORMAN PIRAINO,

a Justice of the Salina Town Court,
Onondaga County.

DETERMINATION

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Jodie Corngold
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (John J. Postel and David M. Duguay, Of Counsel)
for the Commission

Zimmerman Law Office (by Aaron Mark Zimmerman) for the Respondent

The respondent, Andrew Norman Piraino, a Justice of the Salina Town Court, Onondaga County, was served with a Formal Written Complaint dated May 24, 2010, containing four charges. The Formal Written Complaint alleged that in numerous

cases respondent imposed fines and/or surcharges that exceeded the maximum amounts authorized by law (Charges I and II) or were below the minimum amounts required by law (Charges III and IV), and that, in some of these cases, he did so as a result of his failure to properly supervise his court clerks (Charges II and IV). Respondent filed a verified answer dated June 24, 2010.

On June 24, 2010, respondent filed a motion to dismiss the Formal Written Complaint. Commission counsel opposed the motion by affirmation and memorandum dated August 19, 2010, and respondent replied by affirmation dated August 26, 2010. By order dated September 29, 2010, the Commission denied respondent's motion in all respects.

By Order dated October 21, 2010, the Commission designated Edward J. Nowak, Esq., as referee to hear and report to the Commission with respect to the charges. A hearing was held on May 8, 9, 22 and 23, June 26 and July 31, 2013, in Syracuse.[1] The referee filed a report dated February 20, 2014.

On March 19, 2014, respondent filed a motion (i) to preclude certain individuals on the Commission's staff from involvement in preparing briefs and presenting oral argument with respect to the referee's report and the issue of sanctions, and (ii) to strike from the record a memorandum filed by Commission counsel.

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[1] The Commission's proceedings were stayed after respondent commenced an Article 78 proceeding in January 2011 in Supreme Court, Onondaga County, seeking a writ of prohibition. Supreme Court initially dismissed the petition, then reversed after granting leave to renew and reargue. On November 9, 2012, the Appellate Division, 4th Department, reversed and reinstated the judgment dismissing the petition. *Doe v New York State Comm'n on Judicial Conduct*, 100 AD3d 1346 (4th Dept 2012). On February 12, 2013, leave to appeal was denied. *Doe v New York State Comm'n on Judicial Conduct*, 20 NY3d 1030 (2013).

Commission counsel opposed the motion by affirmation dated March 25, 2014, and memorandum dated March 27, 2014, and respondent replied by memorandum dated April 1, 2014. By order dated April 10, 2014, the Commission denied respondent's motion in all respects.

The parties submitted briefs with respect to the referee's report and the issue of sanctions. Commission counsel recommended the sanction of censure. Respondent's counsel argued that respondent's actions were not unethical but that if misconduct was found, a confidential letter of caution should be issued.

On May 29, 2014, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a Justice of the Salina Town Court, Onondaga County, since 1994. His current term expires on December 31, 2017. He was admitted to practice law in New York State in 1983 and has been engaged in the private practice of law since that time.

2. Respondent has regularly attended all required judicial training and education sessions. He regularly received information from the Office of Court Administration concerning changes or updates in the law, and received information and updates concerning changes in fines and surcharges from the Office of the State Comptroller and the State Legislature. He is familiar with and keeps various legal resources in his chambers including McKinney's Consolidated Laws of New York and Magill's Vehicle and Traffic Law Manual for Local Courts, which contains detailed

charts of authorized sentences and surcharges for traffic offenses. The Salina Town Court also has a handbook from the Office of the State Comptroller that provides information and instruction to town and village justices and their court clerks.

3. The Salina Town Court, which has two justices, is responsible for handling both civil and criminal matters. The majority of cases handled by the court are traffic related offenses. Because the town is situated near two major highways, the court handles a high volume of cases. As shown by his reports of cases to the Justice Court Fund showing the fines, fees and surcharges processed by the Salina Town Court, respondent disposed of approximately 22,000 cases from January 2006 through May 2008, an average of 760 cases per month.

4. From January 2006 through May 2008, the Salina Town Court employed two full-time court clerks and two part-time court clerks. Eleanor Mazzye, who had been a clerk for respondent's predecessor as Salina Town Justice, was hired as head court clerk in 1994 and served in that capacity until her retirement in August 2008.

5. Upon hiring Ms. Mazzye as head court clerk, respondent directed her to continue using the same administrative system that respondent's predecessor had used. Respondent provided no training to Ms. Mazzye regarding her duties and responsibilities because, he testified, "[s]he knew more than I did at that time." Respondent did not train any of the other court clerks and relied on Ms. Mazzye to train them. Respondent provided no written court policies or procedures to the court clerks until June 2013.

6. It was the practice in the Salina Town Court that traffic tickets

returnable in the court were submitted to the court clerks, who would open a "file" for each ticket, consisting of a cover sheet attached to the ticket. The cover sheet form contains designated spaces for names, addresses, return dates, adjourned dates and any plea entry information. Generally, when the court received a guilty plea from a defendant through the mail, a clerk would place the file on respondent's desk in order for him to impose the fine and surcharge.

7. Respondent would then write the fine and surcharge amounts, the date on which he imposed the fine, and the Vehicle and Traffic Law section for the conviction upon which he was imposing the sentence. He would then place the file in a designated area of his desk for the clerks to retrieve.

8. The court clerks would then take these files to their work area and enter the fine and surcharge amounts into the court computer system, which would generate a fine notice for each case. The court clerks would send the fine notices to defendants.

9. When the court received fine and surcharge payments, a court clerk would enter the amount received, the date on which the payment was received and the receipt number on the cover sheet.

10. The court files of hundreds of cases from January 2006 through May 2008 contain no handwritten entries by respondent on the file. In these instances, according to respondent, the court clerks imposed the fines and surcharges without his knowledge or authorization.

11. Ms. Mazzye, as head clerk, generated the reports required to be filed

on a monthly basis with the Justice Court Fund, a division of the Office of the State Comptroller. Respondent reviewed the Justice Court Fund reports each month and certified that each report was "a true and complete record of the activity of the court for the period." Respondent never noticed any inaccurate information or any improper fines or surcharges.

12. After the Commission received a complaint alleging that respondent had imposed an excessive fine in two seat belt cases, the Commission authorized an investigation. During the investigation, the Commission's staff reviewed the Justice Court Fund reports filed by the Salina Town Court and prepared a schedule listing approximately 1,300 cases in which respondent had reported fines and/or surcharges that potentially either exceeded the maximum amount authorized by law or were below the minimum amount required by law. The Commission's staff provided the schedule to respondent. After reviewing the court files, respondent returned the schedule to the Commission with his notations and comments as to each case indicating which sentences he believed were unlawful and, as to those, attributing fault either to himself or to his court clerks.

13. As set forth in Schedules A through H of the Formal Written Complaint, in 941 instances from January 2006 through May 2008 respondent imposed fines and surcharges that either exceeded the statutory maximum or were below the statutory minimum, and in 362 of these instances, he did so as a result of his failure to properly supervise his clerks, as follows:

(a) In 369 cases respondent imposed fines that exceeded the maximum

amount authorized by law by a total of $8,745, as shown in Schedule A, and in 93 cases respondent imposed surcharges that exceeded the maximum amount authorized by law by a total of $2,386, as shown in Schedule B;

(b) In 307 additional cases, as shown in Schedule C, respondent imposed fines that exceeded the maximum amount authorized by law by a total of $1,710, and in 22 additional cases, as shown in Schedule D, respondent imposed surcharges that exceeded the maximum amount authorized by law by a total of $610, which respondent attributed to clerk errors;

(c) In 79 cases respondent imposed fines that were below the minimum amount required by law by a total of $3,804, as shown in Schedule E, and in 38 cases respondent imposed surcharges that were below the minimum amount required by law by a total of $1,675, as shown in Schedule F; and

(d) In 13 additional cases, as shown in Schedule G, respondent imposed fines that were below the minimum required by law by a total of $275, and in 20 additional cases, as shown in Schedule H, respondent imposed surcharges that were below the minimum amount required by law by a total of $650, which respondent attributed to clerk errors.

(e) In summary, as shown in Schedules A through D, respondent imposed excessive fines and/or surcharges in 791 instances, 329 of which he attributed to his court clerks. The excess fines and surcharges, totaling $13,451, represent about 1% of the monies reported by respondent over the period covered by the charges. As shown in Schedules E through H, in 150 instances, 33 of which he attributed to his court clerks,

respondent imposed fines and/or surcharges that were a total of $6,404 less than the minimum amount required by law.

(f) The cases shown in Schedules A through H include more than 400 instances of improper fines and/or surcharges for a seat belt violation (VTL §1229[c][3]) (44% of the total) and 300 instances of improper fines and/or surcharges for an unlicensed driver violation (VTL §509) (32% of the total). In most of the seat belt cases listed on the schedules, the excess fines were $5 or $10 above the statutory maximum of $50. The fines authorized by law for such violations did not change during this period.

(g) Eleven cases involve convictions for Driving While Ability Impaired in which respondent imposed a fine of $750, notwithstanding that the maximum fine for a first such offense is $500. In several of these cases, court records indicate that the District Attorney's office recommended the fine amount as part of a plea bargain.

14. Respondent testified that he was "shocked" when he learned of the sentencing errors. He imposed the fines and surcharges from memory instead of relying on the resources available to him. He acknowledged that "too many mistakes" were made and attributed his errors to "oversight," "mental lapse," "not paying attention," "mis-memoriz[ing] the law," "being overloaded" and "judicial error." He believed that he devoted sufficient time to his judicial duties (about 20 hours a week), but testified that even if he had worked longer hours, "I probably still would have made some mistakes"; he stated, "It's impossible not to make a mistake." He noted that for several months during this 29-month period, he was also doing the work of his co-judge who was unavailable.

15. Respondent denied that he ever authorized his clerks to set fines. The former head clerk, Ms. Mazzye, testified that respondent authorized her to set a fine of $55 for a straight guilty plea to a seat belt charge (the authorized fine is zero to $50). The referee did not determine whether respondent had authorized his clerks to set fines since, the referee noted, that allegation was not charged and, as a judge, respondent is responsible for the conduct of his court clerks.

16. As found by the referee, respondent did "little to nothing" to supervise his court clerks. Respondent admitted that he "didn't supervise [his] clerks too well." He testified that he relied on his head clerk to train the other clerks and to handle administrative matters, and he testified that he "had no reason to" question his clerks' handling of cases; he stated, "I thought the system was working. Obviously, it wasn't." Respondent acknowledged that he never checked any fine notices prepared by the court clerks and that he is responsible for the actions of his court clerks.

17. All of the fines and surcharges imposed by respondent's court were remitted to the Office of the State Comptroller and were accurately reported.

18. Respondent testified that upon learning during the Commission's investigation of the sentencing errors, he met individually with each of the court clerks (by that time, Ms. Mazzye had retired) to discuss procedures, and that he instituted new procedures in order to avoid such problems in the future. The procedures are embodied in a two-page "Policy Statement" dated June 21, 2013, signed by respondent and the court clerks. Among other things, the "Policy Statement" states that in every case the judge assesses the fine and thereafter gets the fine notice with the case file, before the

notice is sent, "to verify the amount of the fine."

19. Since learning of the sentencing errors, respondent has taken no steps to reimburse any individuals who had paid fines and/or surcharges in amounts that exceeded the maximum authorized by 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), 100.3(C)(1) and 100.3(C)(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 through IV of the Formal Written Complaint are sustained, and respondent's misconduct is established.

It is the responsibility of every judge to "respect and comply with the law" and to "be faithful to the law and maintain professional competence in it" (Rules, §§100.2[A], 100.3[B][1]). Notwithstanding these requirements, in over 900 Vehicle and Traffic Law cases over a 29-month period respondent imposed fines and/or surcharges that either exceeded the maximum amount authorized by law or were below the minimum amount required by law. Respondent attributes approximately 40% of these unlawful sentences to his court clerks, who, he maintains, imposed fines and surcharges without his knowledge or authorization. Since every judge is obligated to require the judge's staff to "observe the standards of fidelity and diligence that apply to the judge" (Rules, §100.3[C][2]), respondent, who acknowledged that he "didn't supervise [his]

clerks too well," bears responsibility not only for the unlawful sentences he imposed directly, but for those imposed by his court staff. As found by the referee, "[w]hile respondent's actions were not intentional or purposeful," his failure to consult the legal authorities that were available to him and "his inattention to the process and procedures of his court and his clerical staff" resulted in hundreds of illegal sentences being imposed (Report, p 9).

These unlawful dispositions, which respondent cannot and does not dispute, are conclusively established by court records and respondent's monthly reports of cases to the Office of the State Comptroller. In 579 instances respondent directly imposed fines and/or surcharges that either exceeded the maximum amount permitted by law or were less than the minimum amount required by law, and in 362 additional instances, according to respondent, fines and/or surcharges that were too high or too low were imposed by respondent's court clerks. Such a pattern of repeated sentencing errors is inconsistent with a judge's ethical obligation to "comply with the law" and to "maintain professional competence" in the law (Rules, §§100.2[A], 100.3[B][1]) and therefore is subject to discipline. *See, e.g., Matter of Banks*, 2010 NYSCJC Annual Report 100 (judge imposed over $11,000 in excessive fines in 209 cases over six months, and conceded that court records would show excessive fines in the same proportion over 18 additional months); *Matter of Pisaturo*, 2006 NYSCJC Annual Report 228 (judge based fines on the original charges, rather than the lesser charges that defendants pled guilty to, resulting in excessive fines in 703 cases over a 32-month period and in 230 additional cases over the preceding two years, totaling approximately $170,000 in overcharges).

We reject respondent's argument that such sentencing errors are properly addressed by an appellate court, not in a disciplinary setting. Since most of the overpayments in this case involved relatively small amounts, it is unrealistic to expect that the defendants would expend the resources necessary to pursue an appellate remedy. In disciplinary cases, as the Court of Appeals has repeatedly held, errors of law and judicial misconduct are not mutually exclusive. *E.g.*, *Matter of Reeves*, 63 NY2d 105, 109-10 (1984) (pattern of failing to advise litigants of constitutional and statutory rights "is serious misconduct"); *Matter of Jung*, 11 NY3d 365, 373 (2008); *Matter of Feinberg*, 5 NY3d 206, 215 (2005) (judge repeatedly "disregarded the clear statutory mandates of his office" in awarding counsel fees without the statutorily required affidavits). In this case, respondent's repeated errors and negligent supervision of his court clerks, resulting in more than 900 illegal sentences being imposed, involve one of the most fundamental responsibilities of a judge, the imposition of a sentence upon conviction.

While respondent attributes many of these unlawful dispositions to the unauthorized actions of his staff, as a judge he bears full responsibility for his clerks' conduct. This is especially so where, as the referee found, the record shows that during this period respondent did "little to nothing" to supervise his clerks, such as reviewing fine notices before they were sent or providing internal controls or written policies or procedures relating to the processing of cases (Report, p 5). Indeed, not until June 2013 – three years after being served with formal charges addressing the sentencing errors he attributed to his clerks – did respondent prepare a written "Policy Statement" for his staff, describing the court's procedures for handling traffic cases and making it clear that the

judge imposes all fines. In view of his ethical obligation to ensure that those subject to his direction and control follow the law and "adhere to the standards of fidelity and diligence that apply to the judge" (Rules, §100.3[C][2]), respondent is responsible for the sentences imposed by his court staff.

As the record conclusively demonstrates, respondent's sentencing errors cannot be attributed to lack of experience, insufficient training and education, or insufficient resources to assist him in performing his duties. As a practicing attorney and experienced judge, respondent had more than 20 years of legal experience and had been on the bench for more than a decade at the time the unlawful sentences were imposed. He regularly attended all required judicial training and education sessions; he had access to and was familiar with the pertinent statutes; and at the hearing, he acknowledged that all of the resources needed to determine the appropriate sentences were readily available to him. It should be emphasized that this is not an area of law that involves complicated legal issues. Simply consulting the sentencing provisions in the Vehicle and Traffic Law or the sentencing charts available to him would have been sufficient to make sure that a fine or surcharge for a particular charge was within the authorized range.

Respondent's proffered explanations for his errors, including "inattention" or "oversight," do not excuse his misconduct (*see Matter of Feinberg*, *supra*, 5 NY3d at 214; *see also Matter of VonderHeide*, 72 NY2d 658, 660 [1988]), nor does the fact that the Salina Town Court is among the busiest courts in upstate New York. While isolated, inadvertent sentencing errors might be excused in a court that, like respondent's, handles thousands of cases each year, the pervasive, repeated errors depicted in this record are

plainly unacceptable. It is inexcusable, for example, that a judge who each year handles hundreds of cases involving seat belt and unlicensed driver charges – violations that represent more than 70% of the improper dispositions in this record – would not make certain that he or she knew the authorized fine range for those kinds of cases. Notwithstanding that most of the cases in this record involve relatively minor infractions, it is a judge's obligation to impose a legally proper sentence in every case, regardless of the severity of the offense. Public confidence in the proper administration of justice and in the judiciary as a whole is diminished when a judge repeatedly makes sentencing errors even in simple, straightforward cases.

We have carefully considered each of respondent's defenses and find them without merit. The referee correctly rejected respondent's contention that any administrative failures on his part warranted only administrative correction and that misconduct could not be found since he cooperated with administrative authorities. Respondent's reliance on *Matter of Gilpatric*, 13 NY3d 586 (2009) and *Matter of Greenfield*, 76 NY2d 293 (1990) is misplaced, since those cases specifically address the parameters of finding misconduct for delays in rendering court decisions, not for the imposition of illegal sentences. A judge's administrative responsibilities are addressed in the ethical rules (§100.3[C]), and the Commission has repeatedly found that the failure to properly supervise court staff is misconduct. *E.g.*, *Matter of Ridgeway*, 2010 NYSCJC Annual Report 205, 209 ("a judge is required to exercise supervisory vigilance over court staff to ensure the proper performance of [their] responsibilities"); *Matter of Burin,* 2008 NYSCJC Annual Report 97 (judge failed to provide adequate supervision or training to

his staff to ensure the prompt depositing, reporting and remitting of monies); *Matter of Cavotta,* 2008 NYSCJC Annual Report 107 (judge failed to adequately supervise court staff resulting in a deficiency in the court account); *Matter of Jarosz,* 2004 NYSCJC Annual Report 116 (judge was negligent in the supervision of court clerk who made false entries in court records); *Matter of Restino,* 2002 NYSCJC Annual Report 145 (judge failed to adequately supervise court clerk who failed to maintain proper records and make timely deposits of funds).

We also reject respondent's argument that for a judge to be disciplined, a "vile, improper or impure" motive must be charged and proved. Misconduct has been found for behavior that was negligent (*e.g.*, *Matter of Francis M. Alessandro*, 13 NY3d 238, 249 [2009] [judge's omission of certain assets and liabilities on loan applications and financial disclosure forms was "careless," not intentional]), or even when the judge's motive was laudable (*e.g.*, *Matter of Blackburne*, 7 NY3d 213, 219 [2007] [judge was "motivated by a desire to protect the integrity of the Treatment Court" in attempting to prevent the arrest of a suspected felon in her courtroom]; *Matter of LaBelle*, 79 NY2d 350, 362 [judge held defendants in custody without setting bail as required because he believed that homeless defendants were more comfortable and better cared for in jail than on the streets]).

In weighing the appropriate sanction, it is of some concern to us that respondent has taken no affirmative steps to ameliorate the financial harm he caused to 791 defendants, whose overpayments in fines and surcharges totaled $13,451. Although respondent's counsel indicated at the oral argument that he had advised his client that

there was no available avenue for reimbursing the defendants (Oral argument, pp 34-36), we note that a significant mitigating factor in *Banks* and *Pisaturo* was that those judges took extensive measures to initiate and process refunds to defendants who had paid fines in excessive amounts. (We also note that in those two cases, both the total overpayments and average overpayment were significantly greater than in this matter, where a majority of the overpayments were $5 or $10 and the average overpayment was less than $20.)

We are mindful that there is no evidence that respondent's unlawful sentences were the result of bias or other improper motive, such as a desire to financially benefit his town (*compare*, *Matter of Banks*, *supra* [judge's excessive fines "create[d] at least an appearance that he was imposing excessive amounts in order to increase the town's revenues"); indeed, many of the unlawful dispositions in this record involve fines or surcharges that were less than the minimum amount required. Further, there is no indication that respondent's misconduct continued after the sentencing errors were brought to his attention (*compare*, *Matter of Burke*, 2015 NYSCJC Annual Report ___ [judge continued to impose excessive fines in certain cases after his court clerk had advised him that the fines exceeded the maximum amount authorized by law]). As respondent testified, after learning of the errors, he instituted new procedures in order to avoid such problems in the future, including personally reviewing all fine notices and comparing them with the court files. We believe that these actions manifest a sincere desire to improve the operations of his court and we trust that such errors will not recur. Finally, as the referee noted, respondent was cooperative with the Commission during its investigation, during which he conducted an extensive review of court files and provided

information to the Commission's staff. We thus conclude that despite the extent of respondent's derelictions, public confidence in the fair and proper administration of justice in respondent's court and in the judiciary as a whole has not been "irredeemably damaged" (*Matter of Watson*, 100 NY2d 290, 304 [2003]) and, accordingly, that the sanction of censure is appropriate.

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

Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Belluck, Mr. Cohen, Ms. Corngold, Mr. Emery, Mr. Harding, Mr. Stoloff and Judge Weinstein concur.

CERTIFICATION

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

Dated: July 30, 2014

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