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 TO THE COMMISSION

Date: April 9, 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

COMMISSION COUNSEL SEEKS AN UNFAIR AND DISPROPORTIONATE RESULT

Counsel seeks a determination of removal. Respondent acknowledges that she should be disciplined, but asserts that removal is an extreme and disproportionate result.

CHARGE I

An analysis of the Respondent's conduct on the morning she was charged with a DWI shows:

(1) She was drinking more remotely from the DWI arrest than other disciplined Judges who were not removed. (See *In the Matter of Maney*, 2011 Ann Rep. 106)

Her alcohol consumption and subsequent driving is potentially mitigated in that she had a reasonable basis to believe she was not under the influence of alcohol at 7:00 a.m. No legally admissible test was ever performed to demonstrate that she was under the influence.

Commission Counsel raises issues regarding the Respondent's candor on the issue of her alcohol use prior to the arrest. As to Respondent's alcohol consumption, the record is confusing, but the record is not as Counsel's Brief represents. The Respondent testified that the history of alcohol consumption as set forth in Exhibit C, an interview by an alcohol counselor well after the arrest inaccurately states that she started drinking at 10:30 or 11:00 p.m. The Respondent testified that this part of the report was inaccurate. (Tr. 350) The Respondent clarified her recollection that she started drinking at 10:00 p.m., and consumed one half of a bottle of wine. (Tr – 445-447)

Her testimony at deposition was that she did not drink after 10:00 p.m. She clarified that based on the refreshing her recollection, she consumed approximately one half bottle of wine between 10:00 p.m. and 11:00 p.m. (Tr – , 255, 445-447)

She testified that Mr. Catalano incorrectly testified as to her alcohol consumption at the trial. She stated that on the day of the arrest they had done an hour by hour analysis of her consumption at the roadside. She did not tell him she had not consumed alcohol, but rather there was no way she was drunk based on her consumption and the timing thereof. (Tr – 448-449)

(2) Her arrest occurred over a one and a half hour period at the roadside. Once taken to the station, she was pleading to make a call to the Court. She was subjected to a hostile roadside situation where:

- The trooper knew she was a Judge
- Made comments about her ability to function as a Judge
- Misled her that if she took a test he would unarrest her
- Gave conflicting testimony about when he learned she was a Judge

(3) Her refusal to take the breathalyzer at the station well over two hours after she first entered the Trooper car while unwise is understandable in the context of the interaction between the Respondent and the Troopers at the roadside and at the station.

The Referee found she was "intoxicated". (Ref Rep. 13) We respectfully disagree with that finding. Moreover, he failed to note that this is an arrest unlike any other Judge who has been before this body in the context of its duration and the conduct of the State Trooper.

Respondent recognizes that the factual resolution of her alcohol consumption is unfavorable to her, but not without basis. In mitigation, it should be noted that the Respondent has complied with all required medical and counseling evaluations. She successfully completed a multi-week outpatient alcohol counseling program. She was found to have a mild alcohol abuse issue. (Exs. A – C, E – H)

CHARGE II

The Referee did not sustain the charge that the Judge used her office to attempt to receive special treatment at the roadside during her 1 ½ hour ordeal in the back seat of the Trooper's car. (Referee Rep. P. 15, Par 51)

We are puzzled by his finding that she was attempting to advance her private interest at the Trooper's station when she told Lt. Lupo "please don't do this", because "I have arraignments", and "I have court right now". (Ref Rep. P.)

It is an undisputed fact that Respondent had arraignments at 9:30 a.m. The Referee is silent as to the relevance of that fact in the context of her conduct.

There is no dispute that she asked to call the Court once in the Trooper Station. She articulated the above words as part of her effort to call Rochester City Court to advise that she - - the Judge – would not be present to do arraignments.

With all due respect to Commission Counsel and the Referee, just stating she had an important urgent appointment would likely have not achieved the desired result is an unrealistic expectation, particularly in the context of her one and one-half hour interrogation in the Trooper car. She testified that she needed her cell phone to obtain the unpublished inside number for City

Court. It was a Saturday and she could not get through the public number. (Tr- 269) The cell was obtained and she called her clerk. (Tr – 269)

In fact, she did say to Trooper Kowalski she was going to work at the commencement of her discussion with him. That comment earned her 1 ½ hours of interrogation, bargaining and outright deceit on the part of the Trooper.

When she did say she needed to call the Court, it obtained the required result. She was eventually permitted to make the call, after she pled and begged to do so.

Also not mentioned in the Referee's report is a recognition that it was her duty to advise the Trooper she was due in Court to engage in her judicial duties. She needed to tell the Court she would not be there. At the point where her arrest had been made, and she was brought to the Trooper barracks, her only personal advancement was to avoid the embarrassment of a courtroom full of people waiting for her without explanation. The system was advanced as a result of her ethical obligation to make sure that a substitute Judge was brought in to hold the Saturday session she could not attend.

CHARGE III

The Respondent candidly admitted she was unaware of the requirement in the conditional discharge that she abstain from alcohol and pled guilty and apologized to the Court.

CHARGE IV

The Respondent candidly acknowledged that she set bail for James Thomas, a former client. Bail was set by Respondent as she would for any other party. She further acknowledges that she could have referred him to another part, and that she made several inappropriate comments with regard to Judge Johnson. This was several weeks into her tenure as a Judge and she has been forthright in acknowledging the appearance issues associated herewith. However,

there is no specific case cited by Commission Counsel which holds that this body has determined that setting bail in this circumstance is the granting of a benefit to a friend or former client. It is utterly unlike cases cited in Commission Counsel's brief, including for example in the *Matter v. Cohen,* 74 N.Y.2d 272 (1989), where the Judge realized economic benefit from judicial actions taken.

Moreover, this body has recognized bail is a judicial judgment call, and "in the absence of the persuasive evidence that the Judge was motivated by bias, or acted with punitive or improper intent..." will not impose its judgment in the place of the Judge. *Matter v. Bauer*, 2004, Pg. 53-55; 3 NY3d 158 (2004) There is no showing that the Respondent conferred an inappropriate benefit on the Defendant in her determination regarding bail.

CHARGE V

Respondent has forthrightly acknowledged that her conduct was inappropriate with regard to what Commission Counsel references in their brief as her most egregious charge, which is in ***Matter of D[redacted] W[redacted]***. The Respondent expressed remorse that her words could somehow be viewed as either endorsing or vindicating Mr. W[redacted]'s conduct toward the victim. She has candidly acknowledged that she believes she should be disciplined for these comments. She simply offers in mitigation that this was not an exchange that she initiated, that a defense attorney made a statement that Respondent reacted to spontaneously by laughing. She should not have laughed. She recognizes that she made matters worse by attempting to explain. She is truly sorry for what she said. However, her comments are nowhere approximate to the words and comments of removed Judges such as in *Matter of Esworthy*, 77 N.Y.2d 280. This was not a

pattern of comments nor did it reflect an underlying bias on the part of the Respondent, who as an Assistant District Attorney prosecuted sexual abuse cases.

In **People v. T[redacted] Y[redacted]**, Respondent acknowledged that her comments were on the record in that they were recorded, but not intended to be on the record, and were part of an off the record exchange with a Court Officer charged with bringing the defendant into Court. The comments were uttered in a setting where the defendant was acting out in the lock up, and the Court officer so advised the Respondent. The Respondent acknowledged that her comments on the record were inappropriate. It should be noted again that her comments were uttered 27 days into her Judgeship, and she clearly was making the transition from advocate to jurist.

In **People v. X[redacted] V[redacted]**, Respondent is accused of appearing to pre-judge this matter and making inappropriate comments in the context that this was an arraignment. It should be noted, as we noted in our initial brief, that she gave a lecture to this young man at arraignment but concluded it by conditioning her words to recognize that he had not been proven guilty and pointing out the words were applicable only if he did the crime for which he was accused. The Respondent did testify at the hearing that she was trying to give the young man a "scared straight" lecture given the fact that she knew that he would go into a diversion program. In any event, she did testify that in the total context of her comments that they were inappropriate.

In **People v. D[redacted] Y[redacted]**, the respondent gave a lecture to the defendant who had plead guilty to disorderly conduct, he was blocking traffic while walking in the roadway. The Respondent testified that this was a common problem in the neighborhood that she lives in. In this case, she was pointing out to Mr. Y[redacted] the risks associated with his conduct and the fact that many people including herself are frustrated by that conduct. She did acknowledge in her

testimony indicating as a Judge she would run him over if it wasn't illegal was probably not an ideal expression.

CHARGE VI

The Respondent while under a conditional discharge took a vacation and travelled to Thailand.

There was no provision in the conditional discharge that required her to obtain permission to take this trip. The claim is that by virtue of taking the trip, she impeded the ability of the Court and/or Probation Department to perform a laboratory test to ascertain whether she had been consuming alcohol.

The record clearly indicates that she communicated with her attorney, and that she advised him that the best method of reaching her would be email and not telephone. She did this on May 7, 2017. (Tr. 309) The record further indicates that her attorney utilized telephone and not email to attempt to reach her on or around May 15, 2017. (Ex. 51, p. 8) When he did use email, they exchanged emails, and he advised her of the warrant and she promptly made arrangement to be back in Rochester to clear the matter up. (Ex. 51, p. 8)

In any event, once Judge Aronson learned that she was out of the Country, he ordered a laboratory test. There was a delay of approximately 12 days in communicating that order to the respondent because the Respondent was out of the Country, and therefore, not able to receive any mail notice, and because her attorney attempted her to reach her by telephone. When her attorney ultimately, on or about May 27th, utilized email to reach her, she responded immediately. (Ex. 5, P. 8, Tr – 309)

That set off a cascade of events in which she sought an adjournment of a Court appearance at the end of May. The adjournment was denied, and a warrant was issued. The

Respondent returned to the United States on Sunday, June 4, 2017. She presented at the Courthouse the next day, June 5, 2017, for the dual purpose of surrendering herself for an appearance at a meeting with the administrative Judge which was scheduled at the Monroe County Courthouse. When she arrived at the Courthouse at 8:30 a.m., she went directly to the administrative judge's chambers. The police presented there for the purpose of arresting her on the warrant. The police allowed her to meet with the administrative judge before arresting her. She was then arrested, arraigned and incarcerated without bail.

She was ultimately found in violation of the conditional discharge after having been remanded to jail without bail. As noted in our earlier brief, the violation of the condition discharge was found by Judge Aronson to be "inferential". She was sentenced to sixty days in jail.

The respondent acknowledged that in retrospect she would have handled the circumstances of her trip in a different manner. It is respectfully asserted that the response to this circumstance by the system may have been disproportionate to the violation.

SUMMARY

Commission Counsel's application to this body for the removal of Judge Astacio from office is disproportionate and unfair. This Commission has a tradition, a jurisprudence that looks beyond the facial claims or violations when determining the punishment of a Judge. We ask that the Commission follow that path in evaluating Judge Astacio's conduct and arriving at a punishment. To paraphrase a former member of this body, removal from the bench will be the equivalent of a career death sentence for a young woman still in the early part of her legal career.

First and foremost, Judge Astacio has acknowledged that she has made mistakes - - some as a result of her DWI conviction and sentence. Other mistakes occurred while she was on the bench as a new and inexperienced Judge. It is noteworthy that the Referee, while finding against her on certain key issues, did not label her as untruthful or lacking candor and in fact credited her for acknowledging certain of her missteps.

As to the DWI, she testified before the Referee specifically as to when she last consumed alcohol the night before her arrest. While there are conflicting representations in the record attributable to her attorney, she testified with clarity on the record at her hearing that she consumed ½ a bottle of wine at 11:00 p.m. prior to her 8:00 a.m. arrest the following day. While it was reasonable for her to believe she was not under the influence of alcohol when driving when she commenced driving to her work out class between 7:00 and 8:00 a.m., we understand that there is a factual basis for the Referee's finding.

The Referee makes a broad statement in his report that he does not find police misconduct. He offers no useful comment regarding the 1 and ½ hour arrest. The record demonstrates that the police conduct exacerbated Judge Astacio's situation. Judge Astacio's one hour and thirty minutes apprehension in the back seat of the Trooper's car coupled with the stress of knowing she had to be in Court at the conclusion of that one and a half hour, was not adequately addressed by the Referee. Nor did the Trooper Kowalski ever fully explain the duration of the one hour thirty minute apprehension. Judge Astacio clearly testified it was a continued interrogation by the Trooper.

At the time Judge Astacio arrived at the Trooper's barracks at 9:30 a.m., the very time she was due to take the bench in downtown Rochester, she was unable to contact the Court to tell

the staff and the courtroom of attorneys and defendants that she could not be there. After begging and pleading, sometime later she was allowed to make the call to the Court.

The Referee correctly concludes that she did not brandish her office or use it during her one and a half hours on the road for any reason, including seeking a "break" from Trooper. The Referee finds she was compliant with the Rules and restrained in that regard.

At the station, the Referee simply fails to credit that:

(1) The Respondent asked to call City Court because it was her duty to do so. She was already under arrest.

(2) Lt. Lupo emailed his superior and wrote in his notes that she was asking to call City Court. (Ex. 83)

(3) That the Troopers ultimately allowed her to contact City Court.

(4) At 10:00 a.m., Lupo wrote an email to his superior that she was cooperative. (Ex. 84)

(5) Nowhere in Lupo's email or his contemporaneous notes does Lupo state that she was verbally abusive or asking for special treatment. (Exs. 83, 84)

In the context of the above, the Referee's finding that she was asking for favoritism and that should have only said that she had an important appointment and not identify that she needed to call the Court is, respectfully, absurd. It was her duty to be in City Court and/or notify the Court of her absence. She was already under arrest. She needed her cell phone to get the inside number to call Court personnel as it was a Saturday and the public number would not permit it. With that conclusion, it is clear from the record that her statements advising the Troopers that she wouldn't do to them what they were doing to her (preventing her from doing her duty) and that she had Court were fair and reasonable statements in the context of the situation.

As to Charge III, Judge Astacio acknowledged she misread the conditional discharge and did not understand that she could not drink alcohol. In open Court in front of the media, she acknowledged her transgression and apologized to the Court. That act demonstrates candor and a respect for the Rules.

With regard to Charge IV, 20 days into her Judgeship, she arraigned James Thomas, a former client. She acknowledged that there was an appearance issue in her testimony, however, he received the same bail credit any defendant could receive. (Tr. 282) With regard to Charge V, T[redacted] L[redacted], her off the record conversation was recorded 27 days into her Judgeship. She acknowledged that her choice of words was disrespectful and inappropriate. (Tr. 284) Because Ms. L[redacted]'s conduct while in the jail cell was of concern to the officers, she was seeking to avoid a situation that could have accelerated. (Tr. 284)

In Matter of V[redacted], she did acknowledge his presumption of innocence as a part of her lecture. D[redacted] Y[redacted] was dangerously blocking traffic - - her lecture to him was designed to get his attention. She acknowledges that her spontaneous laughter and subsequent attempts to explain were wrong in D[redacted] W[redacted] and that she should be disciplined for that laps of control and her awkward comments.

With regard to Charge VI, as noted above, the Respondent did go on a vacation while under a conditional discharge. There certainly were delays in communicating with her. Respondent has made it clear that she would have handled this situation in a different manner, however, to be sentenced for and serve 60 days in jail based on an inferential violation of a conditional discharge may well have been punishment enough, and certainly, loss of public office and a lifetime ban from seeking a judgeship is hardly a fair remedy.

The cases cited by Commission Counsel in support of the Respondent's removal from office find conduct far more severe than Respondent's. *Matter of Esworthy* is cited by Commission Counsel. 77 N.Y.2d 280. Judge Esworthy was found both by the Commission and the Court of Appeals as being intemperate to attorneys and parties, presumed unproven allegations to be true frequently, on two occasions used racially charged language, in case after case neglected to inform litigants and inform them of their constitutional rights including counsel, pressuring parties to make damning admissions, and incarcerating an individual solely based on his receipt of a letter.

In *Matter v. Quinn*, 54 NY2d 386 (1981), the Judge was removed from office based on an initial admonition by the Commission when he had been found to sleep at the wheel and driving in the wrong direction twice. After that admonition, he was found to be out in public inebriated two times, drove while significantly under the influence of alcohol so that he passed out in the car while running, he refused to give his I.D., insulted a police officer, told the police officer "do you know who I am", urinated on the police car, at the station pulled out his check book and asked "what do I have to do to straighten this out", told the arresting police officers, "let's get this straight right now, my name is not Mr. Quinn, it is Judge Quinn", was belligerent and uncooperative in taking a breathalyzer test which was found to be .19 and threatened the arresting police officer with retribution.

In *Matter of VonderHeide*, 72 NY2nd 658 (1988), the removed Judge was found to routinely seek out and interview witnesses outside of Court and make judgments based on their unsworn statements, berated a teenage boy for violating the open container ordinance, threatened him that he never wanted to come to his Court, arraigned and accepted a guilty plea from a complaining witnesses with no formal charge or notice ever having been given, did not

disqualify himself in two criminal cases, even though he was a witness in those cases, and conditioned a plea agreement for a defendant upon that defendant giving a statement against a third party.

In the *Matter of Reeves*, 63 NY2d 105 (1984), Judge Reeves had a long accumulated failure to follow rudimentary rules with regard to basic issues such as notifying litigants of their rights, assigning counsel and the like.

In case after case cited by Commission Counsel, the litany of violations associated with Judge's removed, far outstretch the claims against Judge Astacio.

In the *Matter v. Hedges*, 20 NY3d 677 (2013), the Respondent who had already resigned, was found to have abused a child prior to assuming judicial office.

In the *Matter v. Aldrich*, the offending Judge initiated profanity and racist comments in Court, berated the County Executive of his County publicly and by telephone, in open court threatened to order a defendant to get a hair cut, brandished a hunting knife to a prison guard and made racist comments to the guard and arrived at various proceedings intoxicated. 58 NY2d 279

In the *Matter of Bauer*, 3 NY3d 158, the Respondent violated defendants rights in a overwhelming number of cases, coupled with a pattern of inappropriate comments.

In no instance while on the bench or in the office, did she do any act or take any steps to advance her own status and well being. There is no indication that her conduct was corrupt or venal.

Certainly, as a new Judge, she engaged in commentary in certain instances that was sub optimal and less than judicial. She has full and candidly acknowledged this.

The issues surrounding her arrest for DWI are much more murky and less clear than the many cases cited by Commission Counsel. We remind the Commission that her roadside

apprehension was one hour and a half long. We further remind that the Commission that she was attempting to convince the police to allow her to call City Court when she arrived at the police station so that she could advise City Court that she would be unable to appear so that a substitute Judge could be engaged. Moreover, we would remind the Commission that the New York State Police were inaccurate in their testimony, acknowledged that they misrepresented to her that they were contemplating un-arresting her, and twice during the arrest process were downright verbally abusive and mocking. We would also point out that Judge Astacio apologized to the arresting police officer for her language when she departed from the station, and that she testified at the hearing likewise that she understood and knew that her language was inappropriate.

While Commission Counsel is appalled that the issue of whether or not she was under the influence of alcohol was placed before the Referee, and now this Commission, we do so in the context of the events surrounding the arrest and her treatment by the State Police.

By virtue of her prior trial, and comments authored by third parties in her medical records, there is some ambiguity about the amount of alcohol that Judge Astacio consumed and when she consumed it the evening before the arrest. She testified with clarity to the hearing officer, that her alcohol consumption was one-half bottle of wine at or before 11:00 p.m. the night before.

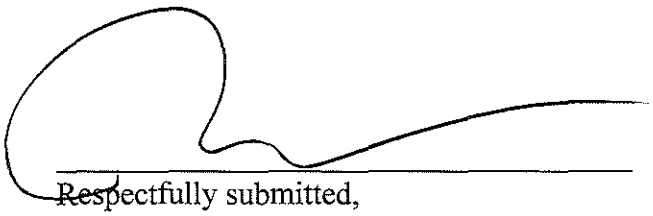
Based on all of the foregoing, we respectfully assert that the judicious and proportional outcome in this case should be censure. We recognize there are aspects of this case that are indefensible, and we have acknowledged that discipline should occur.

Judge Astacio is a self made person - - as a college graduate, law school graduate, attorney and Judge. She was not the beneficiary of a gilded path to her Judgeship. A beneficiary of Jacksonian democracy, she was elected to City Court because she was representative of her

community, with clear ties to the community she grew up in. She was not allowed much latitude from the beginning - - two complaints came forward in her first 30 days as a Judge.

She certainly has made mistakes. But she did not achieve success by allowing herself to be pushed around. Her response to the State Troopers must be put in context. Her cooperation and candor to this body should be recognized. She should be given the opportunity to continue her judicial career.

Dated: April 9, 2018



Respectfully submitted,

Robert F. Julian, Esq.
Attorney for Respondent
2037 Genesee Street
Utica, NY 13501
(315) 797