

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

MICHAEL H. PLASS,

a Justice of the Hyde Park Town Court,
Dutchess County.

**RESPONDENT'S
POST-HEARING REPLY MEMO**

Respondent, Hon. Michael H. Plass, by his attorneys, Leventhal, Mullaney & Blinkoff LLP, respectfully submits this Post-Hearing Reply Memo to assist the Hearing Officer in making findings of fact and conclusions of law, and in identifying mitigating circumstances.

I.

**THE RECUSALS BY JUSTICE PLASS ARE PRESUMED PROPER
FOR THE PURPOSES OF THIS INVESTIGATION BY THE
STATE COMMISSION ON JUDICIAL CONDUCT**

In their post-hearing memo, the Commission's counsel misleadingly claims that Advisory Opinion 23-158 issued by the Advisory Committee on Judicial Ethics "disqualified" Justice Plass from presiding in criminal cases, cases involving allegations of domestic violence and traffic violations, and cases involving alleged drug dealers. The Advisory Committee has no authority to disqualify a judge, and Opinion 23-158 was just that... advice.

The authority of the Advisory Committee is limited to the issuance of confidential advisory opinions to judges or justices upon their request. Judiciary Law § 212(2)(I) provides, in pertinent part, that the Chief Administrator of the Courts shall:

Establish a panel which shall issue advisory opinions to judges and justices of the unified court system upon the request of any one judge or justice, concerning one or more issues related to ethical conduct or proper execution of judicial duties or possible conflicts between private interests and official duties.

(i) The panel shall have no executive, administrative or appointive duties except as provided otherwise in this paragraph or in rules and regulations adopted to implement this paragraph....

(ii) The panel shall issue a written advisory opinion to the judge or justice making the request based upon the particular facts and circumstances of the case, which shall be detailed in the request and in any additional material supplied by the judge or justice at the instance of the panel....

(iii) Notwithstanding any other provisions of law, requests for advisory opinions, advisory opinions issued by the panel to an individual judge or justice of the unified court system, and the facts and circumstances upon which they are based, shall be and remain confidential between the panel and the individual judge or justice making the request....

Most importantly, Judiciary Law § 212(2)(I) further provides that:

(iv) Actions of any judge or justice of the uniform court system taken in accordance with findings or recommendations contained in an advisory opinion issued by the panel shall be presumed proper for the purposes of any subsequent investigation by the state commission on judicial conduct.

(Emphasis added). Accordingly, the recusals by Justice Plass made in accordance with Advisory Opinion 23-158 are presumed proper for the purposes of this investigation by the State Commission on Judicial Conduct. All testimonial and documentary evidence of the allocation of judicial duties between Justice Plass and Justice McArthur should be disregarded.

The remaining allegations asserted against Justice Plass are that his campaign flyer violated the Rules of Judicial Conduct – an allegation that Justice Plass has readily and consistently admitted, and the allegation, raised for the first time in the cross examination of Justice Plass on the final day of the hearing, that he acted improperly in clearing a backlog of pleas by mail. However, Justice Plass has not been charged with any violation of the Rules of Judicial Conduct arising from his handling of the pleas by mail and, therefore, that allegation should be disregarded. In In re Gelfand, 70 N.Y.2d 211, 216 (1987), the Court of Appeals held, in pertinent part, that:

While the Referee may have allowed relevant evidence of events predating the alleged misconduct in order to clarify or to provide background for the formal charges, the complaint did not charge petitioner with misconduct prior to August 1985. Accordingly, it was unnecessary and indeed improper for the Commission to include in its determination extensive findings of fact and legal conclusions based on uncharged incidents – often of a sensational nature – which preceded the dates covered by the complaint or to consider such conduct in its determination of sanction. Indeed, the Commission’s responsibility to safeguard the public’s trust in the judiciary by both shielding innocent judges from unjust charges and exposing and disciplining those who have abused their office is not fulfilled where uncharged conduct forms the basis of its published determination. Due process requires that petitioner not be deprived in this proceeding of his interest in continuing as a judge because of the uncharged misdeeds. Because of our power to review the facts in cases involving judicial misconduct however, a new hearing is unnecessary....

(Internal citations omitted).

Furthermore, no complaint was made, and no evidence was presented, that Justice Plass demonstrated bias in his processing of the pleas by mail.

This investigation is, and should be, about a single campaign ethics violation only. It is not about the protected recusals that Justice Plass made in accordance with Advisory Opinion 23-158, nor is it about the uncharged processing of pleas by mail in August 2024.

II.

JUSTICE PLASS HAS REPEATEDLY EXPRESSED REMORSE FOR HIS IMPROPER CAMPAIGN FLYER

Justice Plass has repeatedly expressed remorse, as demonstrated by his testimony at the hearing:

A. I've learned the error of my ways and how a Judge is supposed to act. If I had this to do over again, Mr. Arnone, I would never write that.

Q. Why wouldn't you write it?

A. Because it's not allowed. You've showed that you're not capable – you wait, that's – I misspoke – It could give the appearance that I'm not capable of being fair to Judge you.

(Tr. 3/25/25, p. 98, ln. 6 – 12).

A. First and foremost, I must take the time to express how upset I am with myself and how truly sorry I am for making this mistake. As we all know, ignorance is no defense.

(Tr. 3/25/25, p. 125, ln. 9-1).

At the preliminary hearing conducted on April 3, 3034, Justice Plass stated that:

A. Could I have done it better? Yes. Did I make a mistake? 100 percent. I never thought that someone would think by these things that I am a horrible person and am biased against every person that's on here. That was not my intention. However, I do realize that, you know, there are some people that probably would question and look at it. And one person is probably too many, according the rules of the Judicial system. I do get it. I understand. I mean, I can't take them back.

(Tr. 3/25/25, p. 62, ln. 18-25).

Q. And you recognize the pledge was inconsistent with your Judicial obligation, even as a candidate, of impartiality?

A. Yeah. Again, that's one of those – that's one of those things that was a little confusing to me. But yes. I do understand what the rules are now. And clearly, it's a mistake that – like I said, I turned myself in for this card. I clearly knew that after listening to – I think her name was Laura something – I clearly knew that I had made an error in judgment and a mistake. I mean, I used the word "pledge". That's the dumbest thing to write out of the whole card. Right? So that's clear it's a bad mistake. And I'm sorry.

(Tr. 3/25/25, p. 67, ln. 11- 23).

Commission counsel misleadingly claims that Justice Plass thinks that he alone is subject to a different set of rules. This argument distorts the meaning of the testimony by Justice Plass that town and village justices, alone among all judges, are not required to take a campaign ethics training program upon announcing their candidacy and, that as a non-lawyer and first-time candidate for judicial office, he did not know that judicial candidates are subject to different rules than the candidates for other offices.

III. CASELOADS ARE DISTINCT FROM WORKLOADS

Justice McArthur herself testified that her workload has increased by only 20 to 30 percent during the tenure of Justice Plass. She reported fewer hours to the New York State Pension System during his tenure than she did during the tenure of his predecessor.

The testimony of Justice McArthur made clear that her concerns were about her on-call duties, not about her caseload:

Q. ... What effect, if any, has Judge Plass' disqualification [sic] had on the operation of the Court?¹

A. Well, in the beginning it was a little tough until we kind of, you know, combined, like I said, the traffic into one court. And you know, eventually, he took over civil and the – that helped. But initially it was tough with me doing everything, you know. So you know, like I said, there's – as far as for anything being missed or – I believe the court is living up to its obligations. I mean, I put in the extra time to do it, and I know he does what he can within his realm of what he's allowed to do. So it works, but it has its moments, especially on-call is really, really my sticking point of – you know.

Q. And Judge what effect, if any, has this had on you personally?

A. Well, like I said, it's difficult for me to get away or, you know, make any real plans to do anything because, you know, if I'm somewhere or to dinner or want to go away, if I get a call and no one responds to cover, you know, its difficult, especially if you're getting a call for an order of protection. Someone needs to respond to that.

...

Q. Judge, are you happy with how the workload is divided at the courthouse at the moment?

A. The main thing I'm unhappy about is the on-call stuff. But no, if you're asking me if it's divided fairly no, obviously, it's not. But like I said, again, I'll go back to the sticking

¹ The question erroneously characterized Judge Plass as "disqualified". Rather, he has recused himself based on the advice of the Advisory Committee on Judicial Ethics.

point of being on call and, you know, not being able to participate in some family things occasionally. I just have to say no.

(Tr. 3/24/25, p. 50, ln. 17-p, 51, ln. 25).

After-hour arraignments have declined dramatically since the enactment of bail reform, and now are few in number. Coverage by judges of neighboring jurisdictions is available upon request. Justice McArthur delegated the task of requesting coverage to the court clerk. Requests for coverage were made twice in 2024. On one of those occasions, Justice McArthur obtained coverage. On the other of the two occasions, the judge that was contacted on her behalf was unavailable. Former court clerk Sarah Jensen testified as follows:

Q. And did it ever come to pass, while you were clerking for Judge McArthur, that a request was made for another Judge to cover for her?

A. Yes.

Q. How did that occur?

A. She wanted to possibly go on a short weekend vacation or something. She would ask me to email her surrounding towns to see if they would cover after hours.

Q. So the request was made by you through email?

A. Yes.

Q. And how often –

A. On behalf of her, yes.

Q. Sure. How often did that occur?

A. Probably twice this year. Or I'm sorry, 2024, probably twice. Yeah.

Q. And what occurred? What, if any, response did you get from those emails?

A. The first request we had a judge from – I don't know if it was Rhinebeck or Red Hook, which are adjoining towns, and he agreed. He gave us his availability, too. And we made sure that the police agencies were aware of who to call and, you know, what hours. And the second request, I believe they just weren't available.

Q. Did they respond and tell you they weren't available?

A. Yes.

Q. Okay. So you actually – each time you sent out –

A. Yes.

Q. – an email on behalf of Judge McArthur requesting coverage, you got a response?

A. Yes.

Q. And one of the two times someone was available to cover for her?

A. Yes.

Q. And the other, no one was available, but they responded?

A. Yes. And let me – there may have – one of those time may have been a phone call request rather than an email. We were very close with the Judges surrounding our towns. They often helped out, you know, even prior to this. So one of those, I recall a conversation on the telephone with Judge Triebwasser. So an email –

Q. Was that a call between Judge Triebwasser and You?

A. Yes.

Q. Okay. And you placed that call?

A. Yes.

Contrary to the claim of commission counsel, former court clerk Sarah Jensen is not a “disgruntled” former employee. Rather, she testified that her relationship with Justice McArthur remained civil after the Justice told her of a request by Human Resources that she alter a time sheet to qualify for “flex time”, and that Justice McArthur was supportive of her new employment opportunity – a transfer from the town court to the town police department located in the same building.

Ms. Jensen testified credibly and in detail about the time that it typically takes to perform the various judicial duties of the court. The testimony of current clerk Pamela Lucia was consistent with Ms. Jensen’s testimony.

Commission counsel erroneously argues that Justice Plass is not remorseful for Justice McArthur’s increased workload. Rather, Justice Plass testified that he “felt bad” that she had to handle all matters during the month of January 2024, that he has since tried to help all that he can (for example, by handling all administrative duties and assisting defendants and other members of the public as they arrive for court sessions). As both judges acknowledged, Justice McArthur’s workload eased after Justice Plass assumed his judicial duties following the first month of his term, and the traffic and criminal calendars were combined. (See Point V, Tr. 3/25/25, p. 65, ln. 16 – p. 66, ln. 22). Both judges testified that the workload of Justice McArthur has not increased as significantly as commission counsel argues. Justice McArthur quantified the increase in her workload as 25 to 30 percent. (Tr. 3/24/25, p. 55, ln. 18-p, 56, ln. 17).

IV.
INCONSISTENCIES IN THE TESTIMONY
OF JUSTICE McARTHUR

Noting inconsistencies in Justice McArthur’s testimony is not an attack on her character or integrity. Rather, it is a necessary part of the fact-finding process.

Justice McArthur told the Deputy Administrator of the Commission’s New York office, Mark Levine, that her workload had doubled since Judge Plass took office, but admitted on cross examination that it had not. She testified that her work load had increased by only 25 to 30 percent. In reports submitted to the New York State Pension System, Justice McArthur reported that she worked *fewer* hours during the tenure of Justice Plass than she reported in the years that she worked with his predecessor, Justice Petito. On direct examination, Justice McArthur testified that she stopped reporting her hours when she reached the “threshold” for pension eligibility. However, on cross examination, Justice McArthur abandoned that explanation, and claimed, implausibly, that she just didn’t record some of her time, i.e., time that would have been used to determine the amount of her pension.

V.
REPLY TO PROPOSED FINDINGS OF FACT

To the extent commission counsel characterizes, paraphrases or selectively quotes the opinion of the Advisory Committee on Judicial Ethics, AO 23-159, the opinion speaks for itself.

Counsel’s claim as to what Justice Plass “questioned and implicitly blamed” in his request for consideration, and counsel’s characterization of Justice Plass as “lamenting” the recusals recommended by the Advisory Committee (Commission counsel, proposed findings of fact, par. 13), is argument and should not be adopted as a finding of fact. Similarly, counsel’s characterization that, in his testimony, Justice Plass “attempted to justify his choice of words”, and counsel’s characterization of his own cross examination questions as “pressing the issue of impartiality” (Commission counsel, proposed findings of fact, par. 29) is argument rather than objective fact.

Commission counsel misleadingly states that Justice Plass conceded that he is not a NYSLRS member, implying that he lacked personal knowledge about the pension system. (Commission counsel, proposed findings of fact, par. 36). But counsel neglects to add that Justice Plass is the recipient of a police pension and thus familiar with the mechanics of the pension system:

Q. Do you know the threshold requirement?

A. There is no threshold requirement. That’s not a thing.

Q. And do you know whether the reports to the pension system are only for the purpose of meeting a threshold?

A. No. there is no threshold.

Q. Okay.

A. The pension reports are for you to obtain credit. Now, I can speak on that on first hand. I just received my first pension check from being a retired police officer. In 19 years of work, I accrued seven service credits....

...

Q. Right. Now, you said that you need a certain number of hours to reach one pension credit; is that right?

A. Correct.

Q. And if you get more pension credits, you get a higher pension; is that right”

A. Correct.

Q. And if you get more pension credits, you get a higher pension; is that right?

A. Correct.

Q. So the more hours you report, the –

A. The higher your pension.

(Tr. 3/25/25, p. 65, ln. 16 – p. 66, ln. 22).

Commission counsel points to a single answer given by Justice Plass, taken out of context, to support a claim that he is not remorseful. The referenced testimony was not about remorse for the pledges made in his campaign flyer, for which Justice Plass has repeatedly expressed remorse. Rather, the testimony was about the allocation of work between himself and Justice McArthur. Following is a more complete excerpt of the testimony, placing the answer in context:

Q. So I'll ask you again: Did you write the letter [i.e., the January 15, 2024 letter requesting reconsideration by the Advisory Committee on Judicial Ethics] because of the strain that was placed on Judge McArthur?

A. Well, by my own writing, I guess I felt bad that she had to come in all the time and I couldn't help. So I did think that was bad for her. If you ask me now, after a year and three months of working there and distributing the duties equitably, in my opinion, it's not a strain on Judge McArthur. But at this time, when I wrote this letter, in January, I wasn't even on the bench. She was handling everything. And the worst part, in my opinion, was that she had to do on-call arraignments. So at the time when I wrote this letter, I probably was remorseful. Even though I was angry at her, I still felt that it wasn't fair to her.

Q. You're not remorseful anymore?

A. No. We get along. We talk and we bought each other Christmas presents, Valentine's Day gifts. We've actually have [sic] started to repair the problems that happened.

(Tr. 3/25/25, p. 132, ln. 15 – p. 133, ln. 4).

This testimony by Justice Plass was consistent with the testimony of Justice McArthur, who stated that her workload eased after Justice Plass assumed his judicial duties following the first month of his term, and after the traffic and criminal calendars were combined. (See Point III above, Tr. 3/24/25, p. 50, ln. 17-p, 51, ln. 25).

A fair reading in context of the answer given by Justice Plass, indicates that he did not deviate from his often-expressed remorse for the pledges made in his campaign flyer.

VI. **REPLY TO PROPOSED CONCLUSIONS OF LAW**

Justice Plass has consistently admitted, with regret, that in a campaign flyer distributed only once, he made improper pledges while seeking judicial office. However, there is no dispute that as a non-lawyer and first-time judicial candidate, he was unaware of the prohibition against pledges and promises. Upon learning of the prohibition, he self-reported and redistributed the flyer without the offending language. Having acted out of ignorance rather than dishonesty or venality, Justice Plass did not fail to uphold the “integrity” of the judiciary (contrary to Commission counsel’s Proposed Conclusions of Law, ¶ 1), nor fail to respect the law (contrary to Commission counsel’s Proposed Conclusions of Law, ¶2).

Further, statements made in one’s own campaign for elective office are not “political activities” as that phrase has been interpreted by the courts. Justice Plass engaged in a campaign activity as distinguished from a political activity (contrary to Commission counsel’s Proposed Conclusions of Law, ¶3). See, In re Raab, 100 N.Y.2d 305, 317, fn. 2 (2003) (District Court judge took part in a Working Families Party phone bank and attended a candidate screening meeting):

A judge or candidate for elective judicial office shall refrain from inappropriate political activity" (22 NYCRR 100.5). The remaining provisions in the section more particularly describe the prohibited conduct, as follows:

“Neither a sitting judge nor a candidate for public election to judicial office shall directly or indirectly engage in any political activity except (i) as otherwise authorized by this section or by law, (ii) to vote and to identify himself or herself as a member of a political party, and (iii) on behalf of measures to improve the law, the legal system or the administration of justice. Prohibited political activity shall include: * * *

"(c) engaging in any partisan political activity, provided that nothing in this section shall prohibit a judge or candidate from participating in his or her own campaign for elective judicial office or shall restrict a non-judge holder of public office in the exercise of the functions of that office;

"(d) participating in any political campaign for any office or permitting his or her name to be used in connection with any activity of a political organization;

"(e) publicly endorsing or publicly opposing (other than by running against) another candidate for public office;

"(f) making speeches on behalf of a political organization or another candidate;

"(g) attending political gatherings;

"(h) soliciting funds for, paying an assessment to, or making a contribution to a political organization or candidate" (22 NYCRR 100.5 [A] [1] [c], [d], [e], [f], [g], [h]).

See also, In re Maney, 70 N.Y.2d 27, 30 (1987) (Town Justice openly engaged in a long-term struggle for control of the local Democratic Party leadership, actively solicited support for his own faction among party members, and assumed a partisan stance at a party caucus).

Here, Justice Plass did not engage in prohibited political activity.

Dated: Roslyn, New York
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