(No. 74 CC 7.—Respondent reprimanded.)

# *In re* ASSOCIATE JUDGE CHARLES J. DURHAM of the Circuit Court of Cook County, Respondent.

*Order entered December 11, 1974.*

## SYLLABUS

On September 17, 1974, the Judicial Inquiry Board filed a ten paragraph complaint with the Courts Commission, charging the respondent with conduct that is prejudicial to the administration of justice and conduct that brings the judicial office into disrepute. The complaint alleged that in three criminal cases, in which the Gilmartin brothers were defendants, the respondent, having heard no evidence regarding the facts underlying the charges and the prosecutor having made no motion to dismiss the charges, dismissed the charges against the defendants only after the defendants agreed to withdraw a complaint previously filed against the arresting police officers with the internal affairs division of the police department and only after the defendants agreed to execute written releases from civil liability in favor of the arresting police officers.

*Held:* Respondent reprimanded.

William J. Scott, Attorney General, of Springfield, for Judicial Inquiry Board.

R. Eugene Pincham, of Chicago, for respondent.

Before the COURTS COMMISSION: SCHAEFER, J., chairman, and EBERSPACHER, STAMOS, DUNNE and FORBES, JJ., commissioners. ALL CONCUR.

ORDER

At the time of the filing of this Complaint, the respondent, Charles J. Durham, was an associate judge of the circuit court of Cook County. On November 5, 1974, he was elected a judge of the circuit court.

Summarized, the Complaint filed by the Judicial Inquiry Board alleges that in August of 1973, in the cases of James Gilmartin, who was charged with battery in complaints numbered H288953 and H288936, and William Gilmartin, who was charged with disorderly conduct in complaint number H288934, came on for trial before the respondent; that although he heard no testimony in those cases, and although the assistant State's Attorney made no motion to dismiss the charges, the respondent nevertheless on his own motion dismissed those cases by order of court, with leave to reinstate. The Complaint further alleges:

"9. That the respondent dismissed the aforesaid cases pending against James and William Gilmartin only after obtaining:

a. A representation from their attorney that the heretofore mentioned complaint filed by Mrs. Delores Gilmartin with the Internal Affairs Division of the Chicago Police Department would be withdrawn;

b. A representation from their attorney that written releases from civil liability in favor of Officers George Cornish and Reginald Williams had been or would be executed by James Gilmartin and William Gilmartin;

c. Statements, under oath, from James Gilmartin and William Gilmartin that they wished to withdraw the aforementioned complaint against Officers Cornish and Williams and that the aforesaid complaint was unfounded."

The Complaint charges that the respondent's conduct

was prejudicial to the administration of justice and tended to create the appearance of such serious impropriety as to bring the judicial office into disrepute.

The "Response and Answer" filed by the respondent does not deny the allegations of the Complaint, but it alleges that Mrs. Gilmartin and her sons voluntarily dismissed the charges which they had filed with the Internal Affairs Division of the Chicago Police Department. With respect to the absence of any motion by the assistant State's Attorney to dismiss the criminal charges against the Gilmartins, the respondent asserts that the assistant State's Attorney was prohibited by his superiors from making such a motion. The respondent emphasizes (1) that no objection to the order of dismissal was made by the State's Attorney, (2) that no motion to vacate the order of dismissal was made, (3) that there was no effort to reinstate the charges, and (4) that no appeal was taken from the order of dismissal. He also emphasizes that each of the Gilmartins testified before the respondent, under oath, without objection, that they wished to withdraw their complaint against the arresting officers and that their charges against those officers were unfounded.

Finally, the respondent asserts that his ruling was a judicial one made in good faith and that such a ruling cannot constitute a basis for disciplinary action against him. The only remedy in such a situation, he states, is by way of appeal, and ultimately, if the judge is incompetent, with the electorate by a determination not to retain him as a judge. The respondent also states that the conduct with which he is charged has been engaged in by members of the judiciary and the bar over many years prior to the trial of the case here involved. He asserts, "the bench and bar have repeatedly, over the years, engaged in conduct and entered dismissal orders of which the complaint is here made against the

respondent." The transcript of an allegedly typical case which occurred before another judge in 1972 is attached to the "Response and Answer" by way of illustration.

As has been stated, the essential facts are not disputed. With respect to the authority of an assistant State's Attorney to consent to the dismissal of a criminal charge based upon an agreement of the defendant to dismiss a civil charge, the parties have agreed that the following instruction was transmitted to all assistant State's Attorneys by the chief of the criminal division of the office of the State's Attorney of Cook County on February 26, 1973.

> "An Assistant State's Attorney is not permitted to condition his official action in a criminal case as contingent upon the action of any person in a civil proceeding (eg. a nolle in return for a release of a civil liability). Your official action must be based only upon the merits [of] the criminal case before you. To do otherwise could violate Chapter 38, Section 32—1, Illinois Revised Statutes (Compounding a Crime) and would be of doubtful validity."

We express no opinion as to the significance of the distinction which was sought to be drawn in this memorandum between the "official action" of an assistant State's Attorney and his "unofficial" conduct. Nor do we express any opinion as to the conclusion expressed in the memorandum.

The record before the Commission includes a transcript of the proceedings which took place before the respondent on August 14, 1973, when the complaints against the Gilmartins were dismissed. Those proceedings opened with the statement of the respondent:

> "The Court: Well, I'm not going to drop charges against them until charges against the policemen are dropped, and nothing pending * * *."

From this remark and from the transcript of the proceedings before the respondent, we find that the allegation of the Complaint that the dismissal of the charges against the Gilmartins was conditioned "solely upon their agreement to withdraw their complaint against the arresting officers and to execute releases in favor of the arresting officers" is proved. The procedure thus disclosed gives rise to suspicion of judicial pressure, either upon the defendants to induce them to withdraw their civil complaint or upon the officers to induce them to withdraw the criminal charge. See, *MacDonald v. Musick* (9th Cir. 1970), 425 F.2d 373; *Dixon v. District of Columbia* (D.C. Cir. 1968), 394 F.2d 966; *Boyd v. Adams* (N.D. Ill. 1973), 364 F. Supp. 1180; *Leonard v. Los Angeles* (1973), 31 Cal. App. 3d 473, 107 Cal. Rptr. 378.

The Commission further finds that the conduct charged in the Complaint—and any other judicial conduct which conditions the dismissal of a criminal charge upon the action of a defendant with respect to alleged misconduct of police officers or others connected with the prosecution—tends to bring the judiciary into disrepute and merits discipline even though it may have been accepted practice in certain areas of the State.

The Commission is conscious of the fact that the respondent has charged that the bench and the bar have repeatedly, over the years, engaged in conduct and entered dismissal orders in circumstances like those involved in the present case and that they have done so without complaint. He has pointed out that neither he nor any other judge has been put upon notice by any statute or rule of the Supreme Court that the conduct in question is prejudicial to the administration of justice and brings the judicial office into disrepute. The Attorney General, representing the Judicial Inquiry Board, acknowledges that similar conduct has been engaged in by other judges. In view of this fact, the Commission has

concluded that our order in this case determining the impropriety of conduct of this kind should operate prospectively rather than retroactively. This is a mitigating circumstance which has a bearing upon the degree of discipline to be imposed upon the respondent. It is therefore ordered that the respondent is reprimanded.

*Respondent reprimanded.*