

Kholodnytskyi's aquarium case - will the prosecutors' commission haul in "the big fish"?

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In early April, a scandal broke out around Nazar Kholodnytskyi, head of the Specialized Anti-Corruption Prosecutor's Office (SAPO). It was caused by the published recordings of conversations from his office which are proof of alleged abuse and violations on the part of the SAPO chief.

For instance, there is a recording of [Nazar Kholodnytskyi's advising a subject of criminal case on bribing](#) acting Minister of Healthcare Ulana Suprun of what he should withhold from the NABU detectives. Later the criminal case subject appeared to be a top manager of a development company and Kholodnytskyi's friend - which was the reason why Kholodnytskyi disclosed confidential information relevant to the criminal proceeding to him, and warned him about scheduled searches by the NABU detectives.

Now it is the Qualification and Disciplinary Commission of Public Prosecutors (QDCPP) who are to decide whether Kholodnytskyi keeps his post of the SAPO chief or faces dismissal.

The commission consists of eleven members, five of which are prosecutors appointed by all-Ukrainian Prosecutor's Conference; two are scientists nominated by the convention of representatives of law schools (higher educational establishments) and scientific institutions.

One lawyer is appointed by the Lawyer's Convention of Ukraine; three more are nominated by the Ukrainian Parliament Commissioner for Human Rights in agreement with the Verkhovna Rada's Committee on Legislative Support of Law Enforcement.

If there is a misdeed in a prosecutor's actions, QDCPP can make a decision to dismiss or to reprimand him/her. Two reprimands can be grounds for prosecutor's dismissal.

In the case of the Anti-corruption prosecutor - he/she can be dismissed straight away if the Commission decides so. The QDCPP can keep the SAPO chief at his post only if they decide not to recognize the tapes [of audio-recordings from Kholodnytskyi's office](#) as the evidence, or ignore them.

The legal experts of the Anti-corruption Action Centre studied previous decisions of the qualification commission and chose those of most interest among them.

"These decisions clearly illustrate selectivity in the commission's actions concerning calling prosecutors to account. Sometimes the commission overlooks obvious gross violations or even crimes of prosecutors; in other cases it takes into account made-up grounds," - says Andrii Savin, legal expert of the AntAC.

THE ATO PROSECUTOR KULYK WHO IS UNDER ILLICIT ENRICHMENT CHARGES WAS ACQUITTED

In February 2018, the QDCPP decided to close proceeding against Kostiantyn Kulyk, former military prosecutor for the ATO forces, suspected of [illicit](#) acquisition of property worth of over 3 million UAH. Kulyk [did](#) not declare elite flats, vehicles, which became grounds for the NABU's opening criminal proceeding against him for false data in his declaration and illicit enrichment.

Notwithstanding Kulyk's phone talk recordings published by the NABU in which he tried "to clear himself" using his prosecutor friends, the QDCPP acquitted the prosecutor. **Instead of dismissing him, the commission drew a conclusion in which they actually refuted the charges.**

The QDCPP members took into consideration the proofs provided by Kulyk, discarding the ones the detectives collected during the pre-trial investigation.

The commission contented themselves with the results of Kulyk's psychological expertise on an unknown computer polygraph which indicated that he did not accept bribes.

Under these circumstances, when a disciplinary complaint is being considered, the criminal proceeding documents cannot be used, as it is the court that assesses the proofs' appropriateness and admissibility, including the subject of proving.

The arguments of of the disciplinary complaint are refuted with the results of K. H. Kulyk's psychological expertise with the use of the computer polygraph no. 10381/16-61 of July 2, 2016, in which it is indicated that the complex study allows to state that K. H. Kulyk, at the time of serving in the ATO zone did not acquire the money, movable or immovable property using his official status, and did not transfer to the PERSON 4's ownership any money for purchase of a flat and/or a parking lot.

Besides, the arguments of the disciplinary complaint were also refuted by the Pecherskyi District Court of Kyiv on October 27, 2016, in the case 757/50348/1 by which plaintiff's claims by K. H. Kulyk to PERSON 4 were rejected as he demanded to establish the fact of their joint residence as a family unit, to recognise the property being acquired into joint ownership, to recognise his share of ownership to the part of immovable property acquired into joint ownership.

Moreover, the commission ignored the SAPO's arguments concerning Kulyk's civil wife with whom he has three children. However, the QDCPP made exclusively of legal experts could not assess the facts from the legal point of view, instead taking into account the expert scientific and legal conclusion provided by Kulyk.

Besides, the arguments of the disciplinary complaint are also refuted by the Pecherskyi District Court of Kyiv of October 27, 2016, in the case 757/50348/1 by which plaintiff's claims by K. H. Kulyk to PERSON 4 were rejected as he demanded to establish the fact of their joint residence as a family unit, to recognise the property being acquired into joint ownership, to recognise his share of ownership to the part of immovable property acquired into joint ownership.

The relations between K. H. Kulyk and PERSON 4 are not family as stipulated by Article 3 of the Civil Code of Ukraine according to the scientific and legal expert conclusion in the field of law of February 13, 2018 issued on K. H. Kulyk's request.

By taking the decision, the Commission comes to the conclusion that there are no grounds for calling K. H. Kulyk to account on disciplinary charges.

The actual grounds for pressing charges within the disciplinary complaint is committing by him a disciplinary misdeed whose corpus delicti is determined under the disciplinary proceeding.

NOT DISMISSING THE PROSECUTOR WHO WAS CAUGHT ACCEPTING A BRIBE. TWICE

In January of 2018, members of the Qualifications Commission closed the disciplinary proceeding against Yaroslav Hulyi, prosecutor of Dnipro City Prosecutor's Office.

The Commission **had doubts about the materials of covert investigative actions**, which showed prosecutor Hulyi demand a bribe twice – first 5000 USD and then 25000 USD.

The prosecutor demanded money for not pressing criminal charges against people and returning them the confiscated property.

Even despite fact that the QDCPP received photo and video evidence of receiving a bribe, they just decided that these materials prove nothing and allowed the bribe-taking prosecutor keep on working at the prosecutor's office.

According to the evidence by the witness PERSON 3, he confirmed that on 10.11.2017 Ya. O. Hulyi demanded illegal profit from him in the amount of 5,000 USD for non-pressing criminal charges, and then in the end of November 2016, showed his a gesture of 5 fingers, which he perceived as the need to pay illegal profit in the amount of 5,000 USD.

There is a protocol of the covert investigative and searching actions and audio and video control which established the meeting of Ya. O. Hulyi and PERSON 3, where they discussed the matters of the property return. Having returned against a receipt the money to PERSON 3, Ya. O. Hulyi came out to the street and showed him a gesture of 5 fingers saying "What do you mean – to decrease more? How come... We have crashed a half already."

The Qualifications Commission decision on another prosecutor in January of 2018 could not be more different, they considered materials of covert investigative actions and deemed them sufficient.

They considered a video of prosecutor of Izmail Prosecutor's Office I. P. Marakhovskyi demanding a bribe of 10000 USD sufficient proof and dismissed him.

According to the protocol of inspection of the place of events of 08.10.2017, made by the investigator of the Prosecutor General's Office of Ukraine on the premises of Zeitun restaurant right after I. P. Marakhovskyi received the last envelope from PERSON 6, the investigator found I. P. Marakhovskyi, PERSON 5 and PERSON 6 sitting at the same table. Examining the sofas they sat on, he found the money inside two white paper envelopes, one of which contained 10,000 USD, and the other – 30,000 USD.

The circumstances are confirmed:

- *by the copies of declassified protocols of covert investigative (search) actions of 24.10.2017 and 25.10.2017 concerning I. P. Marakhovskyi provided by the SAPO at the Commission member's request.*

PROCEEDING AGAINST THE PROSECUTOR WHO HAD NOT REPORTED BEING OFFERED A BRIBE WAS CLOSED

In December of 2017, the QDCPP closed the proceeding against Andrii Velytskyi, head of department in district Prosecutor's Office of Luhansk Oblast.

While watching a district court judge, the NABU detectives recorded her offering a bribe to Velytskyi for him to pass a certain decision in a criminal proceeding.

By law, the prosecutor should have submitted a written report to his superior, and the latter was supposed to register the criminal proceeding.

However, Velytskyi never reported it, and neither did **the QDCPP punish him for violating the law. They seemed perfectly satisfied with his excuse that he did not want to “spoil relations between the prosecutor’s office and court employees”.**

Also, PERSON-1 informed A.O. Velykotskyi that he/she was approached by some person with the request to apply Article 69 of the Criminal Code of Ukraine to the defendant in order to avoid punishment associated with prison sentence and was offered material remuneration. PERSON-1 did not specify the person who had offered unlawful profit or the actions that had to be made by the prosecutor’s office employees.

He understood that intention of PERSON 1, i.e. making an offer is unlawful, yt he could not openly reject it, as he did not want to spoil relations between the prosecution and court employees.

REPRIMANDED A PROSECUTOR FOR SLAMMING THE DOOR

In March of 2018, the QDCPP reprimanded SAPO prosecutor Andrii Perov for **closing the door noisily** when leaving the court hearing in the case of former MP Mykola Martynenko. On that day the court allowed [Martynenko to freely leave](#) the country.

The journalists revealed in the course of their investigation that the QDCPP member, Viktor Shemchuk has vested interest in punishing prosecutor Perov. They discovered that deputy head of the Commission Shemchuk is associated with Mykola Martynenko.

Several years ago, Shemchuk’s family received 250 thousand EUR from the company, that the notorious MP is beneficiary of. Moreover, as it turned out in the process of hearing the case, Shemchuk is a witness in Martynenko’s case and had been previously interrogated by the NABU detectives.

The conclusion of the Commission is completely based on tales of persons with vested interests, namely the defendant’s lawyer, who had filed the complaint. The judge, however, never brought the matter to the QDCPP, while the court secretary said that she did not hear the door slam.

Article 16 of the Code stipulates that prosecutor in the line of duty must adhere common ethical rules of conduct, be a model of integrity, refinement and culture. Violation of the office discipline, improper conduct are unacceptable for prosecutor and entail liability stipulated by the law.

Articles 17 and 26 of the Code state that prosecutor must respect independence of judges, which includes prohibition of public voicing of doubt concerning legitimacy of court decisions other than procedure measures of their appeal in order stipulated by procedural law. For ensuring fair and objective justice, prosecutor must observe mutual respect in relations with judges and jury, being aware of the importance of their common task to uphold supremacy of law and legality in society.

The QDCPP got no further evidence, yet they found the prosecutor guilty of gross violation of the prosecutors’ ethical code.

These decisions are prime example of the Commission treating materials of covert investigative actions and evidence collected in the course of criminal proceeding in a different way.

This partiality and discriminating approach can be clearly seen when one prosecutor is dismissed due to video evidence of demanding a bribe, while another one is not, and still another gets reprimanded for not closing the door quietly enough.

Therefore, it becomes clear that the QDCPP's logic in treating materials of the covert investigative actions and other evidence is truly incomprehensible.

This logic can come in handy for the Anti-corruption prosecutor, when the Commission decides not to let down one of their own and deems evidence on tapes insufficient.

There is still another possibility – that the QDCPP will not even recognize [audio-recordings](#) from Kholodnytskyi's aquarium as evidence and will not even consider it. This would be the first decision of this kind in the history of the QDCPP, and not a legitimate one.

What is more, the Prosecutor General's public comments about [no](#) crime in Kholodnytskyi's actions can be a signal to the Commission that the SAPO head's fate is now in their hands. As Lutsenko makes it perfectly clear that the Prosecutor General's Office is not taking all the evidence against Kholodnytskyi to court, therefore no matter how the QDCPP members assess the Anti-corruption prosecutor's actions, there will be no legal consequences for them.