STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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In the Matter of the Proceeding
Pursuant to Section 44, subdivision 4,
of the Judiciary Law in Relation to

DETERMINATION

MICHAEL M. FEEDER,

a Justice of the Hudson Falls Village Court,
Washington County.

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THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Nina M. Moore
Honorable Karen K. Peters
Richard A. Stoloff, Esq.

APPEARANCES:

Robert H. Tembeckjian (Jill S. Polk and Charles Farcher, Of Counsel)
for the Commission

Honorable Michael M. Feeder, *pro se*

The respondent, Michael M. Feeder, a Justice of the Hudson Falls Village Court, Washington County, was served with a Formal Written Complaint dated April 23,

2010, containing five charges. The Formal Written Complaint alleged that respondent: (i) accepted a plea from an unrepresented defendant at arraignment and sentenced him to 30 days in jail notwithstanding that the defendant's ability to understand the proceedings was impaired by alcohol (Charge I), and (ii) in four cases, held defendants in summary contempt without complying with procedures required by law (Charges II-V). Respondent filed a verified answer dated June 20, 2010.

By Order dated September 16, 2010, the Commission designated Gregory S. Mills, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on November 12, 2010, in Albany, and the referee filed a report dated September 12, 2011.

The parties submitted briefs with respect to the referee's report and the issue of sanctions. Counsel to the Commission recommended the sanction of removal, and respondent recommended a sanction less than removal. On December 8, 2011, 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 Hudson Falls Village Court, Washington County, since October 1999. From 1998 to 2005 he served as a Justice of the Kingsbury Town Court. His current term expires on March 31, 2012. He is not an attorney.

As to Charge I of the Formal Written Complaint:

2. On August 6, 2007, Donald Hammond was charged with Unnecessary Noise, a violation of Section 138-5 of the Code of the Village of Hudson Falls. Mr. Hammond was issued an appearance ticket directing him to appear in the Hudson Falls Village Court on August 23, 2007.

3. Throughout the day on August 23, 2007, Mr. Hammond consumed at least 24 beers and several "shots" of alcohol. He failed to appear in court as required, and respondent issued a warrant for Mr. Hammond's arrest.

4. At approximately 9:47 PM on August 23, 2007, Mr. Hammond was arrested by the Hudson Falls Police Department. The Incident Report stated that the defendant "appear[ed] to be impaired with alcohol" at the time of his arrest. At 9:57 PM, Patrolman B. D. Kinderman completed a Suicide Screening Report, indicating that Mr. Hammond had a "history of drug and alcohol abuse," a "history of counseling and mental health evaluation/treatment" and a "previous suicide attempt." Mr. Hammond was held in custody overnight.

5. On August 24, 2007, at approximately 7:00 AM, Mr. Hammond was transported by the Hudson Falls Police to the Hudson Falls Village Court to be arraigned by respondent. At the time of the arraignment, respondent was aware of the defendant's extensive criminal history and his history of drug and alcohol abuse.

6. At arraignment, respondent allowed Mr. Hammond to waive his right to counsel, accepted his guilty plea to the charge of Unnecessary Noise and

sentenced him to 30 days in jail.[1]

7. Mr. Hammond was still under the influence of alcohol at the time he waived his right to counsel and entered his plea of guilty.

8. After arraignment, Mr. Hammond was transported to the Washington County Correctional Facility, where an initial Medical and Suicide Screening Report was prepared. The Medical Screening Report indicated that Mr. Hammond had been "drunk last night," had consumed "24 beers/couple shots" and drank "daily." The Suicide Screening Report, completed at 8:37 AM, indicated that Mr. Hammond appeared to be "under the influence of alcohol or drugs" and was exhibiting "signs of withdrawal." The report also noted "DT's starting." (DT's refer to Delirium Tremens, a symptom of severe alcohol withdrawal.) The officer who prepared the report suggested a 15-minute "medical check for DT's."

9. Mr. Hammond had attained an eighth grade education and suffered from learning disabilities causing him difficulties in reading and writing. Prior to accepting Mr. Hammond's guilty plea, respondent did not ascertain or consider Mr. Hammond's educational background and/or his learning disabilities.

10. Prior to accepting Mr. Hammond's guilty plea, respondent did not conduct a searching inquiry, as required by law, to determine whether Mr. Hammond had knowingly and intelligently waived his right to counsel, including his appreciation of

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[1]The arraignments in *Hammond* and *Belair* (Ch. II) were not recorded. These two proceedings predate the statewide Administrative Order of the Chief Administrative, effective June 16, 2008, requiring that town and village justices mechanically record court proceedings.

the value of counsel and the inherent risks of self-representation.

11. Prior to accepting Mr. Hammond's guilty plea, respondent did not ascertain whether Mr. Hammond was under the influence of alcohol or drugs in the hours before his arrest or at the time of his arraignment. At the hearing before the referee, respondent testified that his knowledge of Mr. Hammond's history of alcohol abuse, based upon Mr. Hammond's previous appearances before him, influenced his determination that the defendant was sufficiently sober to understand the proceedings.

12. At the hearing before the referee, respondent also testified that Mr. Hammond "indicated" that he did not want an attorney. Respondent acknowledged that he "did not adequately explain" the importance of the right to counsel and testified that his knowledge of Mr. Hammond's prior criminal history influenced his determination that the defendant had knowingly and intelligently waived the right to counsel.

13. Respondent acknowledges that: (i) he should have ascertained and considered Mr. Hammond's educational background prior to accepting his plea; (ii) he should have conducted a searching inquiry to determine whether Mr. Hammond knowingly and intelligently waived his right to counsel; and (iii) he should have ascertained to what extent Mr. Hammond was under the influence of alcohol or drugs during arraignment to determine his mental capacity and ability to knowingly and intelligently waive the right to counsel or enter a plea.

As to Charge II of the Formal Written Complaint:

14. On August 26, 2007, at approximately 12:00 AM, Joshua Belair was

arrested by the Hudson Falls Police Department and charged with Disorderly Conduct, for allegedly arguing with police officers and yelling obscenities outside of a bar. In the five hours preceding his arrest, Mr. Belair had consumed approximately twelve beers.

15. At approximately 2:30 AM, Mr. Belair was brought before respondent for arraignment. Prior to arraignment, respondent was provided with Mr. Belair's Arrest Report, which stated that Mr. Belair "appears to be impaired with alcohol."

16. During the arraignment, Mr. Belair was disruptive and directed obscenities at the court. Respondent determined that the defendant was refusing to be arraigned and did not complete the arraignment. Respondent summarily held Mr. Belair in contempt of court and sentenced him to 30 days in jail.

17. Respondent prepared a commitment order stating that the defendant "did continue to use obscene language after being told on several occasions not to use that kind of language" and "refus[ed] to be arraigned."

18. Before holding Mr. Belair in contempt and sentencing him to jail, respondent did not ascertain to what extent the defendant was still under the influence of alcohol.

19. Prior to holding Mr. Belair in contempt, respondent failed to warn him that his continued conduct would result in contempt and did not offer him an opportunity to apologize or to make a statement on his own behalf.

20. Mr. Belair was transported to the Washington County Correctional

Facility, where an initial Medical and Suicide Screening Report was prepared and completed at 4:11 AM. The report noted that Mr. Belair had a "history of drinking," appeared to be "acting and/or talking in a strange manner," and was "apparently under the influence of drugs or alcohol"; the report included the comment "INTOX" and suggested a 15-minute "check for alcohol."

21. Mr. Belair served nine days in jail. On September 4, 2007, respondent ordered Mr. Belair produced at the request of his newly retained defense counsel, Elan Cherney.

22. On that date, Mr. Belair and his attorney appeared before respondent. Mr. Belair apologized to the court and was purged of the contempt charge. Respondent arraigned Mr. Belair on the Disorderly Conduct charge; Mr. Belair pled guilty and was sentenced to a $100 fine, a mandatory surcharge and a one-year conditional discharge. As a condition of discharge, respondent ordered Mr. Belair to undergo an alcohol evaluation.

23. Respondent acknowledges that prior to holding Mr. Belair in contempt of court, respondent should have ascertained the extent to which he was under the influence of alcohol prior to his arrest and arraignment and should have considered his level of intoxication.

24. Respondent acknowledges that Mr. Belair did not completely comprehend the consequences of his behavior and that before holding him in contempt of court, respondent should have offered Mr. Belair an opportunity to apologize and to make a statement on his own behalf.

As to Charge III of the Formal Written Complaint:

25. On October 29, 2007, Anthony Genier, Jr., was charged with Conspiracy in the Sixth Degree and Endangering the Welfare of a Minor. On December 16, 2007, Mr. Genier was charged with Violation of Curfew Ordinance, a violation of Section 82-3 of the Code of the Village of Hudson Falls. On December 17, 2007, Mr. Genier was charged with two counts of Petit Larceny.

26. On January 15, 2008, respondent accepted a plea agreement whereby Mr. Genier, with the assistance of counsel, pled guilty to Endangering the Welfare of a Minor,[2] a single count of Petit Larceny and Disorderly Conduct in satisfaction of all charges. Respondent adjourned the matter for completion of a presentence investigation and sentencing.

27. On March 4, 2008, Mr. Genier appeared with his attorney before respondent for sentencing. Respondent was aware that Mr. Genier was 16 years old at that time. Respondent sentenced Mr. Genier to a $150 fine, a $165 surcharge, participation in a Values Improvement Program and a one-year conditional discharge on the charge of Endangering the Welfare of a Minor, and a $350 fine, restitution and a one-year conditional discharge on the charges of Petit Larceny and Disorderly Conduct. After

[2] Both the transcript from the March 4, 2008 court proceeding and the Orders and Conditions of Conditional Discharge evince that the Endangering and Conspiracy charges were merged, with the defendant entering a guilty plea to the Endangering charge. The Memorandum of Plea Agreement also shows that the two charges were to be merged, but erroneously indicates that the defendant was to plead guilty to Conspiracy.

sentencing, respondent ordered Mr. Genier to sit in the courtroom while his paperwork was completed.

28. While Mr. Genier was seated in the courtroom, respondent ordered him to stop talking. Several minutes later, respondent stated to Mr. Genier, "[Y]ou just got yourself 15 days" and summarily held him in contempt of court for talking, notwithstanding that Mr. Genier was talking quietly in the back of the courtroom. Respondent directed a court officer to "face [Mr. Genier] into a corner" of the courtroom.

29. At the oral argument before the Commission, respondent stated that he ordered that Mr. Genier's chair be turned towards the wall for the purpose of segregating him from other defendants in order to avoid further disruption.

30. Respondent sentenced Mr. Genier to 15 days in jail for contempt. On the commitment order, respondent stated that the defendant "did continue to talk during Court after being warned three times not to talk."

31. In his verified answer, respondent asserts that prior to holding Mr. Genier in contempt, he issued several warnings to the defendants assembled in the back of the courtroom not to talk or be disruptive.

32. Prior to holding Mr. Genier in contempt, respondent failed to warn him that his conduct could result in summary contempt resulting in incarceration and failed to offer Mr. Genier the opportunity to desist from the conduct or to make a statement on his own behalf.

33. Respondent acknowledges that Mr. Genier did not completely

comprehend that his behavior could lead to his incarceration. Respondent also acknowledges that before finding him in contempt, respondent should have warned Mr. Genier that his conduct could result in contempt of court and should have offered him an opportunity to desist from the conduct and to make a statement on his own behalf.

34. Mr. Genier served 15 days in jail on the summary contempt charge.

As to Charge IV of the Formal Written Complaint:

35. On March 17, 2008, Thomas Butterfield was brought before respondent for arraignment on charges of Criminal Contempt in the First Degree, Burglary in the Second Degree, Criminal Mischief in the Fourth Degree and Harassment in the Second Degree.

36. Prior to the arraignment, respondent was provided with a copy of Mr. Butterfield's Arrest Report, which stated that Mr. Butterfield "appears to be impaired with alcohol." Based upon his past experience with Mr. Butterfield, respondent knew that the defendant's usual demeanor was argumentative.

37. Prior to the arraignment, respondent was aware that Mr. Butterfield was intoxicated and more argumentative than usual, but respondent took no steps to ascertain how much alcohol Mr. Butterfield had consumed prior to his arrest or the level of his intoxication during arraignment.

38. During the arraignment, Mr. Butterfield asserted his right to counsel and stated that he did not understand the charges. (The transcript indicates that respondent advised Mr. Butterfield of the right to counsel and that the public defender

was present.) When Mr. Butterfield stated that the proceedings were "a God damn joke," respondent replied that Mr. Butterfield was "going to get contempt of court." Mr. Butterfield repeated "it's a joke," and respondent told Mr. Butterfield that he could not "address the court this way." After respondent said that he had not received a letter from the purported victim, Mr. Butterfield called respondent's statement "a God damn lie," at which time respondent summarily held Mr. Butterfield in contempt of court and sentenced him to 15 days in jail.

39. Upon being held in contempt, Mr. Butterfield stated, "Big deal. Give me 100 days." Respondent offered Mr. Butterfield the opportunity to retract his statement and apologize; Mr. Butterfield declined, stating, "No I will not." Respondent then increased Mr. Butterfield's sentence to 30 days in jail. Mr. Butterfield again called respondent "a God damn liar" and used obscenities.

40. Respondent prepared a commitment order stating that the defendant:

> ...did refuse to allow me to complete the arraignment, started to yell during the arraignment, continually interrupted me, said this was a "God Damn joke" and that I am a "God Damn liar." When warned that he would be held in contempt and given an opportunity to apologize, he screamed that I should apologize to him and to give him 100 days. He then said "you're a God Damn liar Feeder; I hope you rot in f***ing hell."

41. Mr. Butterfield served 30 days in jail on the summary contempt charge.

42. Before finding Mr. Butterfield in contempt, respondent did not warn him that his conduct could result in summary contempt resulting in incarceration or offer him the opportunity to desist from the conduct, to make a statement on his own behalf or

to apologize to the court.

43. Before increasing his sentence, respondent did not warn Mr. Butterfield that this refusal to retract his statement and apologize could result in additional incarceration or offer him the opportunity to desist from the conduct or to make a statement on his own behalf.

44. Respondent acknowledges that before finding Mr. Butterfield in contempt, he should have warned him that his conduct could result in summary contempt resulting in incarceration and should have offered him the opportunity to desist from the conduct and to make a statement on his own behalf.

45. Respondent acknowledges that he should not have increased Mr. Butterfield's sentence without warning him that his refusal to retract his statement or apologize would result in a further period of incarceration, and without providing him with an opportunity to make a statement.

46. On March 28, 2007, respondent transferred the charges to County Court after they were subsumed in a Grand Jury Indictment.

As to Charge V of the Formal Written Complaint:

47. On March 26, 2008, Robert Syversen appeared before respondent for arraignment on a charge of Operating an Uninspected Motor Vehicle, a violation of Vehicle and Traffic Law Section 306(b), for which the maximum penalty was a $100 fine.

48. On several occasions during the arraignment, respondent told Mr.

Syversen that he would be held in contempt of court for, *inter alia*, refusing to provide his date of birth, refusing to listen to a reading of his rights and refusing to enter a plea. Mr. Syversen asserted that he was not refusing to be arraigned but believed that he was not required to provide his date of birth, that he could waive the reading of his rights and that the entry of his plea could be adjourned.

49. Mr. Syversen ultimately provided respondent with his date of birth and other pedigree information. During the discussion of his plea, when Mr. Syversen asked respondent if he would "consider dropping the charge," respondent advised Mr. Syversen that he was being held in contempt of court and sentenced to 15 days in jail unless he apologized. Mr. Syversen apologized and pled guilty to the traffic violation, and respondent imposed a $50 fine, a $55 mandatory surcharge and a conditional discharge.

50. When Mr. Syversen objected to and refused to sign the conditional discharge on the basis that it violated his religious beliefs, respondent summarily held Mr. Syversen in contempt of court and sentenced him to 15 days in jail. The transcript states:

> DEFENDANT: ...I can't sign that it's against my religion. Sorry.
>
> COURT: What do you mean it's against your religion sir?
>
> DEFENDANT: It's, I'm a Christian and that violates my religion principles.
>
> COURT: How's it violate your religions principles?
>
> DEFENDANT: It's, just generally, I'd have to study, study the document, I can't sign it.
>
> COURT: Are you refusing to sign this order sir?
>
> DEFENDANT: It's against my religion, my religions principles, my religions principles as a Christian.

COURT: And what religions principles is it violating? What religions principles is it violating sir?

DEFENDANT: I can't, you're asking me to explain that right now under duress and--

COURT: We're done. Place him in custody. You've got 15 days for contempt of court sir.

51. On the commitment order, respondent stated that the defendant "did continue to refuse to be arraigned, insisted on entering a plea only under duress, refused to sign the conditional discharge and continued to disrupt the proceedings after being given numerous opportunities to comply."

52. Mr. Syversen served six days in jail before respondent ordered him produced on April 1, 2008. On that date, Mr. Syversen apologized to the court and was purged of the contempt charge.[3]

53. On April 29, 2008, Mr. Syversen pled guilty by mail to Operating an Uninspected Motor Vehicle. Respondent imposed a $50 fine and a mandatory surcharge.

54. Respondent did not include a conditional discharge as part of the disposition.

55. Respondent did not warn Mr. Syversen that his refusal to sign the conditional discharge could result in summary contempt resulting in incarceration.

56. Before finding Mr. Syversen in contempt, respondent did not offer him the opportunity to desist from the conduct, make a statement on his own behalf or apologize.

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[3] The transcript erroneously indicates that Syversen appeared before respondent on April 4, 2008.

57. Respondent acknowledges that he should have warned Mr. Syversen that refusing to sign the conditional discharge could result in summary contempt resulting in incarceration and that, before finding him in contempt, he should have offered Mr. Syversen the opportunity to desist from the conduct and to make a statement on his own behalf.

58. Respondent acknowledges that instead of holding Mr. Syversen in contempt for his refusal to sign the conditional discharge, respondent should have adjourned the matter for Mr. Syversen to obtain counsel.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(C), 100.3(B)(1) and 100.3(B)(6) 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 V of the Formal Written Complaint are sustained, and respondent's misconduct is established.

In five cases respondent showed a profound disregard for the rule of law and failed to accord defendants fundamental due process while depriving them of liberty. In four of these cases, within a span of a few months, he abused the summary contempt power, ignoring clear procedural safeguards mandated by law and sentencing individuals to jail without issuing an appropriate warning or providing an opportunity to desist from the contumacious conduct. In an especially mean-spirited overreaction, he held in

contempt a sixteen-year old defendant, who was about to be released on a conditional discharge, and sentenced him to 15 days in jail for talking quietly in the back of the courtroom. In another case, he accepted a guilty plea at arraignment from an unrepresented defendant and sentenced him to 30 days in jail for a violation of local ordinance (Unnecessary Noise), despite having good cause to believe that the defendant was under the influence of alcohol and incapable of understanding and asserting his rights. Exacerbating this record of egregious misconduct is respondent's censure in 2009 for a variety of ethical transgressions; indeed, the disciplinary charges in the earlier matter were pending at the very time he engaged in the misconduct depicted in this case. Viewed in its totality, this record amply demonstrates that respondent lacks fitness for judicial office and that the sanction of removal is appropriate.

In *Hammond*, involving a defendant who had been drinking heavily prior to his arrest, the record establishes that prior to accepting the defendant's guilty plea at arraignment, respondent failed to make a searching inquiry into whether the defendant was capable of entering a plea or appreciated the "dangers and disadvantages" of waiving the fundamental right to the assistance of counsel (*see People v. Smith*, 92 NY2d 516, 520 [1998] and cases cited therein). It is well-established that at an arraignment, a judge not only must advise a defendant of the right to counsel and to have counsel assigned if he or she cannot afford one, but must "take such affirmative action as is necessary to effectuate" the defendant's rights; the court may permit a defendant to proceed without an attorney only "if it is satisfied that [the defendant] made such decision with knowledge of

the significance thereof" (CPL §170.10[4][a], [6]). As we have previously stated:

> To determine whether a defendant has knowingly and intelligently waived this fundamental right, the court must "'undertake a sufficiently "searching inquiry"'" in order to be "'reasonably certain"' that a defendant appreciates the risks inherent in proceeding without an attorney (*People v. Smith*, *supra*, 92 NY2d at 520). While there is no rigid formula for such an inquiry, the record as a whole must reflect that the court has explored the relevant factors bearing on an intelligent and voluntary waiver of the right to counsel, including the defendant's age, education, occupation and previous exposure to legal procedures (*People v. Arroyo*, 98 NY2d 101, 104 [2002]; *People v. Smith*, *supra*; *People v. Providence*, 2 NY3d 579, 582 [2004]).

Matter of Dunlop, 2009 Annual Report 83.

Respondent has acknowledged that prior to accepting the plea in *Hammond*, he did not conduct a searching inquiry, as required by law, to determine whether the defendant had knowingly and intelligently waived his right to counsel and appreciated the inherent risks of self-representation and the consequences of a guilty plea. He did not explore the defendant's educational background or ascertain that the defendant had an eighth grade education and suffered from learning disabilities. Nor did respondent explore whether the defendant was under the influence of alcohol or drugs – despite knowing that the defendant had been intoxicated when arrested the previous evening, and despite the fact that a short time *after* the arraignment, a Suicide Screening Report prepared at the jail noted that the defendant appeared to be "under the influence of alcohol or drugs" and was exhibiting "signs of withdrawal." Respondent's testimony that he simply "thought [the defendant] had been in the holding cell long enough to sober up

considerably" (Tr. 133) is unpersuasive, especially in view of the absence of any significant inquiry into whether this vulnerable defendant was competent to proceed. By disregarding his obligations under well-established law, respondent engaged in misconduct and abused the power of his office.

Depriving a litigant of fundamental rights not only constitutes legal error, but may constitute judicial misconduct. *See Matter of Dunlop, supra*; *Matter of Reeves*, 63 NY2d 105, 109-10 (1984); *see also Matter of Feinberg*, 5 NY3d 206, 215 (2005) (legal error and misconduct "are not necessarily mutually exclusive"). In numerous cases the Court of Appeals has held that a pattern of violating fundamental rights of litigants constitutes serious misconduct warranting removal from office. *E.g.*, *Matter of Bauer*, 3 NY3d 158 (2004); *Matter of Reeves*, *supra*; *Matter of Sardino*, 58 NY2d 286 (1983); *Matter of McGee*, 59 NY2d 870 (1983). Even a single instance of such behavior may constitute misconduct, especially where there is an egregious violation of well-established legal principles, resulting in a proceeding that was patently lacking in fundamental fairness (*Matter of Dunlop*, *supra*).

In four other cases, respondent abused his summary contempt power and deprived individuals of their liberty without due process. The exercise of the enormous power of summary contempt requires strict compliance with mandated safeguards, including giving the accused a warning that the conduct can result in contempt and providing an opportunity to desist from the contumacious conduct and to make a statement before a contempt adjudication (Jud Law §§750, 755; *see Rodriguez v.*

Feinberg, 40 NY2d 994 [1976]; *Katz v. Murtagh*, 28 NY2d 234 [1971]; *Pronti v. Allen*, 13 AD3d 1034 [3d Dept 2004]; *Loeber v. Teresi*, 256 AD2d 747, 749 [3d Dept 1998] ["Contempt is a drastic remedy which necessitates strict compliance with procedural requirements"]; *Doyle v. Aison*, 216 AD2d 634 [3d Dept 1995], *lv den* 87 NY2d 807 [1996]). Here, respondent not only wielded the power without reasonable basis[4] – for example, in *Genier*, where the defendant was held in contempt for talking quietly in the back of the courtroom – but ignored the mandated procedures prior to the adjudication of contempt. Even if an individual is disorderly or disrespectful, a judge's strict adherence to procedures required by law – including issuing a warning and providing an opportunity to desist – may well avoid the necessity of imposing a contempt citation to maintain order and decorum. The Court of Appeals and the Commission have held that abuse of the summary contempt power and the failure to observe the procedural safeguards may constitute misconduct warranting discipline. *Matter of Hart*, 7 NY3d 1 (2006); *Matter of Mills*, 2005 Annual Report 185; *Matter of Teresi*, 2002 Annual Report 163; *Matter of Recant*, 2002 Annual Report 139. Respondent's exercise of the summary contempt power without complying with due process was a gross abuse of judicial authority.

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[4] Two intoxicated defendants were summarily held in contempt and sentenced to jail for their behavior at arraignment: Joshua Belair received a 30-day sentence for using obscenities at his 2:30 AM arraignment (notwithstanding that the maximum sentence he faced for the underlying charge was 15 days), and Thomas Butterfield received a 15-day sentence for calling the proceedings "a God damn joke," a sentence which escalated to 30 days when the intoxicated defendant responded to the sentence by saying, "Big deal. Give me 100 days." Another obviously confused individual (*Syversen*) was held in contempt and sentenced to 15 days with no warning for refusing to sign a conditional discharge because it violated his "religions principles [sic]."

With more than a decade of judicial experience, which included presiding over a drug court, respondent should be familiar with the requirements of due process and should understand that his duty to act in a neutral, judicious manner must take precedence over impulses arising from personal pique. Instead, his disregard of the rule of law and the basic rights of litigants was inconsistent with the fair and proper administration of justice. The conclusion is inescapable that respondent willfully ignored the law and, thus, violated his duty to be faithful to the law (Rules, §100.3[B][1]).

While respondent's misconduct and the salient facts have been stipulated, the record indicates that throughout this proceeding he offered various, inconsistent rationalizations for his misconduct. For example, when asked at the oral argument about the 15-day sentence for contempt he imposed in *Genier*, respondent explained, "I was under the impression, the mistaken impression that the term for a contempt like that was 15 days. I didn't realize that it could have been shorter" (Oral argument, p. 22); he said he could not recall why he believed a shorter sentence was unavailable (pp. 28-29). Whether or not we believe that respondent – an experienced judge who attended a judicial training session on summary contempt procedures – harbored such a mistaken, draconian view of the law, it does not in the slightest mitigate his actions in that case. Significantly, he also acknowledged that during the 15 days that Mr. Genier served in jail, respondent never considered that the defendant could be brought back to court to purge the contempt (p. 27), though that is precisely what occurred in two other cases (*Belair* and *Syversen*), where the defendants were returned to court after serving a portion of their sentence,

apologized for their actions and were released. That history does not lend credence to respondent's statements to the Commission. The record in its totality strongly suggests that respondent, in a gross overreaction to Mr. Genier's courtroom demeanor, simply determined that this young defendant, who was due to be released on a conditional discharge after a negotiated plea, should spend 15 days in jail, then abused his judicial authority to make that happen.

With respect to respondent's explanations regarding the issuance of a warning prior to the contempt adjudications, the record is rife with inconsistencies. While respondent repeatedly implied that his only error was that his warnings were insufficiently clear,[5] he has stipulated that he did not warn any of the defendants that the conduct that provoked the contempt adjudications could result in contempt. Indeed, in *Genier*, the record shows that respondent never mentioned contempt at all before holding the defendant in summary contempt for talking in the back of the courtroom. Nor does the record substantiate respondent's portrayal of his warnings to Mr. Genier: although the commitment order states that the defendant "did continue to talk during Court after being warned three times not to talk" (Stipulation, Ex W), the recording of the proceedings (Ex. 2) shows that respondent said once, "No more talking" before holding the defendant in contempt several minutes after that warning was issued. Respondent then told Mr.

[5] He stated in his verified answer that his warnings to defendants prior to the adjudication of contempt "could have been more clearly given" (Answer, par 13, 20, 22, 28, 29, 38), and he testified at the hearing, "I understand that I have to be much, much clearer in conveying to defendants that their behavior or their actions are contemptuous" (Tr. 135).

Genier, "You continued to talk after being repeatedly warned not to" (Ex. 2; Stipulation, Ex U, p. 4), but no such "repeated" warnings are reflected on the record. In his answer, respondent states that he had warned all the defendants assembled in the courtroom not to talk (Answer, par. 22), but he was constrained to admit that he never warned that talking could result in contempt or incarceration (Stipulation, par. 33). Moreover, although he repeatedly insisted that Mr. Genier's "quiet" talking was disruptive (Answer, par. 21; Tr. 135-36, 166; Oral argument, p. 21), he conceded at the oral argument that the record in *Genier* shows no indication that the proceedings were disrupted in any way (Oral argument, p. 24). And while respondent repeatedly maintained that he believed that he "was properly exercising judicial contempt powers pursuant to the protocol" he was taught at his judicial training program, he admitted that he "had not assiduously followed all the requirements" (Brief, p. 3; *see also* Answer, par 13, 20, 27-29, 37, 38). No explanation was offered for his failure to follow those requirements – "assiduously" or otherwise – in the cases here.

Viewed in their totality, respondent's handling of these matters showed a disregard of fundamental legal principles and casts serious doubt on his fitness to serve as a judge. In deciding the appropriate sanction, we consider both the severity of the misconduct depicted in this proceeding and respondent's prior censure for a variety of ethical transgressions, including using his judicial power to effect the arrest of a motorist and then taking action in the case, failing to disqualify notwithstanding a clear conflict, engaging in an *ex parte* communication, and imposing an adjournment in contemplation

of dismissal without the consent of the prosecutor (*Matter of Feeder*, 2010 Annual Report 143). While the misconduct in the earlier proceeding is different from the conduct here, respondent's argument that he has learned from his past mistakes and desisted from particular acts of misconduct when they were brought to his attention is hardly reassuring. His apparent inability to recognize and avoid misconduct, to apply fundamental principles of law and to adhere to the high ethical standards required of judges demonstrates that he is unfit to serve as a judge (*Matter of Cerbone*, 2 NY3d 479 [2004]).

Accordingly, by reason of the foregoing, we determine that the appropriate disposition is removal, making him ineligible for judicial office in the future (NY Const Art 6 §22[h]).

Judge Klonick, Judge Ruderman, Mr. Belluck, Mr. Cohen, Mr. Emery, Ms. Moore, Judge Peters and Mr. Stoloff concur.

Mr. Harding did not participate.

Judge Acosta was not present.

CERTIFICATION

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

Dated: January 31, 2012

Jean M Savanyu

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

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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In the Matter of the Proceeding
Pursuant to Section 44, subdivision 4,
of the Judiciary Law in Relation to

MICHAEL M. FEEDER,

a Justice of the Hudson Falls Village
Court, Washington County.

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CONCURRING OPINION
BY MR. COHEN

Given the record established both at the hearing at which Judge Feeder testified and in his answers during his *pro se* argument to the Commission on December 8, 2011, it is clear that he is not fit, under the circumstances, to continue to serve as a judge. Accordingly, I have voted with my unanimous colleagues to remove him from his judgeship.

Nonetheless, I write separately to address an issue not directly raised in the Determination, in order to underscore why it is indeed necessary for the Commission to proceed to remove him, even though he stated to us during argument that he will not (have) run for re-election as Justice of the Hudson Falls Village Court to seek an additional term when his current term expires on March 31, 2012.

Notably, the Commission only learned of Judge Feeder's intention not to seek re-election during the December 8, 2011 argument when he was directly asked by Commissioner Emery why, given the pattern of his misconduct as a judge, he wanted to

continue as a judge. Only then did he state that he had "already announced" his intention not to seek re-election (Oral argument, pp. 36-37). When I inquired further about that "announcement" and whether it had been "formally" made, he stated that it had occurred, curiously, just one day earlier when, Judge Feeder stated, a newspaper reporter called him to determine if he was intending to run (*Id.* at 42-43). The timing of his "announcement" seemed odd indeed, given that Judge Feeder implied that it was unrelated to the fact that oral argument was scheduled for the very next day.

There is also some history here worth noting. As mentioned in the Determination (pp. 22-23), several years ago the Commission filed unrelated charges against Judge Feeder, resulting in the sanction of censure. According to the Determination in the prior matter, Judge Feeder had entered into a stipulation with the Commission agreeing that if he vacated judicial office before the Commission rendered a decision on the merits, the stipulation would be public and he would not seek or accept judicial office in the future (Determination 11/18/09, pp. 2-3). The record in that matter reveals that five months after the stipulation, shortly before the scheduled hearing in August 2008, the judge formally announced his resignation of his judgeship. When, consistent with its standard practice and as part of its duties to the public, the Commission made public the stipulation, Judge Feeder changed his mind, withdrew his resignation and proceeded to litigate the charges at the hearing (Hearing transcript 8/18/08, pp. 2-3, 6-8).

I write here not to "pile on," given the unanimous vote to remove, but to explain why, notwithstanding the fact that Judge Feeder's term will expire very shortly, it

is not sufficient to simply allow his term to silently run its course. Simply put, if the Commission were to close the matter in view of the judge's impending departure from the bench, Judge Feeder would be free to run for, or perhaps be appointed to, another judicial office, with the public never knowing the likely true reason that he decided not to seek re-election, *i.e.*, that these charges and their supporting proof are too substantial. That would be turnstile justice indeed, and poor policy. The sanction of removal makes a judge absolutely "ineligible" to hold judicial office in the future (NY Const. Art 6, §22[h]). Parenthetically, if Judge Feeder had resigned his judgeship, the Commission under Judiciary Law Section 47 would retain jurisdiction for 120 days past his resignation in order to file a determination of removal, likewise barring him from judicial office in the future; in extending the Commission's jurisdiction for that purpose, the statute underscores the rationale for removing a judge in certain circumstances notwithstanding the judge's departure from the bench. Not so, however, if the judge simply leaves the bench as his term expires, as he has asked to do here.

This is not to suggest – and is, in fact, part of the reason for this concurring opinion – that there might not be sympathetic facts and circumstances where it would be prudent and appropriate, indeed, for the Commission to allow a respondent judge to walk off into the sunset without a public detailing of the embarrassing allegations and facts that might have led the Commission to prefer charges in the first place. The conduct of some judges against whom charges are brought simply does not warrant a public humiliation, if it is clear that the conduct was aberrational for him or her and it is clear that that the respondent's days on the bench are essentially over.

This, however, is not such a case. Here, a continuation and public resolution of these proceedings is necessary as a deterrent against *this* particular judge holding further judicial office, and a vehicle to help ensure that his unfortunate conduct will not be replicated either by himself or by others.

Dated: January 31, 2012

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