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

JAMES A. McLEOD,

a Judge of the Buffalo City Court,
Erie 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
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (David M. Duguay, Of Counsel) for the Commission

Michael M. Mohun for the Respondent

The respondent, James A. McLeod, a Judge of the Buffalo City Court, Erie County, was served with a Formal Written Complaint dated September 14, 2012, containing one charge. The Formal Written Complaint alleged that respondent was

discourteous to a defendant and convicted him without a plea or trial. Respondent filed a verified answer dated October 10, 2012.

On November 27, 2012, the Administrator, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On December 6, 2012, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Judge of the Buffalo City Court, Erie County, since 1999. His current term expires on December 31, 2018. Respondent was admitted to the practice of law in New York in 1975.

2. On February 16, 2011, respondent presided over the custodial arraignment part of the Buffalo City Court. Two of the cases on the calendar that day involved defendant T[redacted], who was 17 years old at the time.

3. In one case, Mr. [redacted] was charged with two misdemeanors: Criminal Possession of a Controlled Substance in the Seventh Degree, in violation of Penal Law Section 220.03, and Obstructing Governmental Administration in the Second Degree, in violation of Penal Law Section 195.05. The conduct that led to these charges was alleged to have occurred on November 3, 2010.

4. In the other case, Mr. [redacted] was charged with two violations:

Harassment in the Second Degree, in violation of Penal Law Section 240.26(3), and Trespass, in violation of Penal Law Section 140.05. The conduct that led to these charges was alleged to have occurred on February 4, 2011.

5. Prior to any plea discussion, respondent characterized the harassment charge as "thuggery" and asked Mr. [redacted] if he understood what the word meant. When the defendant said he did not, respondent stated:

> It means being a bully, trying to impress people....That's not good. Especially when they say you can't follow through on any of those wolf cries. If they were to gang up on you, you would be the first one yelling mama as you're running home.

6. Mr. [redacted]'s attorney, Daniel E. Barry, Jr., proposed that Mr. [redacted] be permitted to plead guilty to Trespass and Disorderly Conduct, in satisfaction of all the charges. The prosecutor indicated that he would accept those pleas "[w]ith orders of protection," and respondent agreed.

7. Addressing the Trespass charge, respondent asked Mr. [redacted], "What's going on with you over there, Mr. Tough guy...?" After Mr. [redacted] replied that he did not recall, respondent stated, "Don't play me."

8. Without allocuting Mr. [redacted] or having him enter a plea of guilty, respondent convicted him of Trespass and sentenced him to 75 hours of community service, setting March 16, 2011, as the due date for the mandatory surcharge payment.

9. Addressing the Disorderly Conduct offer, respondent informed Mr. [redacted] that the police had seen him throw away some drugs. Mr. [redacted] denied doing so, and respondent replied, "...don't play me like I'm stupid, you're not bright enough to

outsmart me. You want to try it again?"

10. Mr. [redacted] again said that he did not have the drugs.

11. Without allocuting Mr. [redacted] or having him enter a plea of guilty, respondent convicted him of Disorderly Conduct and sentenced him to 15 days in jail, the maximum sentence, setting March 16, 2011, as the due date for the mandatory surcharge payment.

12. Mr. [redacted] responded:

> Kiss my ass. Fuck you, you bitch ass nigger. You don't fucking scare me, nigger. I don't care. Kiss my ass, suck my dick, fuck you. I see you next court date, pussy.

13. Respondent thereafter stated, "I think we should vacate the plea." Mr. Barry, the defense attorney, responded, "You're going to have to recuse yourself...," and respondent agreed. Mr. Barry added, "Judge, I don't know that he was interested in taking a plea," and Mr. [redacted] said, "Pussy."

14. Respondent replied, "That's his problem. That's what pussies do." Respondent then vacated Mr. [redacted]'s Disorderly Conduct conviction and set March 22, 2011, as the trial date for the matter.

15. Respondent then fixed bail at $50,000, to which Mr. [redacted] responded, "You can keep the bail, and keep the trial, and suck my dick."

16. Respondent replied to Mr. [redacted], "Why don't you pull it out for me." Mr. [redacted] responded that he would if he were not in handcuffs.

17. Respondent stated, "Probably need a magnifying glass, too."

18. Respondent ordered bail set at $50,000 or, in the alternative, release under supervision. On February 24, 2011, Mr. [redacted]'s release under supervision was approved by the Probation Department.

Additional Factors

19. Respondent recognizes that, even when baited by a disrespectful and profane party, a judge must (A) remain patient, dignified and courteous, (B) refrain from and not escalate the disrespect and profanity directed toward the court, and (C) maintain, not participate in undermining, the decorum of the courtroom. Respondent accepts full responsibility for failing to maintain high standards of conduct when he spoke in an undignified and discourteous way to Mr. [redacted].

20. Respondent acknowledges that he failed to comport with the law when he convicted Mr. [redacted].

21. Respondent was instrumental in the creation of the Adolescent Diversion Court Program in the Buffalo City Court which provides at-risk youth with educational and treatment resources necessary to assist them in leading productive and law-abiding lives. Respondent has handled the majority of the workload in this court program since its inception.

22. In his 13 years on the bench, respondent has not been previously disciplined for judicial misconduct. He regrets his failure to abide by the Rules in this instance and pledges to conduct himself in accordance with the Rules for the remainder of his term as a judge.

23. Respondent has been cooperative with the Commission throughout its inquiry.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(1) and 100.3(B)(3) 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. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

Every judge must be "patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity" (Rules, §100.3[B][3]). Even in the face of provocative, disrespectful comments by a litigant, a judge is required to be an exemplar of decorum and dignity in the courtroom and not allow the proceedings to devolve into an undignified exchange of taunts, insults and obscenities. Respondent's statements to T[redacted], a young defendant in his courtroom, were inconsistent with these standards and violated his duty not only to maintain decorum, but to be faithful to the law and avoid even the appearance of impropriety (Rules, §§100.2[A], 100.3[B][1]).

The record indicates that prior to any plea discussions, respondent abandoned his proper role as a neutral and detached magistrate by making remarks that presumed guilt, characterizing the defendant's alleged conduct as "thuggery" and taunting

him ("If they were to gang up on you, you would be the first one yelling mama as you're running home"). Instead of allocuting the defendant as to the proposed pleas, respondent questioned him about drugs he allegedly threw away, potentially eliciting admissions to more serious crimes while continuing to mock and insult him ("Mr. Tough guy"; "you're not bright enough to outsmart me"). *See*, *Matter of Austria*, 1996 Annual Report 51. Engrossed in this intemperate colloquy, respondent ignored fundamental due process by convicting the defendant without a plea or allocution.

Respondent compounded his misconduct by responding in kind to the defendant's use of profane language, continuing the exchange of taunts and insults even after he had agreed to recuse himself. The requirement to be courteous and patient to every litigant applies equally to those who may be difficult and disrespectful. Indeed, the more offensive a litigant's behavior, the more important a judge's obligation to act with dignity and restraint. Even if provoked by a perceived lack of respect for the court, respondent's conduct cannot be excused. As the Court of Appeals has stated, "respect for the judiciary is better fostered by temperate conduct, not by hot-headed reactions to goading remarks" (*Matter of Cerbone,* 61 NY2d 93, 96 [1984]; *see also*, *Matter of Evens*, 1986 Annual Report 103 ["Whether or not respondent correctly perceived that the lawyers and litigants before him were disrespectful should not be at issue. The controlling factor is that... respondent's conduct, whatever may have provoked it, was inappropriate, unprofessional and intemperate"]). Even a single instance of intemperate language may be the basis for a finding of misconduct. *See Matter of Going*, 1998 Annual Report 129;

Matter of Mahon, 1997 Annual Report 104.

While respondent may have been attempting to reach the young defendant by using such language, his inappropriate comments contributed to the atmosphere of disrespect and lack of decorum. *See Matter of Trost*, 1980 Annual Report 153 (rejecting a Family Court judge's defense that his use of intemperate language was an attempt "to meet people at their own level and to use language and convey ideas that they would not understand if presented in any other fashion"). Such invective undermined his obligation to be dignified and patient, and set a poor example for everyone present. Moreover, a litigant who is the subject of such comments may reasonably perceive that the judge is biased. Respondent had sufficient judicial remedies at his disposal, including contempt (with appropriate warnings) or removing the defendant from the courtroom.

In accepting the stipulated recommendation of admonition, we note that respondent's improper comments were limited to a single occasion. Further, respondent has acknowledged that his actions were inconsistent with the ethical standards and the procedures required by law, and has stipulated that he will avoid such misconduct in the future.

By reason of the foregoing, the Commission determines that the appropriate disposition is admonition.

Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Cohen, Mr. Emery, Mr. Harding, Ms. Moore, Mr. Stoloff and Judge Weinstein concur.

Mr. Belluck was not present.

CERTIFICATION

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

Dated: December 11, 2012

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