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

DOUGLAS C. MILLS,

a Judge of the Saratoga Springs City Court,
Saratoga County.

- -

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Honorable Frances A. Ciardullo, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci and Kathryn Blake, Of Counsel)
for the Commission

Jones Ferradino (by Matthew J. Jones) for Respondent

The respondent, Douglas C. Mills, a judge of the Saratoga Springs City Court, Saratoga County, was served with a Formal Written Complaint dated July 17,

2003, containing two charges. Respondent filed an answer dated August 29, 2003.

By Order dated September 8, 2003, the Commission designated Michael J. Hutter, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on November 14, 2003, in Saratoga Springs, New York, and the referee filed his report dated May 24, 2004, with the Commission.

The parties submitted briefs with respect to the referee's report. On August 5, 2004, the Commission heard oral argument, at which the respective counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a judge of the Saratoga Springs City Court since 1988. Until 1999, respondent was an appointed part-time judge; since then, he has served full-time. Prior to becoming a full-time judge, respondent was a practicing attorney.

As to Charge I of the Formal Written Complaint:

2. On October 5, 1999, Jason Kalenkowitz appeared before respondent for a non-jury trial on a charge of Possession Of An Open Container in violation of Section 61-1 of the Code of the City of Saratoga Springs. Mr. Kalenkowitz, who was a full-time student at Skidmore College in Saratoga Springs, appeared *pro se*. Assistant District Attorney David Harper called one witness, police officer Eileen Cotter, who had arrested Mr. Kalenkowitz. Mr. Kalenkowitz testified on his own behalf and called two

witnesses.

3. During Mr. Harper's cross-examination of a defense witness, the following occurred:

> Q. You testified there is a sidewalk there. Was she [police officer Cotter] standing on the house side of the sidewalk or in the pavement, on the side of the sidewalk?
>
> A. Probably on the house --
>
> MR. KALENKOWITZ: This is ridiculous.
>
> THE COURT: Really? The next time you have an outburst like that, I will hold you in contempt, and sentence you to ten days in the Saratoga County jail.
>
> Want to state your reasoning on the record?
>
> MR. KALENKOWITZ: Because he's going on to something that's already been said. He's asking questions about calling somebody a bitch. That is irrelevant. He's using -- trying to get something that is irrelevant. I believe the cops in the front yard saw me walk out. I don't see how, me calling somebody a bitch, that I testified to, has anything to do with their testimony.
>
> THE COURT: That's what you're concluding, that all these proceedings are ridiculous?
>
> MR. KALENKOWITZ: Also, me, you, probably, and him, probably, have had a drink - and me being arrested for drinking in the front yard.
>
> THE COURT: That's why we have a court. I am warning you, if you interrupt me, you will go to jail.
>
> MR. KALENKOWITZ: You asked me a question. I am answering it.
>
> THE COURT: Good idea. Because you will go to jail.

MR. HARPER: No further questions.

THE COURT: Want to make any concluding remarks?

MR. KALENKOWITZ: I just made them.

THE COURT: Mr. Harper?

MR. HARPER: I will waive a closing statement.

4. Mr. Kalenkowitz spoke the words "This is ridiculous" as his way of objecting that Mr. Harper's cross-examination of the witness was irrelevant.

5. Respondent gave no prior warning to Mr. Kalenkowitz not to interrupt him or not to disrupt the proceedings before him. There was no prior conduct by Mr. Kalenkowitz that would have warranted any such warning. To the extent that Mr. Kalenkowitz may have made noises like "tsk", "ah" or shook his head while police officer Cotter testified for the prosecution, respondent never warned Mr. Kalenkowitz about refraining from such conduct.

6. At the conclusion of the trial, respondent found Mr. Kalenkowitz not guilty.

7. The following then occurred:

> THE COURT: However, Mr. Kalenkowitz, the Court is not going to avoid having a conversation with you about your attitude, which is much more important to me than this whole proceeding.
>
> MR. KALENKOWITZ: I am sorry. I am frustrated with the whole ordeal. I am missing classes for this court date, and it is the second charge I was brought up against, in Saratoga, that I was not guilty of, and it's taken a lot of time and money out of my hands.

THE COURT: Does that mean you can be disrespectful to the Court and declare this whole thing is a joke on the record?

Do you think that [endears] yourself --

MR. KALENKOWITZ: No. I --

THE COURT: Now we're going to have a contempt hearing. You've again interrupted me.

The Court finds you are in contempt of Court.

The Court has previously warned the Defendant, several times, not to interrupt the Court, and he did so again. So I will sentence the Defendant to three days in the county jail.

Please take the Defendant into custody.

You will have to learn your lesson the hard way.

MR. KALENKOWITZ: You're a good man for doing this.

THE COURT: Mr. Kalenkowitz, you're an obnoxious young man.

MR. KALENKOWITZ: You're [an] obnoxious old man.

THE COURT: I will sentence the Defendant to three more days in the Saratoga County Jail, to total six days.

8. Mr. Kalenkowitz's words, "No. I--", were not, and were not intended to be, an interruption of respondent, but rather his response to what he perceived to be respondent's questions, "Does that mean you can be disrespectful to the Court and declare this whole thing is a joke on the record? Do you think that [endears] yourself --."

9. Respondent gave Mr. Kalenkowitz no opportunity to explain his conduct or otherwise defend himself before holding him in contempt.

10. In summarily finding Mr. Kalenkowitz to be in contempt of court, without a hearing, respondent determined that he was guilty of Criminal Contempt in the second degree in violation of Penal Law Section 215.50, as stated in a commitment order dated October 5, 1999.

11. A Court Information and New York State Incident Report were prepared and filed by Saratoga Springs police officer Warren Wildy on October 5, 1999, after Mr. Kalenkowitz was found guilty of contempt. The Information charged Mr. Kalenkowitz with Criminal Contempt for engaging in "disorderly, contemptuous, or insolent behavior, committed during the sitting of a court, in its immediate view and presence and directly tending to interrupt its proceedings or to impair the respect due to its authority" and stated that Mr. Kalenkowitz was charged for "constantly verbally interrupting" respondent, "in direct violation of verbal orders...to cease such behavior." The Incident Report alleged that the defendant interrupted respondent "after repeated statements by Judge Mills to not interrupt him."

12. Mr. Kalenkowitz's conduct that formed the basis of respondent's finding of contempt, the purported interruption after the trial was over, cannot be found as a matter of law to rise to the level of contumacious behavior encompassed by Penal Law Section 215.50.

13. The Information charging Mr. Kalenkowitz with Criminal Contempt in the second degree was filed after Mr. Kalenkowitz was found guilty. The transcript of the proceeding does not support the Information's allegations or those set forth in the

Incident Report.

14. Upon respondent's finding of contempt, Mr. Kalenkowitz was handcuffed and taken to a holding cell and then to the Saratoga County Jail, where he was held in solitary confinement for four days. Mr. Kalenkowitz did not have any contact with an attorney while in jail and was not aware of any means of refuting the contempt charge and getting himself out of jail.

15. On October 6, 1999, the day after respondent's finding of contempt, respondent realized that he was in error in finding Mr. Kalenkowitz guilty of Criminal Contempt in the second degree because Mr. Kalenkowitz was not informed that he was being charged with that crime and there was no trial on a properly filed accusatory instrument. Instead of releasing him from custody, respondent, *sua sponte* and in Mr. Kalenkowitz's absence, decided to dismiss the Criminal Contempt charge and to charge Mr. Kalenkowitz with contempt in violation of Judiciary Law Section 750. The sentence remained the same. Respondent issued a commitment order dated October 6, 1999, which stated that Mr. Kalenkowitz was convicted of contempt in violation of Judiciary Law Section 750 and was sentenced to a term of six days. No new trial or hearing on this charge was held.

16. On October 7, 1999, Mr. Kalenkowitz, still in custody and unrepresented by an attorney, appeared before respondent. Respondent advised Mr. Kalenkowitz of his right to an attorney, but did not ask if he wanted an attorney. Assistant District Attorney Harper moved to dismiss the criminal contempt charge on the

ground of double jeopardy, apparently on the belief that on October 5, 1999, Mr. Kalenkowitz had been found guilty of contempt under Judiciary Law Section 750. Respondent dismissed the charge, but the defendant was returned to jail on the commitment order dated October 6, 1999, which reflected a conviction and sentence for contempt under Section 750 of the Judiciary Law.

17. At the October 7, 1999 court appearance, Mr. Kalenkowitz again apologized to respondent. Respondent stated, "Thank you very much" and remanded him to the jail to serve out his sentence.

18. In summarily convicting Mr. Kalenkowitz of contempt, respondent failed to give Mr. Kalenkowitz any opportunity to make a statement in his defense and failed to make a mandate of commitment as required by Judiciary Law Section 752.

19. Mr. Kalenkowitz was released from custody after four days of incarceration. The invalid contempt finding and subsequent incarceration caused Mr. Kalenkowitz numerous personal repercussions.

As to Charge II of the Formal Written Complaint:

20. On September 24, 2002, Anthony Caton was scheduled to appear in Saratoga Springs City Court regarding various Vehicle and Traffic Law tickets he had received. His parents, Terry and Laura Caton, had retained attorney Jake Hogan to represent him in connection with the tickets. Anthony drove himself to court that day and appeared in court with his attorney.

21. On September 24, 2002, Terry and Laura Caton drove together to the

Saratoga Springs City Court in order to support their son during his court appearance.

22. Terry and Laura Caton have been married for 22 years. They reside with their son in Round Lake, Saratoga County. During their marriage they have argued frequently but have had no physical altercations.

23. During the drive to the courthouse, the Catons argued about personal matters.

24. When they arrived at the parking lot next to the courthouse in Saratoga Springs, Ms. Caton said, "Fuck you" to her husband. Mr. Caton repeated those words to his wife in a raised, but not screaming, voice as he was getting out of the car. Ms. Caton was still in the car and her husband was about twelve feet away. The Catons were not physically fighting and did not make any threatening gestures. Neither party was afraid of the other, nor felt threatened at the time. The Catons did not notice anyone else in the vicinity, and no one approached them to find out what was occurring or to complain about any perceived disturbance.

25. Respondent, as he was walking to the courthouse through the parking lot about 50 feet away, overheard Mr. Caton's comment to his wife and the car door slam.

26. Respondent did not approach the Catons or request any assistance, but continued walking out of the parking lot and stopped in a coffee shop on his way to the courthouse. Respondent saw Mr. and Ms. Caton as they walked by the coffee shop in an orderly fashion, and he noted that there did not seem to be any threat of physical

violence at that time.

27. Mr. and Ms. Caton entered the courthouse and sat together towards the back of the courtroom near their son Anthony. Anthony went up to the bench for the plea, which his attorney had negotiated with Assistant District Attorney David Harper. After the plea allocution had transpired, respondent asked Laura Caton to approach the bench. Respondent asked her if Anthony's father was in the courtroom, and when she said he was, respondent requested that he also approach the bench.

28. When Terry Caton approached the bench, respondent stated on the record:

> I'd like this man arrested for disorderly conduct for yelling in the parking lot. He yelled at her in a loud, obnoxious voice, "fuck you". I heard it. I was within 50 feet. If I was within three feet of him like you were I would be scarred [sic] to death. He scarred [sic] me a distance of 50 feet.
>
> Charge him with disorderly conduct. That happened this morning. The time is approximately 9:05. I want a temporary order of protection in favor of her against him. He's barred from the house. We'll talk about it later.
>
> You're going to behave like that around me, you're going to be under arrest.

29. Laura Caton had not made any complaint to anyone concerning her husband and did not want him arrested. After ascertaining that Ms. Caton wanted him to represent her husband, Mr. Hogan asked for bail and tried unsuccessfully to secure Mr. Caton's release:

> MR. HOGAN: Bail your Honor.

THE COURT: Have to draw up a complaint. Talk about it in a few hours. Have to run his criminal history -

MR. HOGAN: I have to ask that you be disqualified, your Honor since you are a witness to the matter.

THE COURT: We'll talk about in a while after you see the complaint.

MR. HOGAN: We done with Mr. -

THE COURT: We're done. We're finished.

30. Terry Caton was handcuffed in the courtroom, taken into custody by two police officers and led out the back door of the courtroom. He was taken downstairs to a desk and then placed in a cell. Mr. Caton had medical problems that had recently required surgery and caused seizures, for which he took medication. He did not have access to his medication while in the cell.

31. Later that day, respondent signed a Court Information charging Terry Caton with Disorderly Conduct, a violation of Penal Law Section 240.20(3), for yelling "Fuck you" to his wife while in a public place and causing respondent "to become annoyed and alarmed."

32. Laura Caton waited with her son in Mr. Hogan's office for several hours and did not see her husband again until he was released. During this time, at the request of Judge Doern, Mr. Harper called Mr. Hogan and inquired as to whether Ms. Caton believed an Order of Protection was necessary. Ms. Caton said that she did not want an Order of Protection.

33. Mr. Harper arranged to have Mr. Caton arraigned by Judge Doern,

and Mr. Caton was arraigned after spending approximately three hours in a jail cell. Judge Doern released him on his own recognizance and issued a Temporary Order of Protection in favor of Laura Caton, which required that Mr. Caton refrain from, *inter alia*, "any and all offensive conduct."

34. The Saratoga County District Attorney recused his office in the case, and the Warren County District Attorney was assigned. The case was transferred to the Glens Falls City Court, where it was dismissed on motion of the District Attorney.

35. Terry Caton incurred $1,500 in legal fees to defend himself in the case against him.

36. Respondent caused and directed the unjustified arrest and detention without bail of Terry Caton because he was personally offended by Terry Caton's use of profanity.

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), 100.3(B)(3), 100.3(B)(6), 100.3(E)(1)(a)(ii) and 100.3(E)(1)(d)(iv) of the Rules Governing Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained insofar as they are consistent with the above findings, and respondent's misconduct is established. Charge I, paragraph 4A is not sustained and is therefore dismissed.

On two occasions, respondent abused his judicial power by depriving individuals of their liberty, without just cause or due process. One individual, held in

contempt for interrupting respondent during a post-acquittal lecture, was held in jail for several days; another individual, a courtroom spectator, was held in custody for three hours for using an expletive to his spouse in the courthouse parking lot. In both instances, respondent's conduct was a mean-spirited, substantial overreaction to conduct that in no way warranted such extreme punitive measures.

Respondent summarily sentenced Jason Kalenkowitz to jail for contempt, ostensibly for violating "several" warnings against interrupting respondent. The record does not substantiate respondent's portrayal of the events, neither as to his warnings or as to any behavior by the defendant that would justify respondent's actions. As the transcript shows, the defendant, a college student who had successfully defended himself on an Open Container charge, was apparently attempting to respond to respondent's questions during a sermon about the defendant's "attitude." Respondent's exercise of the summary contempt power in such circumstances, without complying with statutory due process, was a gross abuse of judicial authority. Compounding his misconduct, when he later realized he had wrongly convicted Mr. Kalenkowitz of Criminal Contempt under the Penal Law, respondent did not release him when he was brought back to court the following day, but simply changed the commitment order to reflect a conviction under a different statute and sent the defendant back to jail, where he remained in solitary confinement, without access to an attorney, for another three days. Even with an opportunity to reflect on his actions, and even when the defendant had apologized for a second time, respondent failed to remedy the harsh consequences of his actions in sending

an acquitted defendant to jail.

The exercise of the enormous power of summary contempt requires strict compliance with statutory safeguards, including giving the accused an appropriate warning and the opportunity to desist from the supposedly contumacious conduct and preparing an order setting forth the basis for the ruling (Jud Law §§750, 755; *Doyle v. Aison*, 216 AD2d 634 [3d Dept 1995], *lv den* 87 NY2d 807 [1996]; *Loeber v. Teresi*, 256 AD2d 747 [3d Dept 1998]). Here, respondent not only wielded the power without reasonable basis, but failed to adhere to mandated procedures. Such conduct constitutes an abuse of the summary contempt power and warrants discipline. *Matter of Teresi*, 2002 Annual Report 163 (Comm. on Judicial Conduct); *Matter of Meacham,* 1994 Annual Report 87 (Comm. on Judicial Conduct); *Matter of Recant*, 2002 Annual Report 139 (Comm. on Judicial Conduct).

In a second incident, respondent caused the arrest and detention, without bail, of Terry Caton because respondent was personally offended by Mr. Caton's use of an expletive to his spouse in the courthouse parking lot. Respondent's claim that he was "alarmed" about a domestic violence situation is belied by the fact that he neither promptly interceded nor called for assistance, and took no action until later that morning. If he actually believed that a danger existed or a crime had occurred, respondent, as a private citizen, could have reported the incident to the police; instead; respondent waited until he was on the bench and then used his judicial authority to cause Mr. Caton's immediate detention. Respondent's own words – "You're going to behave like that

around me, you're going to be under arrest" – strongly suggest that his actions arose not, as he claimed, from a "heightened sensitivity" to domestic violence, but because he viewed Mr. Caton's use of profanity as a personal affront. Mr. Caton was handcuffed, held in custody for three hours and required to hire an attorney before the meritless charge was eventually dismissed.

As an experienced judge, respondent should be familiar with statutory procedures and should understand that his duty to act in a patient, neutral, judicious manner must always take precedence over impulses arising from personal pique or offense. Here, respondent's disregard of due process in both matters resulted in a travesty of justice and was inconsistent with the fair and proper administration of justice.

By reason of the foregoing, the Commission determines that the appropriate sanction is censure.

Mr. Goldman, Judge Ciardullo, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Felder, Ms. Hernandez, Judge Peters, Mr. Pope and Judge Ruderman concur as to respondent's misconduct, except that Mr. Goldman, Judge Ciardullo, Mr. Coffey and Mr. Pope dissent as to Charge I, paragraph 5, alleging that respondent failed to prepare a mandate as required by law, and vote to dismiss the allegation.

Mr. Goldman, Judge Ciardullo, Mr. Coffey, Ms. Hernandez, Judge Peters, Mr. Pope and Judge Ruderman concur as to the sanction and vote that respondent be censured. Ms. DiPirro, Mr. Emery and Mr. Felder dissent as to the sanction and vote that respondent be removed from office. Mr. Felder files a dissenting opinion in which Ms.

DiPirro and Mr. Emery join.

Judge Luciano was not present.

CERTIFICATION

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

Dated: December 6, 2004

Lawrence S. Goldman, Esq., Chair
New York State
Commission on Judicial Conduct

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

DOUGLAS C. MILLS,

a Judge of the Saratoga Springs City Court,
Saratoga County.

DISSENTING OPINION
BY MR. FELDER, IN WHICH
MS. DIPIRRO AND MR.
EMERY JOIN

Tyrants come in more varieties than Baskin-Robbins has flavors. The ultimate protection a free society has against a tyrant, is a judicial system that acts as the last barrier to a tyrant's will. Therefore, it is immeasurably worse when the tyrant is the judge himself. Our sensibilities are even more offended at a time when our treasure and youth have been spent to remove a far-away tyrant on the simple premise that in the modern world, the velocity of events is such that evil in one place eventually becomes evil touching everyplace. Just as there is no small death, there is no small tyranny.

Respondent acted in tyrannical fashion. His will was the law, and to the degree that *his* law conflicted with the actual one, he was above the law.

A college student, Jason Kalenkowitz, attempting to represent himself on a minor charge, did little more than offend the judge and, for doing that, ended up in jail in solitary confinement for four days without counsel or any way of representing himself. When respondent realized that he had jailed the student on the wrong statute, he simply

changed the charge but nevertheless forced the defendant to serve out the remainder of the previously ordered sentence. Along the way, at each opportunity, the defendant was denied his constitutional and statutory rights. Further confirming respondent's bad faith, he refused to reconsider his harsh and illegal "sentence" even after Mr. Kalenkowitz apologized to him not once but twice. Respondent's utter failure to recognize wrongdoing in his handling of the case "strongly suggests that, if he is allowed to continue on the bench, we may expect more of the same." *Matter of Bauer*, __NY2d__, No. 125, Slip op. at 14 (Oct. 14, 2004).

In the matter of Terry Caton, respondent, some 50 feet away from Mr. Caton in a parking lot, overheard a verbal disagreement between Mr. Caton and his wife, who were on the way to respondent's courtroom in connection with traffic tickets their son had received. Respondent did not interfere in the Catons' argument but rather continued to walk to a coffee shop. Indeed, respondent essentially lied by stating in an information that he had been "alarmed" by Mr. Caton's conduct, when the record is clear that respondent was, at most, personally offended by Mr. Caton's conduct.

Later, when respondent saw the Catons sitting in his courtroom, he had Mr. Caton arrested and charged with Disorderly Conduct, although Mrs. Caton had made no complaint about her husband's conduct. Mr. Caton spent several hours in jail (without his necessary medication) until released by another judge.

I strongly believe that respondent is not fit to remain a judge. Arrogance and narcissism are not uncommon human qualities, but this judge's sense of self is so

inflated that he chose to fuel his ego by burning the fundamental rights of citizens in his courtroom. I can think of no greater transgression by a jurist entrusted with the responsibility of ensuring that justice is dispensed with basic fairness. Respondent is not just an embarrassment to his fellow jurists. He is dangerous, and he should be removed.

Dated: December 6, 2004

Raoul Lionel Felder, Esq., Member
New York State
Commission on Judicial Conduct