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

GERALD J. POPEO,

DETERMINATION

a Judge of the Utica City Court,
Oneida County.

- -

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Jodie Corngold
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

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

Robert F. Julian for the Respondent

The respondent, Gerald J. Popeo, a Judge of the Utica City Court, Oneida County, was served with a Formal Written Complaint dated May 30, 2013, and an Amended Formal Written Complaint dated July 29, 2013, containing three charges. The

Amended Formal Written Complaint alleged that respondent was discourteous to two defendants and committed them to jail for summary contempt without following the procedures required by law (Charges I and II) and that he made injudicious statements to and about attorneys (Charge III). Respondent filed a verified Answer dated August 23, 2013.

Respondent filed a motion on June 19, 2013, and an amended motion dated June 25, 2013, to dismiss certain specifications of the Formal Written Complaint for lack of specificity. Commission counsel opposed the motion to dismiss by affidavit and memorandum dated August 14, 2013, noting that an Amended Formal Written Complaint had been served. By affirmation and memorandum in reply dated August 23, 2013, respondent argued that paragraphs 30 through 34 of the Amended Formal Written Complaint should be dismissed. By Decision and Order dated September 20, 2013, the Commission denied respondent's motion, as modified, in all respects.

By Order dated October 24, 2013, the Commission designated Bruno Colapietro, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on February 24, 25 and 26, April 29 and 30, and May 29, 2014, in Albany. The referee filed a report dated September 30, 2014.

The parties submitted briefs with respect to the referee's report and the issue of sanctions. Commission counsel recommended the sanction of removal, and respondent recommended a confidential disposition.

On December 11, 2014, 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 Judge of the Utica City Court, Oneida County, since 2001. His present term expires in 2020.

As to Charge I of the Amended Formal Written Complaint:

2. On February 17, 2010, respondent presided over the case of *People v. Robert M. Gentile*. The defendant was appearing for sentencing on a charge of Assault in the Third Degree. Assistant Public Defender James Kehoe represented the defendant.

3. As he approached the podium to speak prior to the imposition of sentence, the defendant addressed the victim of the Assault and two others in the courtroom, stating, "If I go to jail you guys won't hear the end of this." During his statement, the defendant repeatedly turned to the audience, made faces and again addressed the victim. Respondent warned Mr. Gentile not to "put a show on" and that threatening or intimidating the victim could result in criminal contempt. As the defendant complained about his lawyer and that his rights had been violated, respondent engaged in extended colloquy with him, stating that the jury "didn't buy it" and that he was "not retrying the case."

4. As respondent sentenced the defendant to a term of one year in jail on the Assault charge, Mr. Gentile stated, "I already knew what you were going to do." Respondent warned the defendant, "[I]nterrupt me one more time, it's 30 days contempt of court. Do it again, it's 30 more. So if you would like to interrupt me again, go ahead."

5. Thereafter, in a series of incidents as set forth below, respondent committed the defendant to jail for five separate counts of criminal contempt, with five

separate 30-day sentences to be served consecutively in addition to his sentence for Assault.

(A) After respondent warned the defendant not to interrupt and said, "May I continue?", the defendant responded, "You didn't let me continue." Respondent then held him in contempt and sentenced him to 30 days in jail. Mr. Kehoe told his client, "I caution you," and the defendant stated that he did not want the attorney there, that his lawyer did nothing for him, and that he wanted to represent himself.

(B) Respondent accused Mr. Gentile of "disrupting my courtroom," turning away, saying something and "ma[king] a face to me." The defendant said, "Made a face to you?", resulting in the second contempt and 30-day sentence.

(C) When the defendant said, "You can do what you want to do," respondent stated, "There's 90." The defendant said, "They already took my life away, your Honor," and respondent said, "Okay, do you want more or do you want to keep your mouth shut?"

(D) Near the end of the proceeding, Mr. Gentile did something that prompted a deputy to warn, "Don't do that again." Respondent stated that the defendant was "standing at the podium smirking, turning away, looking at the audience," and the defendant said, "Smirking?" Respondent stated, "There's another 30."

(E) The defendant said, "This is a mockery in this court." Respondent stated, "There's another 30. We're up to five now."

6. During the proceeding, the defendant raised his voice, yelled at his attorney, repeatedly turned and addressed the audience, made faces, laughed and was

otherwise disruptive and disrespectful.

7. Prior to holding Mr. Gentile in summary contempt in five successive instances, respondent did not issue appropriate warnings before each contempt citation or give the defendant an opportunity to make a statement on his own behalf or apologize for his contumacious behavior.

8. On August 12, 2010, on motion of Mr. Gentile's lawyer, respondent dismissed two of the five counts of contempt.

9. At the hearing before the referee, respondent testified that the number of contempt citations in *Gentile* "just doesn't seem fair" and that he "should have just let [Mr. Gentile] talk no matter how."

As to Charge II of the Amended Formal Written Complaint:

10. On January 5, 2011, the defendant in the case of *People v. Jeffrey D. Blount* appeared before respondent for disposition of a charge of Harassment. The defendant, who was represented by Assistant Public Defender Cory Zennamo, was being sentenced to time served with an order of protection.

11. As respondent was imposing the sentence, Mr. Zennamo spoke quietly to his client. Respondent reprimanded the attorney, stating, "When you were a kid did anyone tell you it was rude to be talking when somebody else is talking?" Mr. Zennamo said, "Yes," and respondent continued, "Well, it's rude, okay. If you need to talk to your client, hold your hand up, and I will be quiet; I'll wait. I don't want to interfere with an attorney's obligation and right to provide legal advice, but once I'm

doing my end of things, shut up and let me do my thing, okay?" Mr. Zennamo apologized and said he was "just explaining the surcharge" to his client.

12. After that exchange, respondent told the defendant, "You're standing there with a grin that I would love to get off the bench and slap off your face." Mr. Blount said he was "just laughing." Respondent said, "What are you laughing about? You're in a courtroom, handcuffed, in an orange jumpsuit being issued an order of protection, and you're laughing. That's a funny thing, that's hilarious. How about 30 days in jail for contempt, that's hilarious, too, isn't it? What's wrong with you? We done smirking?" Respondent then warned the defendant of the consequences of violating the order of protection.

13. After the proceeding had concluded, as the defendant was leaving the courtroom, respondent ordered him brought back, stating, "As he turned away he gave me a nice, big smirk, nice big smirk as if to say, blank you, Judge. That's 30 days contempt of court. Have a good day, Mr. [Blount]."

14. When Mr. Zennamo attempted to intercede, respondent stated, "File an appeal, Mr. Zennamo." Shortly thereafter, Mr. Zennamo approached respondent and asked if his client might come back and apologize, and respondent denied the request.

15. Respondent summarily held the defendant in contempt of court without warning him that his conduct could result in a citation for contempt and without giving him an opportunity to make a statement on his own behalf or apologize. The commitment order for the contempt states that the defendant "displayed a disrespectful attitude towards the Court, smirking at the Court while being issued an order of

protection and continuing to do so after being advised to cease such conduct."

16. On the following Monday, January 10, 2011, after respondent's administrative judge had questioned him about his actions in *Blount* and after his chambers had received media inquiries about the matter, respondent vacated the contempt on his own motion. In doing so, respondent said:

> "It's my responsibility as judge to hold people accountable for their conduct. I recognize that in doing so, I am also accountable and expected to properly apply the law. With regard to contempt matters, there is a multi-step procedure essentially involving several warnings and an opportunity to be heard before there is a finding of contempt."

Respondent stated that after learning that the defendant's attorney was contesting the contempt citation, respondent reviewed the transcript to refresh his recollection "since it was one of 73 cases I handled that day." He stated that he had "concluded that in my effort to address what I felt was inappropriate conduct and being upset with the conduct, I reacted with some intemperate words and did not fully and completely follow the procedure in place in order to hold a person in contempt."

17. Mr. Blount was not subject to any additional incarceration as a result of respondent's contempt citation since he was in custody on other charges.

As to Charge III of the Amended Formal Written Complaint:

18. Paragraphs 30 to 34 are not sustained and therefore are dismissed.

People v. Bart Harvey, Jr.

19. On November 7, 2008, respondent presided over the case of *People v. Bart Harvey, Jr.*, in which the defendant was charged with Unlawful Possession of

Marijuana and Aggravated Unlicensed Operation of a Motor Vehicle. ADA Christopher Hameline appeared for the Office of District Attorney Scott D. McNamara, and Assistant Public Defender James Kehoe represented the defendant. Mr. Kehoe objected to a plea offer that included forfeiture of $400 that had been seized from the defendant. Pursuant to local law, monies that are illegal proceeds from a criminal enterprise can be seized and forfeited. When Mr. Kehoe said that the defendant wanted the funds returned, respondent stated, "Then you deal with them over that. I don't have anything to do with the forfeiture sir. If Mr. McNamara wants to buy a new couch for his office or something else, I'm not in the middle of that."

20. After Mr. Kehoe said that the ADA was "getting direction from higher," respondent stated, "I think my couch thought might be true afterwards, if somebody is pressuring you to do this to get the forfeiture. Somebody wants a new laptop or whatever. I'm not saying it's inappropriate, maybe it is appropriate for the forfeiture. I sometimes wonder." Respondent continued, "Where the money goes, it goes for another picture in the paper and a headline."

21. Subsequently, District Attorney McNamara complained to Administrative Judge James D. Tormey that respondent's comments impugned his integrity, and Judge Tormey asked respondent to apologize. Respondent testified that he and Mr. McNamara did "mend fences."

22. At the hearing, respondent acknowledged that his comments about forfeiture were "snide" and "sharp." He testified that forfeiture places judges "in an uncomfortable position" because they have no authority over the seizure of funds.

People v. Rossie L. Harris

23. On or about December 6, 2008, in the case of *People v. Rossie L. Harris*, the defendant appeared before respondent for sentencing on a charge of Disorderly Conduct. Assistant District Attorney Todd C. Carville was the prosecutor, and Assistant Public Defender Mark C. Curley represented the defendant. Mr. Carville recommended a conditional discharge with a forensic evaluation so that the defendant could be evaluated for anger management.

24. Respondent imposed a conditional discharge, noting that the defendant was 74 years old. After imposing the sentence, respondent said to the defendant's attorney, "You know what? Mr. Curley, there is no justice because the end result of this is Mr. Carville gets another notch on his belt. It actually helps his standing in the office."

People v. David Carter

25. On June 28, 2011, in the case of *People v. David Carter*, in which the defendant was charged with Stalking, Assistant District Attorney Patrick Scully offered a plea, and Assistant Public Defender Cory Zennamo asked that the charge be dismissed because the accusatory instrument was insufficient. After a new accusatory instrument was filed, Mr. Scully made the same plea offer. Following an off-the-record discussion, respondent stated, "That would be the appropriate thing to do, but Mr. Scully is playing the cigar store Indian at the moment, so I don't know what he wants to do."

People v. Jean Palmer

26. A week later, on July 5, 2011, respondent presided over the case of

People v. Jean Palmer. Mr. Scully was the prosecutor. During discussion of a plea, respondent stated, "Mr. Scully is the perfect cigar store Indian at the moment, but he did discuss this with the court and is in agreement."

27. Respondent testified at the hearing that his comment in both *Carter* and *Palmer* was "an innocent use of words that were not intended to be offensive." He testified that he wanted the prosecutor to note his position on the record and stated, "[I]n hindsight, I wish I had used different language such as 'Mr. Scully, can we hear your input, please,' or words to that effect."

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) 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 III of the Amended Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established.

On two occasions respondent abused his judicial power by summarily holding defendants in contempt of court and depriving them of their liberty without due process. One defendant, who was disrespectful during a sentencing proceeding, was sentenced to a total of 150 days in jail on five separate counts of summary contempt, which respondent imposed in quick succession without issuing appropriate warnings or providing the defendant with an opportunity to make a statement in defense or

extenuation of his conduct. Another defendant was held in contempt and sentenced to 30 days in jail for "smirking" as he was leaving the courtroom after the proceeding had ended. In both matters, respondent failed to observe the mandated procedural safeguards before exercising his contempt power and sending the defendants to jail.

Pursuant to a judge's duty to "require order and decorum" in court proceedings (Rules, §100.3[B][2]), a judge may impose contempt for "[d]isorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority" (Jud Law §750[A][1]). "Where the offense is committed in the immediate view and presence of the court,... it may be punished summarily" (Jud Law §755). The exercise of the contempt power requires compliance with procedural safeguards, including giving the accused an appropriate warning and opportunity to desist from the contumacious conduct (*Katz v Murtagh*, 28 NY2d 234, 238 [1971]; *Loeber v. Teresi,* 256 AD2d 747 [3d Dept 1998]; *Doyle v. Aison,* 216 AD2d 634 [3d Dept 1995], *lv den* 87 NY2d 807 [1996]). Implicit in the law is that strict adherence to these procedures is necessary to ensure that summary contempt be imposed only in "exceptional and necessitous circumstances" (*see* 22 NYCRR §604.2[a][1]). A judge's failure to adhere to the mandated procedures is inconsistent with his or her ethical duty to "be faithful to the law" and may constitute misconduct that warrants public discipline. Rules, §100.3(B)(1); *Matter of Feeder*, 2013 NYSCJC Annual Report 124; *Matter of Mills*, 2005 NYSCJC Annual Report 185; *Matter of Teresi,* 2002 NYSCJC Annual Report 163; *Matter of Recant,* 2002 NYSCJC Annual Report 139.

In the case of *People v. Gentile*, respondent disregarded these procedural and ethical requirements in issuing five successive contempt citations against the defendant and imposing five consecutive 30-day jail sentences. Although it is clear from the record that the defendant was disruptive – he repeatedly turned and addressed the audience, threatened the victim, made faces, yelled at his lawyer, interrupted respondent and made disrespectful comments – it is a judge's duty to act in a patient, neutral, judicious manner and to properly apply the law regardless of the provocation (Rules, §100.3[B][3]). While respondent warned the defendant early in the proceeding that "putting on a show," threatening the victim and interrupting could result in contempt, he has acknowledged that he did not give appropriate warnings before each of the acts that triggered a contempt citation or thereafter provide the defendant with an opportunity to purge the contempt by making a statement or apologizing for his behavior; nor did respondent make a clear record of each of the defendant's contumacious acts. Even if it seemed unlikely that repeated warnings would have deterred further misbehavior or that the defendant would have apologized if afforded the opportunity to do so, he was entitled to the full protections afforded by law. At the hearing before the referee, respondent acknowledged that the number of contempt citations "just doesn't seem fair" and that he "should have just let [Mr. Gentile] talk."

In the case of *People v. Blount*, respondent not only failed to follow the mandatory contempt procedures, but abused his authority by holding the defendant in summary contempt and imposing a 30-day jail sentence for "smirking" after the proceeding had ended. The record establishes that from the outset of the proceeding,

respondent took personal offense at the defendant's demeanor and overreacted to a perceived show of disrespect. After the defendant apparently smiled or laughed as respondent was explaining the order of protection, respondent stated, "You're standing there with a grin that I would love to get off the bench and slap off your face." He then added, "How about 30 days in jail for contempt, that's hilarious too, isn't it? What's wrong with you? We done smirking?" Later, as the defendant was leaving the courtroom, respondent called him back and summarily committed him to jail for 30 days, stating that the defendant "gave me a nice, big smirk ... as if to say, blank you, Judge." Respondent provided no opportunity for the defendant to make a statement prior to the contempt adjudication and curtly rejected his attorney's attempt to intervene. Respondent's conduct was clearly a "substantial overreaction to conduct that in no way warranted such extreme punitive measures" (*Matter of Mills*, *supra*, 2005 NYSCJC Annual Report at 191). Not until five days later, after hearing from his administrative judge, did respondent vacate the contempt citation on his own motion, recognizing that his conduct in *Blount* was "intemperate" and inconsistent with the mandated procedures.

As respondent stated when he vacated Mr. Blount's contempt, a judge who has responsibility to hold people accountable for their conduct is "also accountable and expected to properly apply the law." If an individual's behavior is disorderly or disrespectful, strict adherence to the contempt procedures required by law may avoid the necessity of imposing a contempt citation to maintain order and decorum. Here, respondent's disregard of due process in both matters was inconsistent with the fair and proper administration of justice.

While the record before us depicts a judge who holds defendants and lawyers to exacting standards of courtroom behavior and is quick to lecture them for perceived displays of disrespect (*e.g.*, scolding Mr. Blount's lawyer and telling him to "shut up" when he quietly spoke to his client), respondent's own behavior fell short of the required standards. On several occasions he made injudicious, disparaging comments to and about attorneys. Respondent twice referred to a prosecutor as "a cigar store Indian" for not speaking during plea discussions. Such language was snide and demeaning, although we do not consider the term racially offensive in this context (*see Matter of Duckman*, 92 NY2d 141, 151 [1998] [judge described prosecutors as "mannequins" and "puppets" as part of a pattern of "open-court sarcasm and ridicule"). In another case, involving a 74-year old defendant who pled guilty to Disorderly Conduct, respondent stated derisively that the conviction gave the prosecutor "another notch on his belt." In a case where the prosecutor proposed a plea involving forfeiture of funds seized from the defendant, respondent speculated that the district attorney "wants to buy a new couch for his office" or "wants a new laptop or whatever." Respondent's flippant remarks were not only discourteous but impugned the lawyers' integrity and undermine their role in the eyes of defendants and the public, which is inconsistent with established ethical standards requiring judges to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary and to treat lawyers with courtesy, dignity and patience (Rules, §§100.2[A], 100.3[B][3]).

In finding that respondent engaged in misconduct with respect to the above matters, it seems appropriate to comment with respect to the dismissal of paragraphs 30

through 34 of the Amended Formal Written Complaint, which allege that respondent used a racial epithet in an off-the-record courtroom conversation with a lawyer approximately six years ago.[1] We consider this accusation of the utmost gravity. It would certainly be grounds for removal if credited, particularly in light of the other misconduct findings regarding respondent. We are deeply reluctant, however, to remove a jurist on the basis of the ambiguous evidence presented in connection with this allegation. While two attorneys say they heard the remark, at least three others (including an attorney) who were alleged to have been in the courtroom at the time swear they did not, and respondent has categorically denied using that term. Moreover, two supervisors who say they were contemporaneously informed of the alleged statement acknowledge that they did nothing in response at that time, and none of the witnesses memorialized the event or brought it to the attention of respondent's administrative judge (although one of the attorneys had previously made a complaint against respondent about matters that seem less egregious). Not until at least two years later was the allegation included in a complaint filed with the Commission.

Finally, as respondent's counsel has pointed out, the manner in which respondent was confronted by this allegation made any rebuttal on his part extremely difficult. Respondent was not made aware of the accusation – consisting of a single off-the-record statement – until more than a year after the Commission had received the

[1] It was alleged that after a court session had ended, respondent asked the lawyer, who is African-American, if the lawyer knew what black people from New York City call black people from upstate New York and when the lawyer responded in the negative, respondent replied, "Country niggers."

complaint and more than three years after the statement was allegedly made. Even then, respondent was given shifting time frames and few specifics as to when it took place; ultimately he was provided with a possible range of six months.

Under these circumstances, we simply cannot come to a firm conclusion as to what occurred in respondent's courtroom on the day in question. And while we generally give deference to the referee's findings, in this case the referee accepted the allegation as true without any explanation as to why, without making any credibility findings, and without setting forth any reasoning as to how he reached this conclusion. Indeed, the referee drew many conclusions favorable to respondent, including a finding that his testimony was "forthright" and that there was no other evidence of racial bias, without reconciling them with the findings on this incident. Absent any understanding of how the referee arrived at his factual determination, we cannot give it any deference.

Thus we are left with no clear view as to the accuracy of this allegation. In so stating, we do not intimate that we believe any particular account to be truthful, or any other to be false. Indeed, those are not the only possibilities. Even on a matter of this importance, witnesses can mishear or have mistaken or faded recollections, and after so many years uncertain memories can harden, while others can change. But the bottom line is that we cannot make a finding in regard to this allegation with any degree of confidence. Given the seriousness of this charge, the conflicting testimony, the absence of a clear explanation for the actions taken or not taken afterwards by those involved, respondent's adamant and consistent denials, and the difficulties presented in defending

against the allegation under these circumstances, we find that the record does not contain sufficient proof to sustain the allegation.

As to the misconduct established in the record before us, we conclude that it constitutes a significant breach of the ethical standards. We are unpersuaded, however, that the record establishes that respondent is "unfit to remain in office" (*Matter of Reeves*, 63 NY2d 105, 111 [1984]) and, in view of several factors, determine that he should be censured. In particular, we note that respondent took ameliorative steps to reduce the harsh consequences of his contempt citations. In *Blount*, he vacated the contempt on his own motion five days later, and the defendant, who was in custody on unrelated matters, was not subject to any additional incarceration. In *Gentile*, when the defendant's lawyer moved to modify the sentence (conceding that the defendant had engaged in "bad behavior"), respondent vacated two of the five counts of contempt. We also note that respondent has acknowledged that his actions were inconsistent with the procedures required by law and, as the referee found, has been "contrite recognizing that he had made errors in language and temperament" (Report, p 16). We accept respondent's assurance that he has learned from this experience and that his conduct in the future will be in strict accordance with the mandated procedural and ethical standards. Accordingly, we conclude that censure is appropriate.

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

Judge Ruderman, Judge Acosta, Mr. Belluck, Mr. Cohen, Ms. Corngold,

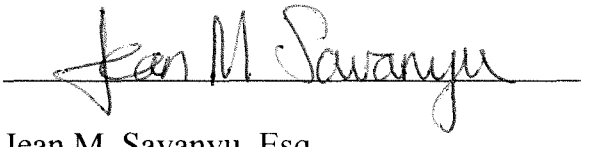
Mr. Emery, Mr. Harding, Mr. Stoloff and Judge Weinstein concur.

Judge Klonick dissents as to the dismissal of paragraphs 30 to 34 of the Amended Formal Written Complaint and dissents as to the sanction, voting that respondent should be removed from office.

CERTIFICATION

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

Dated: February 12, 2015



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