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

HOWARD GERBER,

a Justice of the Clarkstown Town Court,
Rockland County.

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THE COMMISSION:

Joseph W. Belluck, Esq., Chair
Taa Grays, Esq., Vice Chair
Jodie Corngold
Honorable John A. Falk
Paul B. Harding, Esq.
Honorable Leslie G. Leach
Honorable Angela M. Mazzarelli
Honorable Robert J. Miller
Marvin Ray Raskin, Esq.
Ronald J. Rosenberg, Esq.
Akosua Garcia Yeboah

APPEARANCES:

Robert H. Tembeckjian (Mark Levine and Daniel W. Davis, Of Counsel)
for the Commission

Scalise & Hamilton, P.C. (by Deborah A. Scalise) for respondent

Respondent, Howard Gerber, a Justice of the Clarkstown Town Court, Rockland County, was served with a Formal Written Complaint dated January 30, 2020,

containing one charge. Charge I of the Formal Written Complaint alleged that on three occasions, between August 2017 and November 2017, respondent made inappropriate comments to and about lawyers and others with whom he dealt in his official capacity and failed to disqualify himself after he expressed negative views regarding the Department of Probation in connection with a probation violation matter pending before him.

On April 21, 2020, the Administrator, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Section 44, subdivision 5, of the Judiciary Law, 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 April 30, 2020, the Commission accepted the Agreed Statement and made the following determination:

1. Respondent has been a Justice of the Clarkstown Town Court, Rockland County, since 2007. Respondent's current term expires December 31, 2023. He was admitted to the practice of law in New York in 1983.

As to the Rockland County Departments of Probation and Health

2. From November 8, 2017 to January 3, 2018, respondent presided over *People v. M.R.*, in which the defendant was charged with a Violation of Probation ("VOP") relating to his conviction for a misdemeanor sexual offense. The VOP was filed on behalf of the Rockland County Department of Probation on a petition by Probation

Officer Page Ehrhardt ("Officer Ehrhardt").

3. On November 8, 2017, respondent presided over a conference in the *M.R.* case. The conference was held in a jury deliberation room at the Clarkstown Town Court. Respondent, Officer Ehrhardt, defense attorney Michael Collado, and Assistant District Attorney ("ADA") Joanna McKeegan were present.

4. During the conference, in the presence of the aforementioned participants, respondent looked, pointed, and/or nodded at Officer Ehrhardt and said that he had problems with "your department" because the underlying facts of the case were reminiscent of *People v. C.P.*, a VOP matter over which respondent had presided eight years earlier.

5. Referring to Supervising Probation Officer Jennifer Williams ("Officer Williams") and *People v. C.P.*, respondent said that Officer Williams was a "liar" who had "perjured herself" while appearing before him in that matter. Respondent further said that he had come "this close to putting [Officer Williams] in jail" because he believed that she had failed to inform him that C.P. had reported to the Department of Probation on the same day she filed an application that sought C.P.'s arrest and alleged that C.P.'s whereabouts were unknown to her at that time.

6. Also referring to the *C.P.* matter, and to James Foley, a Sex Offender Treatment Specialist with the Rockland County Department of Health who had testified before respondent in that matter, respondent gestured with his fingers to connote quotation marks when referring to Mr. Foley as the "sex offender treatment specialist" who had testified in the prior matter. Respondent then said that Mr. Foley had received

his training "through the mail," referencing the fact that Mr. Foley had completed certain courses online, notwithstanding that Mr. Foley has a master's degree in social work and certifications in the treatment of juvenile and adult sex abusers.

7. Although Officer Williams supervised Officer Ehrhardt at the Department of Probation, and although Officer Ehrhardt worked closely with Mr. Foley, respondent failed to disqualify himself from the *M.R.* case, notwithstanding the negative views he expressed regarding Officer Williams, Mr. Foley, and the Department of Probation.

8. The *M.R.* case was settled on January 3, 2018, by agreement of the parties under new terms that they independently worked out without any input from respondent.

As to an Assistant District Attorney and a Motor Vehicle Case Defendant

9. ADA Joanna McKeegan was assigned by her office to appear in respondent's courtroom from April 2016 to December 2017, during which time she regularly appeared four days a month to prosecute misdemeanors and other criminal matters which were unrelated to Vehicle and Traffic Law ("VTL") matters involving vehicle registration.

10. From May 2017 to September 2017, respondent presided over *People v. M.G.*, in which a ticket had been issued to a parked car, pursuant to VTL 401-1a, for lacking proper registration. At various times in connection with this matter, M.G., her son E.G., and her daughter L.G. appeared in court without counsel. At one appearance, after M.G. and/or one of her children made admissions against their interest, respondent suggested that they retain counsel. Subsequently, ADA McKeegan informed respondent that her office was interested in investigating and prosecuting the matter.

11. On August 14, 2017, ADA McKeegan appeared for a conference in the matter with respondent and defense attorney Scott Feiden. During a conversation among those present regarding L.G.'s attire at past appearances, respondent said in words or substance that L.G. was "dressing for attention," by which he meant "for men to look at her."

12. During the same conference, someone commented that L.G. had worn "yoga pants" to court.[1] Respondent thereafter commented in words or substance to ADA McKeegan: "I don't care what anybody wears, Ms. McKeegan, if you wear yoga pants to court, it's okay with me." When ADA McKeegan did not respond, respondent said in words or substance, "Oh, I should not have said that. Are there cameras in here?"

As to an Assistant District Attorney and Her Friend

13. Peter Boyle is a friend of ADA Joanna McKeegan.

14. In the summer of 2017, at a time when he was visiting from London, England, Mr. Boyle came to observe ADA McKeegan work on cases in respondent's courtroom. She introduced him to respondent and the two men spoke briefly.

15. At the end of the court session, when ADA McKeegan, Mr. Boyle, and respondent were the only people left and respondent was walking out of the courtroom, he asked if ADA McKeegan and Mr. Boyle "want[ed] a room." Respondent

[1] While there are differing recollections as to who said L.G. had been wearing yoga pants, it is agreed by the parties that regardless of who said it, respondent's rejoinder regarding Ms. McKeegan was inappropriate.

then offered in words or substance to "turn off the lights" for ADA McKeegan and Mr. Boyle, intending to make an off-color joke.

Additional Factors

16. Respondent has been cooperative, candid, and contrite throughout the Commission's inquiry and has had an otherwise unblemished career as a judge.

17. Respondent appreciates that he is obliged to discharge his judicial duties in a fair and impartial manner and that disparaging remarks such as he made about Officer Williams, Mr. Foley, and the Department of Probation during *People v. M.R.* undermine public confidence in his fairness and impartiality. Respondent now recognizes that he should have disqualified himself from *People v. M.R.* after making the remarks.

18. Respondent acknowledges that his comments regarding the attire of a VTL litigant were inappropriate. He regrets his remarks and pledges to refrain from making similar comments in the future.

19. Respondent regrets his remarks to ADA McKeegan and Mr. Boyle. He recognizes that the remarks, which he intended to be humorous, were inappropriate and injudicious.

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)(3) and 100.3(E)(1) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause pursuant

to Article 6, Section 22, subdivision (a) of the Constitution and Section 44, subdivision 1 of the Judiciary Law. Charge I of the Formal Written Complaint is sustained insofar as it is consistent with the above findings and conclusions and respondent's misconduct is established.

Each judge is obligated to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" and to "be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. . .." (Rules, §§100.2(A) and 100.3(B)(3)) Respondent stipulated that his disparaging remarks regarding the Department of Probation, one of its employees and an employee of the Department of Health while presiding over a violation of probation matter were improper and undermined public confidence in the impartiality of the judiciary. Similarly, respondent admitted that his comment that the daughter of a litigant was "dressing for attention" was also inappropriate. Respondent compounded his misconduct when, after it was noted that the litigant's daughter wore yoga pants to court, respondent told the ADA during a case conference, "if you wear yoga pants to court, it's okay with me." When the ADA did not respond to his improper comment, respondent, who understood at the time that his remark was inappropriate, stated, "Are there cameras in here?"

It was discourteous and unacceptable for respondent to tell an attorney appearing before him that she could wear yoga pants to court. This comment was particularly inappropriate since respondent had just made a remark by which he meant that the litigant's daughter who had worn yoga pants to court did so "for men to look at her."

Respondent demeaned the ADA and detracted from the professionalism of the proceeding over which he was presiding. In addition, respondent's comments to the ADA and her friend asking whether they "want[ed] a room" and offering to "turn off the lights" were also demeaning and inappropriate for a judge to make in a courtroom. By his conduct, respondent violated his ethical responsibilities.

More than 30 years ago, the Commission made clear that it was inappropriate for a judge to make comments regarding the appearance of female attorneys even if such comments were intended to be humorous. In *Matter of Doolittle*, 1986 NYSCJC Annual Report 87, the Commission held,

> The cajoling of women about their appearance or their temperament has come to signify differential treatment on the basis of sex. A sensitized and enlightened society has come to realize that such treatment is irrational and unjust and has abandoned the teasing once tolerated and now considered demeaning and offensive. Comments such as those of respondent are no longer considered complimentary or amusing, especially in a professional setting.

Id. at 88. As an experienced attorney and an experienced jurist, respondent should have known that his comments toward the ADA were discourteous, unprofessional, and improper.

Section 100.3(E)(1) of the Rules provides: "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . .." During a violation of probation proceeding, based upon his experience in a similar matter several years earlier, respondent made disparaging comments regarding the Department of Probation, one of its employees and an employee of the Department of

Health. It is well-settled that a judge must disqualify if he or she has a bias for or against a party. *Matter of Appel*, 2008 NYSCJC Annual Report 77, 78 ("As a judge, respondent is required to set aside her personal biases and to act impartially; she must not only be, but appear to be, impartial. If she could not do so because of a personal bias, she was required to disqualify herself.") Given his disparaging statements, respondent's impartiality could reasonably be questioned.[2] Respondent acknowledged that he should have disqualified himself from the matter.

In accepting the jointly recommended sanction of admonition, we have taken into consideration that respondent has an unblemished record in his thirteen years on the bench and has acknowledged that his conduct warrants public discipline. We expect that respondent has learned from this experience, will comply with his pledge to refrain from making inappropriate comments in the future and will act in accordance with his obligation to abide by all the Rules Governing Judicial Conduct.

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

Mr. Belluck, Ms. Grays, Ms. Corngold, Judge Falk, Mr. Harding, Judge Leach, Judge Mazzarelli, Judge Miller, Mr. Raskin, Mr. Rosenberg, and Ms. Yeboah concur.

[2] It was stipulated that after respondent's inappropriate statements, the parties resolved the matter without respondent's involvement.

CERTIFICATION

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

Dated: June 17, 2020

Celia A. Zahner, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct