

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

DAVID W. WILBANKS,

a Justice of the Fort Covington Town Court,
Franklin County.

**MEMORANDUM BY COUNSEL TO
THE
COMMISSION IN SUPPORT OF RECOMMENDATION
THAT RESPONDENT BE REMOVED FROM OFFICE**

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PRELIMINARY STATEMENT

This Memorandum is respectfully submitted by Counsel to the Commission on Judicial Conduct (“Commission”) in support of Counsel’s recommendation that the Honorable David W. Wilbanks (“Respondent”) be removed from judicial office. The Commission has already determined that Respondent committed judicial misconduct, having granted Counsel’s uncontested motion for summary determination on January 25, 2024.

PROCEDURAL HISTORY

A. The Formal Written Complaint

Pursuant to Judiciary Law §44(4), the Commission authorized a Formal Written Complaint (“Complaint”), dated October 26, 2023, containing two charges, alleging that Respondent:

1. failed to report or remit court funds to the Office of the State Comptroller in a timely manner, and
2. failed to cooperate with the Commission’s investigation of the complaint that he failed to timely report and remit funds to the Comptroller, in that
 - A. he failed to respond to two letters from the Commission requesting his response to the complaint concerning his failure to report and remit to the Comptroller,
 - B. he failed to produce court records and other related documents requested by the Commission, and
 - C. he failed to appear as required for scheduled testimony before the Commission.

B. Respondent's Failure to Answer

Respondent was personally served with the Complaint on November 9, 2023.

He did not file an Answer.

C. Motion for Summary Determination

By motion dated December 18, 2023, Commission Counsel moved for summary determination, in that the allegations in the Complaint were deemed admitted by Respondent's failure to file an Answer and constituted judicial misconduct. Respondent did not respond to the motion.

D. The Commission's Decision and Order

By decision and order dated January 25, 2024, the Commission granted the motion for summary determination in all respects, finding that the factual allegations of Charges I and II of the Complaint, and Respondent's misconduct, were established. The Commission found the following facts.

Charge I: For the months of December 2022 through May 2023, Respondent failed to report or remit court funds in a timely manner to the Office of the State Comptroller ("Comptroller"), as required by Section 1803 of the Vehicle and Traffic Law, Sections 2020 and 2021 of the Uniform Justice Court Act, Section 27, subdivision 1, of the Town Law, and Section 99-a of the State Finance Law.

On or about February 14, 2023, the Comptroller issued Respondent a written notice advising that his December 2022 monthly report had not been filed by the 10th

day of the following month as required and still was not on file with the Comptroller (Complaint ¶ 6). A copy of the notice is appended as Exhibit 1 to the Complaint.

On or about March 22, 2023, the Comptroller issued Respondent a second written notice advising that his December 2022 monthly report had not been filed, and simultaneously notified him that he had failed to file his January 2023 monthly report by the 10th day of the following month as required (Complaint ¶ 7). A copy of the second notice is appended as Exhibit 2 to the Complaint.

Respondent failed to file his February 2023 monthly report by the 10th day of the following month as required, and it remained unfiled through on or about mid-April 2023 (Complaint ¶ 8).

On or about April 20, 2023, the Comptroller left a phone message for Respondent regarding his still-unfiled reports for December 2022, January 2023, and February 2023, as a courtesy before mailing him a notice that his salary would be stopped in connection with those delinquencies (Complaint ¶ 9). A copy of the Justice Court Fund (JCF) phone record is appended as Exhibit 3 to the Complaint.

That same day, the Comptroller also sent an email to Respondent, again noting the delinquent December 2022 and January 2023 monthly reports and notifying him of his failure to file his February 2023 monthly report in a timely manner. A copy of the April 20, 2023, email is appended as Exhibit 4 to the Complaint. The email further

advised Respondent of the prior written notices, as well as the phone message left for him that same day, concerning his delinquent reports (Complaint ¶ 10).

On or about April 18, 2023, the Comptroller notified the Fort Covington Town Supervisor to stop Respondent's judicial salary in connection with his failure to file his monthly reports for December 2022, January 2023 and February 2023. A copy of the stop-salary notice is appended as Exhibit 5 to the Complaint. Thereafter, Respondent failed to timely file his reports for March, April and May 2023. (Complaint ¶ 11).

Respondent failed to file his monthly reports with the Comptroller for the months of December 2022 through May 2023 until on or about July 6, 2023. Thereafter, Respondent's judicial salary was resumed (Complaint ¶ 12). A copy of the resume-salary notice, dated July 17, 2023, is appended as Exhibit 6 to the Complaint.

Charge II: Respondent failed to cooperate with the Commission's investigation by failing to respond to two letters requesting his response to the complaint concerning his failure to report and remit to the Comptroller; by failing to produce court records and other related documents requested by the Commission; and by failing to appear for scheduled testimony before the Commission, as was required.

By letter dated May 3, 2023, the Commission notified Respondent that it was investigating a complaint from the Comptroller alleging that he had failed to file reports or remit funds to the Comptroller in the time required by law for the months of December 2022, January 2023, and February 2023, which resulted in his judicial

salary being stopped on or about April 18, 2023. The letter requested that Respondent provide a written response to the allegations and produce court records and other related documents by May 31, 2023. The letter was sent to Respondent by regular mail and via email to his court system account: ██████████@nycourts.gov (Complaint ¶ 16). A copy of the letter is appended as Exhibit 7 to the Complaint.

Respondent failed to respond to the Commission’s letter of May 3, 2023, and failed to produce any documents requested therein (Complaint ¶ 17).

By letter dated June 14, 2023, the Commission sent Respondent a copy of its letter dated May 3, 2023, and requested his response by June 28, 2023. The letter informed Respondent that his “failure to respond may be found by the Commission to be failure to cooperate with the investigation” (emphasis in original) (Complaint ¶ 18). A copy of the letter is appended as Exhibit 8 to the Complaint.

Respondent did not respond to the Commission’s letter of June 14, 2023. (Complaint ¶ 19).

By letter dated July 13, 2023, which was personally delivered to the Fort Covington Town Court and accepted by the court clerk, the Commission notified Respondent that his testimony concerning the stop-salary complaint was required on August 16, 2023, at 10:30 AM at the Commission’s Albany office. The letter noted that the Commission had not received a response from Respondent and enclosed a copy of the complaint, as well as copies of the letters from the Commission dated May

3, 2023, and June 14, 2023. The letter of July 13, 2023, requested that Respondent confirm his appearance by August 7, 2023 (Complaint ¶ 20). A copy of the letter is appended as Exhibit 9 to the Complaint.

Respondent neither confirmed his appearance for testimony nor provided any documents to the Commission (Complaint ¶ 21).

On or about August 15, 2023, a member of the Commission's staff telephoned Respondent at his place of employment. Respondent confirmed having received the Commission's letter requiring his appearance the following day for testimony. Respondent stated that he was going to be out of town and could not appear to testify as scheduled, but offered to appear for testimony on his day off the following week, on August 21, 2023 (Complaint ¶ 22).

The Commission sent Respondent a letter dated August 15, 2023, to his home address, adjourning his appearance for testimony to August 21, 2023, as he had requested and agreed, and providing directions to the Commission's Albany office (Complaint ¶ 23). A copy of the letter is appended as Exhibit 10 to the Complaint.

Respondent failed to appear at the Commission's Albany office on August 21, 2023, and failed to communicate with the Commission in any manner. A transcript was prepared on August 21, 2023, noting Respondent's failure to appear. On August 23, 2023, a copy of the transcript along with its exhibits and a cover letter were mailed to the Respondent's home address. Respondent personally received and signed for

those documents on August 28, 2023 (Complaint ¶ 24). A copy of the transcript along with its exhibits, cover letter and proof of delivery are appended as Exhibit 11 to the Complaint.

ARGUMENT

POINT I

RESPONDENT’S FAILURE TO REPORT OR REMIT COURT FUNDS AS REQUIRED BY LAW CONSTITUTES MISCONDUCT WARRANTING REMOVAL.

As the Court of Appeals held in *Matter of Petrie*, 54 NY 2d 807 (1981), the “disregard for statutory recordkeeping requirements and ... carelessness in handling public moneys is a serious violation of [a Judge’s] official responsibilities. Such a breach of the public’s trust warrants removal.” *Id.* at 808. Indeed, “[s]uch breaches of public trust have frequently led to removal.” *Matter of Murphy*, 82 NY 2d 491, 494 (1993) (citing *Matter of Vincent*, 70 NY 2d 208, 209 [1987]); *Matter of Rater*, 69 NY 2d 208, 209 (1987); *Matter of Petrie*, 54 NY2d at 808; *Matter of Cooley*, 53 NY 2d 64, 66 (1981)); *see also Matter of Persons*, 2024 Ann Rep of NY Comm on Jud Conduct at ___ (removal warranted where judge’s “underlying misconduct was significantly exacerbated when he chose to ignore the Commission’s proceedings”).¹ Such mishandling of public money by a judge is serious misconduct even when not done for personal profit. *See Bartlett v. Flynn*, 50 AD2d 401,404 (4th Dept 1976).

¹ Available at <https://cjc.ny.gov/Determinations/P/Persons.Jeremy.L.2023.02.23.DET.pdf>, at p. 20.

Here, Respondent failed to comply with clear statutory requirements governing the reporting and remitting of court funds, in that he failed to file six months' worth of monthly reports in a timely fashion, despite multiple requests and reminders from the Comptroller. That dereliction of duty – which resulted in his salary being stopped on in April 2023 – is the precise type of misconduct the Court of Appeals has called “serious,” regardless of the monetary the amounts involved. *See Petrie*, 54 NY2d at 808; *Cooley*, 53 NY2d at 64.

With respect to financial and administrative transgressions, the Court of Appeals has stated: “The severity of the sanction imposed for this variety of misconduct depends upon the presence or absence of mitigating and aggravating circumstances.” *See Matter of Rater*, 69 NY2d 208, 209 (1987). The Court noted that “in the absence of any mitigating factors, the failure to make timely deposits in the court account and timely reports and remittances to the State might very well lead to removal.” *Id.*

There are no mitigating factors present in this case. To the contrary, Respondent’s failure to cooperate with the Commission’s investigation into his failure to account for court funds is a significant aggravating factor. Respondent should be removed from office for this misconduct.

POINT II

RESPONDENT’S FAILURE TO COOPERATE WITH THE COMMISSION’S INVESTIGATION EXACERBATES HIS MISCONDUCT AND FURTHER WARRANTS REMOVAL AS THE APPROPRIATE SANCTION.

“[I]t is well settled that, when a judge fails to cooperate with an investigation of the Commission – which is vested with the statutory authority to require the appearance of the judge involved before it – that dereliction can be a significant aggravating factor in determining the appropriate sanction.” *Matter of O’Connor*, 32 NY3d 121, 129 (2018) (citations and quotation marks omitted). *See also Matter of Cooley*, 53 NY2d 64, 66 (1981) (removing judge where failure to comply with filing and recordkeeping requirements was exacerbated by her failure to cooperate with the Commission’s investigation); *Matter of Mason*, 100 NY2d 56, 60 (2003) (the judge’s misconduct “was significantly compounded by [his] persistent failure to cooperate with the Commission investigation and his marked lack of candor”).

The Commission is authorized to “request a written response from the judge who is the subject of the complaint” and to require a judge’s testimony during the investigation (22 NYCRR §7000.3[c], [e]; Jud. Law §44, subd.3). Accountability for members of the judiciary is critical and all judges must be attentive to their responsibility to participate in Commission proceedings. *Matter of Persons*, 2024 Ann Rep at __. As the Court of Appeals held in *O’Connor*, “those who don the robe and assume the role of arbiter of what is fair and just must do so with an acute

appreciation both of their judicial obligations and of the Commission’s constitutional and statutory duties to investigate allegations of misconduct” so that “the public trust in the judiciary is ... maintained.” 32 NY3d at 129 (citing NY Const, art VI, § 22; Judiciary Law, article 2-A). “In short,” the Court concluded, “willingness to cooperate with the Commission’s investigations and proceedings is not only required – it is essential.” *Id.*

By refusing to answer the Commission’s multiple written inquiries, failing to produce court records and other related documents, and failing to appear for testimony concerning the complaint under investigation, Respondent delayed and impeded the Commission’s efforts to obtain a full record of the relevant facts and thereby obstructed the Commission’s discharge of its lawful mandate. His failure to cooperate “demonstrates a lack of respect for the process, created by Constitution and statute, under which the Commission is empowered to investigate the conduct of judges.” *Matter of McCall*, 2004 Ann Rep of NY Commn on Jud Conduct at 137.

Notably, in this proceeding, Respondent also willfully and pervasively failed to answer the charges or respond to the motion for summary determination. His failure to respond throughout the proceeding or to submit any papers on his own behalf may be construed not only as an admission of the allegations, but as “an indifference to the attendant consequences.” *Matter of Nixon*, 53 AD2d 178, 180 (1976). In its totality, Respondent’s conduct shows “contumacious disregard for the responsibilities of [his]

judicial office,” which warrants removal from office. *Matter of Carney*, 1997 Ann Rep of NY Commn on Jud Conduct at 78, 79.

CONCLUSION

For the foregoing reasons, Commission Counsel respectfully requests that the Commission, based upon Respondent’s collective established misconduct, issue a determination that Respondent be removed from office.

Dated: February 15, 2024
Albany, New York

Respectfully submitted,

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