

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

DETERMINATION

MICHAEL M. FEEDER,

a Justice of the Hudson Falls Village
Court, Washington County.

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Honorable Jill Konviser
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci and Cheryl L. Randall,
Of Counsel) for the Commission

Kindlon Shanks & Associates (by Lee C. Kindlon) for the Respondent

The respondent, Michael M. Feeder, a Justice of the Hudson Falls Village
Court, Washington County, was served with a Formal Written Complaint dated April 19,

2006, containing four charges. The Formal Written Complaint alleges that respondent: (i) used his judicial power to effect the arrest of a motorist and then took action in the case; (ii) made improper public statements supporting stronger penalties for curfew violations; (iii) promised a defendant's mother *ex parte* that he would not sentence the defendant to jail; and (iv) granted an adjournment in contemplation of dismissal without notice to or the consent of the prosecution. A second Formal Written Complaint dated October 9, 2007, was served, containing one charge. The second Formal Written Complaint alleged that respondent presided over cases filed by members of the Hudson Falls Police Department without disclosing his close friendship with the Assistant Chief of Police.

By notice of motion dated January 7, 2008, counsel to the Commission moved for summary determination pursuant to Section 7000.6(c) of the Commission's operating procedures and rules (22 NYCRR §7000.6[c]), based on respondent's failure to answer the Formal Written Complaints. Respondent did not file a response to the motion. By Decision and Order dated January 29, 2008, the Commission granted the motion for summary determination and determined that the charges were sustained and that respondent's misconduct was established.

By stipulation dated March 5, 2008, the parties agreed that the summary determination should be vacated, that respondent be permitted to file an answer to the Complaints, and that if respondent vacated judicial office before the Commission rendered a determination on the merits, the stipulation would be public and respondent

would not seek or accept judicial office in the future. The Commission accepted the stipulation by Decision and Order dated March 13, 2008.

By Order dated January 29, 2007, 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 August 18 and 19, 2008, in Albany. The referee filed a report dated June 29, 2009.

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's counsel argued that misconduct was not established. By letter to the Commission dated September 22, 2009, Commission counsel withdrew Charge II of the Formal Written Complaint.

On September 23, 2009, 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 Justice of the Hudson Falls Village Court since October 1999. From January 1, 1998, to December 31, 2005, he was also a Justice of the Kingsbury Town Court. Respondent is not an attorney.

As to Charge I of the Formal Written Complaint:

2. On or about December 31, 2004, while driving his own vehicle in the Village of Hudson Falls, respondent observed motorist Fred Kennison as he allegedly

failed to yield the right of way to a pedestrian in a crosswalk. Respondent telephoned the local police dispatcher and provided local police with the license plate number and a description of the vehicle.

3. Respondent pursued Mr. Kennison's vehicle for more than a mile. Respondent's intent was to make a citizen's complaint or a citizen's arrest. Throughout his pursuit of Mr. Kennison, respondent maintained phone contact with the Village of Hudson Falls police.

4. Signaling with his high beams, respondent induced Mr. Kennison's vehicle to pull over. Respondent then approached Mr. Kennison's vehicle and identified himself as a judge, displaying a badge bearing the words "Town Justice, Town of Kingsbury." Respondent told Mr. Kennison that he had committed a traffic infraction.

5. Mr. Kennison denied that he had committed an infraction. Faced with a member of the judiciary in direct contact with the police, Mr. Kennison agreed to return to the Hudson Falls Village Police Department, and he and respondent drove their vehicles there.

6. At the Police Department, respondent spoke with Sergeant Mark LaFay and signed a complaint against Mr. Kennison. Based on respondent's statement, Sergeant LaFay issued a citation to Mr. Kennison for Failing to Yield to a Pedestrian in a Crosswalk, and based on his own observation, he issued a citation for Operating a Motor Vehicle While Using a Cell Phone. The charges were filed in the Hudson Falls Village Court.

7. Mr. Kennison retained an attorney, who contacted the court and requested an adjournment and a supporting deposition. On or about January 6, 2005, respondent granted the requested adjournment and ordered the production of a supporting deposition. On the same date, respondent recused himself from the case. The case was transferred to another court.

8. Following his recusal but while the *Kennison* case was still pending, on or about January 6, 2005, respondent met with a reporter for the *Post Star* newspaper and spoke with him about Mr. Kennison's case. Respondent was accurately quoted in a January 7, 2005, *Post Star* article as having said, "I think anyone who saw [Mr. Kennison] would have reported him." Around the same time, respondent spoke about the incident with a reporter for WTEN Channel 10 news, who accurately quoted respondent as having said, "It bothers me that he gets to say whatever he wants and I can't respond. At some point my side will be heard."

9. The case was disposed of in the Fort Ann Town Court, where Mr. Kennison pled guilty to a charge and was fined \$25.

As to Charge II of the Formal Written Complaint:

10. The charge was withdrawn and therefore is dismissed.

As to Charge III of the Formal Written Complaint:

11. On December 24, 2004, Tanya Looney was arrested and charged with Driving While Intoxicated ("DWI"), Unlawful Possession of Marijuana and an

equipment violation.

12. Within the previous five years, Ms. Looney had been convicted of DWI and Driving While Ability Impaired and had twice completed a mandatory drug court program supervised by respondent. During those programs, Ms. Looney was returned to jail at least twice following violations of the drug court protocols.

13. Sometime prior to Ms. Looney's appearance in court on the December 24, 2004 charges, her mother, Linda Looney, approached respondent after a court session. In an *ex parte* conversation, Mrs. Looney asked respondent not to impose a sentence in her daughter's case that included incarceration. Mrs. Looney told respondent that she was ill and that if her daughter were incarcerated, there would be no one to care for Tanya's children. Respondent told Mrs. Looney to have her daughter "come in and see what we could do about that." At the time of this conversation, respondent knew that he was scheduled to hear Tanya Looney's case.

14. On January 26, 2005, Tanya Looney, represented by counsel, appeared before respondent. The assistant district attorney said that because of the defendant's prior convictions, the DWI misdemeanor charge should have been charged as a felony, but she was amenable to a guilty plea to all the charges, with a sentence within the judge's discretion. For a misdemeanor conviction, the defendant faced a possible sentence of up to one year of incarceration. Respondent accepted the plea from Ms. Looney and sentenced her to a conditional discharge and a series of fines. Respondent did not disclose his *ex parte* conversation with the defendant's mother.

15. In sworn testimony during the Commission investigation on November 29, 2005, respondent stated that he did not recall speaking to Mrs. Looney about her daughter's case. At the oral argument before the Commission, respondent acknowledged that Mrs. Looney had spoken to him *ex parte* about her daughter's case and had asked him not to impose a jail sentence. Respondent also stated that he had told Mrs. Looney to "have Tanya come in," by which he meant that she should come to court and he would be fair. Respondent acknowledged that he had erred in speaking to Mrs. Looney and in not disclosing the conversation to the attorneys.

As to Charge IV of the Formal Written Complaint:

16. In February 2005 Raymond Camp was served with a criminal summons, signed by respondent, for a village code violation for having two unregistered vehicles on his property.

17. A few days later, after Mr. Camp had the unregistered vehicles removed from his property, he contacted Terry Root, the officer named on the summons, and informed him that the violation had been remedied. At the Commission hearing, Mr. Camp testified that Mr. Root told him that respondent had "asked [him] to go out and look for code violations."

18. Mr. Camp asked Mr. Root to speak with respondent about having the matter "settled" that day, and shortly thereafter Mr. Camp was called to appear before respondent.

19. On February 16, 2005, Mr. Camp appeared before respondent

without counsel. No representative for the prosecution was present. Sometime prior to Mr. Camp's appearance, Mr. Root advised respondent that the violation had been remedied.

20. Mr. Camp told respondent that he had been given a criminal summons for a code violation, that he should have been given an opportunity to remedy the violation, and that the vehicles had been removed. Respondent's arraignment memorandum shows that Mr. Camp pleaded guilty.

21. Respondent imposed an adjournment in contemplation of dismissal ("ACD") without the consent of the defendant or the prosecution notwithstanding that section 170.55(1) of the Criminal Procedure Law requires the consent of both parties to such a disposition.

22. In his investigative testimony, respondent stated that Mr. Camp had pled guilty while explaining that he had remedied the violation. Respondent acknowledged that he knew that an ACD requires the consent of the prosecution; he testified that he may have intended to impose an unconditional discharge and recorded the disposition in error.

As to Charge V of the Second Formal Written Complaint:

23. Randy Diamond has been a police officer with the Hudson Falls Police Department for over 22 years. He served as Assistant Chief of Police from in or about 2004 until June 2008, when he was promoted to Chief of Police.

24. As Assistant Chief, Diamond had supervisory authority over all the

patrol officers, detectives and drug task force operations in the Hudson Falls Police Department. He supervises approximately 23 officers in the department.

25. Respondent and Diamond have been close personal friends for at least ten years. They and their wives socialize several times per year, sometimes at each other's homes. In or about July 2006, respondent and Diamond and several other people vacationed together in Florida. For a few weeks in 2001, respondent resided in Diamond's home.

26. Since 2004, Assistant Chief Diamond and members of the Hudson Falls Police Department have filed numerous criminal and traffic charges in respondent's court and have testified in matters over which respondent has presided. In one case, Diamond himself appeared before respondent as a witness. Respondent presided over such matters without disqualifying himself or disclosing to any of the parties his relationship with Diamond.

27. By failing to disclose his close personal friendship with Diamond, respondent deprived the parties of the opportunity to consider whether his disqualification in proceedings involving the local police would be appropriate.

Supplemental finding:

28. At the hearing before the referee, respondent did not testify or offer any evidence to dispute the charges. In light of respondent's failure to testify or offer any contrary evidence, a negative inference can be drawn from respondent's silence with respect to the charged misconduct.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(C), 100.3(B)(1), 100.3(B)(6), 100.3(B)(8), 100.3(E)(1), 100.3(E)(1)(a)(ii) and 100.4(A)(1), (2) and (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. Charges I, III and IV of the Formal Written Complaint and Charge V of the Second Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent’s misconduct is established. Charge II was withdrawn by Commission counsel and, therefore, is dismissed.

At all times, a judge remains “cloaked figuratively” with the robes of judicial office. *Matter of Kuehnel v Comm on Judicial Conduct*, 49 NY2d 465, 469 (1980). Thus, even off the bench, judges are required to avoid conduct that casts doubt on the judge’s impartiality, interferes with the proper performance of judicial duties or detracts from the dignity of judicial office (Rules, §§100.4[A][1], [2], [3]). By pursuing a motorist for a perceived traffic violation, displaying a badge and identifying himself as a judge to the motorist, and filing a complaint against the motorist in the court where he is a judge, respondent undertook law enforcement duties and thereby compromised his impartiality. Such activities are inherently incompatible with judicial office. *Matter of Ronas*, 1995 Annual Report 126 (Comm on Judicial Conduct) (judge followed or

confronted motorists for purported traffic infractions on numerous occasions).

A judge cannot be perceived as neutral and detached if he or she acts as a law enforcement officer; indeed, the law prohibits a judge from being a peace officer of any kind (UJCA §105[c]; Rules, §100.4[C][2][b]). Since respondent had provided the license number and vehicle description to the police, it was unnecessary for him to pursue the motorist further, to confront him while identifying himself as a judge, and to lead him to the police station. Even if respondent believed that he was acting in the public interest, he should have recognized that acting as a traffic enforcer is inconsistent with his role in presiding over such cases as a judge.

Respondent compounded his misconduct a week later by taking judicial action in the case, which was filed in his court, and by commenting about the case to the press. Instead of immediately disqualifying himself, respondent issued a notice for a supporting deposition in the case and granted an adjournment at the request of the defendant's attorney. Although he disqualified himself that same day, respondent should have realized that it was improper to take any action as a judge in a case that he himself had initiated (Rules §100.3[E][1][a][ii]; *Matter of Barnes*, 2005 Annual Report 81 [Comm on Judicial Conduct]). Respondent also should have realized the impropriety of commenting to the press about the case, and publicly criticizing the motorist, while the case was pending (Rules §100.3[B][8]). In fact, respondent's statements ("It bothers me that he gets to say whatever he wants and I can't respond") show that he was mindful of the ethical prohibition even as he made the inappropriate comments.

In another matter, respondent granted an adjournment in contemplation of dismissal without the consent of the prosecution or the defendant, contrary to the procedures mandated by law (CPL §170.55[1]). Judges must be faithful to the law and maintain professional competence in it (Rules, §100.3[B][1]; *Matter of Barringer*, 2006 Annual Report 97 [Comm on Judicial Conduct]). While not every error of law constitutes a violation of the ethical rules, respondent's conduct here, especially when viewed together with his other actions, adds to the appearance that he was deliberately acting both as judge and prosecutor.

In the *Looney* case, respondent engaged in an *ex parte* conversation with the mother of a defendant charged with Driving While Intoxicated, who asked him not to impose a jail sentence in her daughter's case. Notwithstanding that the defendant had previously been convicted of two alcohol-related driving offenses and had twice completed drug court under respondent's supervision, respondent imposed a notably lenient disposition in the case – a conditional discharge and a series of fines – without disclosing the *ex parte* request. Regardless of whether he was influenced by his conversation with the defendant's mother, his conduct conveyed the appearance of favoritism and prejudgment. See *Matter of LaBombard*, 11 NY3d 294 (2008) (after engaging in an *ex parte* conversation with the defendant's mother, judge vacated a bail order he had issued, compounding the appearance of favoritism). Respondent's actions were inconsistent with his obligation to avoid even the appearance of impropriety, both on and off the bench, and to avoid improper *ex parte* communications (Rules,

§§100.2[A], 100.3[B][6]). Public confidence in the impartiality and independence of the judiciary is seriously diminished by such conduct.

While we view such misconduct as serious, we note that there was no testimony that respondent “promised” the defendant’s mother that he would be lenient, as stated by the dissent. Although the sentence he imposed was consistent with her *ex parte* request – contributing to the appearance of impropriety – judges have broad discretion on sentencing, and the sentence was a lawful one.

Finally, over several years respondent presided over numerous cases filed by members of the local police department without disclosing his close personal friendship with then-Assistant Chief of Police Randy Diamond. In view of respondent’s relationship with Diamond – which included socializing, vacationing with him, and living for a few weeks in Diamond’s home in 2001 – his impartiality in cases involving the police department might reasonably be questioned (Rules, §100.3[E][1]); certainly this was so when Diamond personally appeared in respondent’s court, as he did in one case. At the very least, respondent should have disclosed the relationship, subject to remittal (Rules, §100.3[F]; *see, Matter of Robert*, 89 NY2d 745 [1997]; *Matter of Merkel*, 1989 Annual Report 111 [Comm on Judicial Conduct][without disclosure, judge issued a warrant and disposed of a case in which her court clerk was the complaining witness]).

While this series of misdeeds, which are essentially undisputed,¹ shows insensitivity to the high ethical standards required of judges and warrants a severe

sanction, we are unpersuaded that the record establishes that respondent's continued performance in judicial office threatens the proper administration of justice or that he is unfit to serve as a judge. Removal is the ultimate sanction and should be imposed only in the event of truly egregious circumstances (*Matter of Steinberg*, 51 NY2d 74, 83 [1980]; *Matter of Cunningham*, 57 NY2d 270, 275 [1982]). While serious, the misconduct described herein does not rise to the level of "egregious" misbehavior which has been held to warrant the sanction of removal (*compare, e.g., Matter of LaBombard, supra; Matter of VonderHeide*, 72 NY2d 658 [1988]; *see also, Matter of F. Alessandro*, ___ NY3d ___, No. 126 [Oct. 20, 2009]). We also note that at the oral argument, respondent expressed remorse, acknowledged that he had exercised poor judgment with respect to these matters and stated that he is committed to ensuring that his conduct in the future is consistent with the ethical standards. Accordingly, we conclude that censure is appropriate.

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

Judge Klonick, Mr. Coffey, Mr. Emery, Mr. Harding, Ms. Hubbard, Judge Konviser, Ms. Moore, Judge Peters and Judge Ruderman concur, except as follows.

Mr. Coffey, Ms. Hubbard and Judge Konviser dissent as to Charge IV and vote to dismiss the charge.

¹At the hearing, respondent did not testify or offer any contrary evidence, permitting a negative inference to be drawn as to the allegations (*Matter of Reedy*, 64 NY2d 299, 302 [1985]).

Judge Klonick, Mr. Emery and Ms. Moore dissent as to the sanction and vote that respondent be removed. Mr. Emery files an opinion, in which Judge Klonick and Ms. Moore concur.

Mr. Belluck was not present.

CERTIFICATION

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

Dated: November 18, 2009

Jean M. Savanyu, Esq.
Clerk of the Commission
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

MICHAEL M. FEEDER,

a Justice of the Hudson Falls Village
Court, Washington County.

DISSENTING OPINION
BY MR. EMERY, IN
WHICH JUDGE KLONICK
AND MS. MOORE JOIN

A majority of the Commission finds Hudson Falls Village Justice Michael Feeder to have committed misconduct in the context of four charges that, in the majority's opinion, warrants censure. In fact, the four counts of misconduct really comprise seven serious acts of misconduct because the first charge comprised three violations and the third charge comprises two. With respect to Charge I, Judge Feeder (1) misused his judicial powers to effectuate the arrest of a motorist he claimed failed to give way to a pedestrian; (2) acted as a judge in the same case in which he initiated the arrest; and (3) commented to the press about his vigilante arrest while the case was pending and implied that the defendant was not credible. On Charge III, the majority finds two acts of misconduct when Judge Feeder implicitly promised a mother in an *ex parte* conversation not to jail her defendant daughter notwithstanding two prior drunk-driving convictions, and then, in fact, carried through on the promise. Finally, in Charges IV and V, the majority finds misconduct as a result of Judge Feeder granting a defendant

an Adjournment in Contemplation of Dismissal without consulting the District Attorney whose consent is required by law, and presiding in numerous criminal cases without revealing that he had a close, longstanding personal relationship with the Assistant Chief of Police.

Notwithstanding this veritable rampage of serious misconduct, Judge Feeder escapes with a censure. Under normal circumstances I might quietly assent to the majority's lenience, even though I disagree, for fear that to dissent would highlight a precedent which likely will give comfort to other wayward judges. But in this case I cannot for a singular reason: when Judge Feeder came before the Commission at the oral argument, he misrepresented his earlier sworn testimony and calculatedly changed his presentation of the events to conform to the testimony of other witnesses.

Appearing before the full Commission, Judge Feeder conceded that he spoke *ex parte* with the mother of the drunk-driving defendant about her daughter's case. He tried to minimize the significance of the conversation but he clearly admitted it:

“Tanya’s mother came in and asked that I not put her daughter in jail. What I said to Mrs. Looney is, ‘You know me better, you know I’m fair, have your daughter come in, have Tanya come in.’ I never made a promise about keeping her out of jail; the only promise I did make was being fair. My error was allowing her to come in, and as my counsel did say, this is not a big, fancy courtroom. It’s a room a fraction of the size of this room, probably more like the size of that office. My clerk wasn’t there; I was there in the office and Mrs. Looney came right in. My error was not disclosing that to the district attorney. My error was not disclosing to her attorney regardless of what I said to Mrs. Looney.”

(Oral argument, pp. 61-62)

The Commission’s Vice Chair then asked the judge whether the statement he had just

made at the oral argument about that incident was consistent with his testimony during the Commission's investigation, and the judge declared that it was:

“MR. COFFEY: ...[W]ere you asked questions, if you recall at the IA, about the conversation that you had with the mother that's the subject of this complaint? Do you recall being – I don't know what the IA –

JUDGE FEEDER: – I believe I was questioned and I believe I answered exactly as I –

MR. COFFEY: – So your statement today in your recollection is consistent with that?

JUDGE FEEDER: Yes, sir.”
(Oral argument, p. 63)

After the judge made this statement at the oral argument, staff counsel, on rebuttal, read from the transcript of the judge's investigative testimony, which was in evidence (Resp. Ex. C). As recounted by staff counsel, Judge Feeder, under oath, had testified earlier that he had no recollection of speaking with Linda Looney about her daughter's case:

“MS. CENCI: ...At page 117 he testified in this manner:

‘Question: Well, do you have a recollection of Linda Looney coming to court to speak with you prior to Tanya Looney's appearance on the most recent charge?

Answer: Yes. My clerk had left me a note that Mrs. Looney – when I say Mrs. Looney, Linda Looney had come in requesting to speak to me –’

* * *

‘Question: Did you then have a conversation with Linda Looney?

Answer: Not to my knowledge. I don't believe I did, because it was a pending case. Question’ –

JUDGE PETERS: – So he denied the conversation?

MS. CENCI: ‘So, you don’t recall telling her that she did not want -- telling you that she did not want Tanya to go to jail because she, Linda Looney, has Crohn’s disease and would be left with the care of Tanya’s children?’

Answer: I don’t recall that conversation. My impression was that -- I am aware that Linda Looney has -- I thought she had cancer but I am not sure what her ailment is.

Question: Well, does my telling you that refresh your recollection as to any conversation that you had with Linda Looney concerning her daughter, Tanya?

Answer: I don’t recall having a conversation about Tanya specifically.’”

(Oral argument, pp. 72, 74)

Judge Feeder’s investigative appearance took place on November 29, 2005, only eleven months after the events at issue. Of course, the critical change in circumstances between Judge Feeder’s two statements was the mother’s testimony which corroborated the allegation that the *ex parte* conversation took place.

Similarly disingenuous was Judge Feeder’s claim that his good friend, the Assistant Police Chief, never actually appeared before him and that that was the reason he did not reveal their relationship in criminal cases. But the Assistant Chief had, in fact, appeared before Judge Feeder, according to reliable otherwise uncontested testimony – by an attorney and, notably, by the Assistant Chief himself. Judge Feeder did not reveal the relationship even though he had vacationed with his friend and had lived at the friend’s home when the judge was having marital difficulties.

This sort of convenient “truth-telling,” as recently as at his appearance before us, along with the array of the proven misconduct that Judge Feeder denied,

reveals to me that Judge Feeder continues to be a danger to the public, who trusts us “to safeguard the Bench from unfit incumbents” (*Matter of Reeves*, 63 NY2d 105, 111 [1984], quoting *Matter of Waltemade*, 37 NY2d [a], [III] [Ct. on the Judiciary 1975]). When he committed this misconduct and then lacked candor when the Commission questioned him about it, he forfeited his privilege to judge others on behalf of the State of New York. He should be removed. Therefore, I dissent.

Dated: November 18, 2009

Richard D. Emery, Esq., Member
New York State
Commission on Judicial Conduct