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

ROBERT M. RESTAINO,

a Judge of the Niagara Falls City Court,
Niagara County.

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THE COMMISSION:

Raoul Lionel Felder, Esq., Chair
Honorable Thomas A. Klonick, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (John J. Postel, Stephanie A. Fix and Edward Lindner, Of Counsel) for the Commission

Joel Daniels and Mark Uba for the Respondent

The respondent, Robert M. Restaino, a Judge of the Niagara Falls City Court, Niagara County, was served with a Formal Written Complaint dated June 20,

2006, containing one charge. The Formal Written Complaint alleged that while presiding in a Domestic Violence Part, respondent threatened to commit to jail and did revoke the recognizance release of 46 defendants when no one took responsibility for a ringing cell phone. Respondent filed an Answer dated August 9, 2006.

By Order dated August 29, 2006, the Commission designated Honorable Edgar C. NeMoyer as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on November 1, 2 and 15, 2006, in Buffalo. The referee filed a report dated March 30, 2007.

The parties submitted briefs with respect to the referee's report. Counsel to the Commission recommended the sanction of removal, and counsel for respondent recommended censure. On September 19, 2007, 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 Niagara Falls City Court Judge since 1996. He initially served in a part-time capacity and became a full-time judge in January 2002.

2. Respondent presided in the Domestic Violence Part on a weekly basis from 1999 through March 11, 2005. The Domestic Violence Part handles cases of defendants who, after arraignment on charges involving violence against family members, have been screened to determine whether they are eligible for a court-supervised, 26-week program of counseling and education. If accepted into the program, defendants are required to refrain from using drugs or alcohol, to undergo counseling and testing, and to

report to court on a weekly basis so their progress can be monitored. As a matter of practice, defendants in the Domestic Violence Part are released each week on their own recognizance unless they violate a condition of participation, in which case they face the possibility of sanctions, including the revocation of their release and the imposition of bail. When defendants appear in the Part, they are generally required to remain in the courtroom until the completion of all the proceedings that day, even after their own cases have been concluded.

3. Shortly after 9:00 AM on March 11, 2005, respondent took the bench in the Domestic Violence Part. About 70 cases were scheduled, and approximately 70 people were in the courtroom. In addition to defendants, also present were defense attorneys and prosecutors, court administrative personnel, court security officers, and representatives from counseling programs. The courtroom was open to defendants and others entering and leaving.

4. For about 45 minutes, respondent handled in a routine manner eleven cases involving defendants who were participants in the Domestic Violence Program. In accordance with the customary procedures, respondent questioned the defendants, released them on their own recognizance and directed them to remain in court until the proceedings were concluded. At approximately 10:00 AM, a device that appeared to be a cell phone rang in the back of the courtroom. Addressing the defendants in the courtroom, respondent stated:

> Now, whoever owns the instrument that is ringing, bring it to me now or everybody could take a week in jail and please

> don't tell me I'm the only one that heard that. Mr. Martinez, did you hear that ringing?...
>
> Everyone is going to jail; every single person is going to jail in this courtroom unless I get that instrument now. If anybody believes I'm kidding, ask some of the folks that have been here for a while. You are all going.

5. When no one took responsibility for the ringing phone, respondent directed that everyone remain in the courtroom and then took a five-minute recess while court security attempted to locate the phone. An officer stood at the doorway to prevent anyone from leaving the courtroom. Prior to that time, there had been traffic in and out of the courtroom.

6. Notwithstanding the recess, respondent did not withdraw his threat to send all of the defendants to jail if the owner of the phone was not discovered.

7. When respondent returned to the bench, he was told that the phone had not been located. Respondent then asked Reginald Jones, the defendant who had been standing before him when the phone had sounded, if he knew whose phone it was. Mr. Jones replied, "No. I was up here." Although respondent knew that Mr. Jones did not have the phone that had been ringing, he revoked Mr. Jones' recognizance release, set bail at $1,500 and committed him into custody.

8. Respondent proceeded to call the remaining cases on the calendar and then to recall the cases of the eleven defendants who had been released on their own recognizance earlier that morning. Respondent questioned each defendant as to his or her knowledge of the phone. After each defendant denied having the phone or knowing

whose it was, respondent revoked the defendant's recognizance release and reinstated bail; he set additional bail for two defendants who were previously released on bail. In total, he committed 46 defendants into custody. In five of the cases, he revoked the defendant's release and committed the defendant with little or no discussion.

9. Three of the defendants committed into custody were making their first appearance in the Domestic Violence Part that day. The remaining defendants had regularly appeared in the Part as required; 15 defendants had previously appeared on at least a dozen occasions as required in connection with the program; one defendant had appeared 25 times and was one or two weeks away from completing the program. Only one of the defendants committed into custody had an attorney who was present.

10. In questioning the defendants, respondent repeatedly admonished the "selfish" person who refused to take responsibility for the phone, and chastised the defendants who claimed not to know whose phone it was. At one point he said, "[T]his hurts me more than any of you imagine because someone in this courtroom has no consideration for you, no consideration for me and just doesn't care." He stated:

> As I have indicated, this troubles me more than any of you people can understand. Because what I am really, really having a hard time with, that someone in this courtroom who is so self-absorbed, so concerned only for their own well-being, they kind of figure they're going to be able to establish the bail and it won't matter so screw all of the rest of you people. Some of you people may not be in the economic situation this selfish person is in and you have to start realizing amongst your own selves someone out there who is the typical reason we have this Part; they put their interests above everybody else's. They don't care what happens to anybody.

A short time later he stated:

> This person, whoever he or she may be, doesn't have a whole lot of concern. Let's see how much concern they have when they are sitting in the back there with all the rest of you. Ultimately when you go back there to be booked, you got to surrender what you got on you. One way or another we're going to get our hands on something. See, the sadness in all of this is that this individual is prepared to put everybody through a reassessment of bail rather than dealing with it.

11. During the questioning, many defendants told respondent that the noise had come from the back corner and that if they knew who had the phone, they would say so. Several defendants pleaded with the phone's owner to come forward.

12. During the questioning, numerous defendants commented on the unfairness of respondent's actions in committing all the defendants into custody. When one defendant said, "This is not fair to the rest of us," respondent replied, "I know it isn't," before committing the defendant. Another defendant told respondent, "I know this ain't right," and respondent replied, "You're right, it ain't right. Ain't right at all." To another defendant, respondent commented, "That's really a shame and it isn't fair at all. Somebody completely doesn't care." One defendant said, "I don't see everybody going to jail for this, I really don't." Another defendant said, "It's a shame, everybody being penalized." One defendant told respondent, "I think the more people you send to jail, [the] less likely [the] culprit is to come forward."

13. As he was committing the defendants, respondent alternated between verbalizing sympathy and outright sarcasm. When one defendant said, "I'm sorry I had to

be here today," respondent said, "I'm sorry too." After several defendants said that the noise had appeared to come from the back corner, respondent said, "Life gets dizzy in that back corner"; he commented to one defendant, "There's a whole lot of phones back there but nobody's phone was ringing." At another point he said, "[I]t seems to me I'm supposed to be dealing with grown-ups..."; then he compared the defendants' responses to a scene from "a mob movie":

> The other thing which is amazing here with this group, this is better than watching a mob movie. Everybody that comes to this microphone, and I got to tell you something, you're all pretty good, when you come up to this microphone, and if you saw somebody got shot or killed, you would say, "I didn't see nothing, I heard shots." And if a body dropped right in front of you, you would say that, "I didn't see a thing."

14. In committing the defendants, respondent ignored the special circumstances cited by several defendants who asked not to be taken into custody. Three defendants told respondent that their jobs would be at risk if they were incarcerated; one said, "You know I just got a job and I love the job. I don't have $1000. I really don't." One defendant said he was scheduled to be in school; one defendant said that he had a doctor's appointment that day and might need surgery; another said that his mother was having surgery that day. One defendant, who had previously appeared four times as required, told respondent, "My little girl is coming home at 3:00. Can I be sanctioned next week so I can get my girl?" Respondent committed each of these defendants into custody.

15. At the hearing before the referee, respondent acknowledged that,

while he was committing the defendants into custody, he knew that he had no legal basis for doing so; he explained that he simply focused on attempting to locate the phone's owner and was frustrated by his inability to do so. Although a sign in the court warns that cell phones and pagers must be turned off, bringing a cell phone into the courtroom or having a cell phone ring in the court was not a violation of the Domestic Violence Program requirements.

16. Respondent questioned only defendants about the ringing phone. He did not question any of the prosecutors, defense attorneys, court personnel, program representatives or others who were present in the courtroom.

17. In addition to the 46 defendants who were committed into custody, respondent handled several other cases in a routine manner that morning after the phone had sounded. He allowed four defendants to leave, two after dismissing the charges against them and asking them about the phone, one after his attorney told respondent that the defendant had "wandered in at the wrong time," and another because he had been outside of the courtroom.

18. Throughout all the proceedings that morning, respondent did not raise his voice; he appeared calm and in control.

19. In reinstating bail for the defendants and setting additional bail for two defendants, respondent did not consider any of the factors required by Section 510.30 of the Criminal Procedure Law to be considered before setting bail.

20. At the conclusion of the proceedings, shortly before noon,

respondent left the bench and made a scheduled trip to tour a juvenile detention facility in Erie County.

21. After being committed into custody, the 46 defendants were taken by police to the booking area in the City Jail, where they were searched and their property was confiscated. They were then placed in crowded "holding" cells or jail cells. Thereafter, 17 defendants were released from custody after it was determined that the court still held bail that had previously been posted on their behalf, and 15 defendants were released after posting the bail set by respondent. The remaining 14 defendants could not post bail and were committed to the custody of the Niagara County Sheriff.

22. The 14 defendants who could not post bail were shackled; their wrists were handcuffed to a lock box attached to a waist chain; and they were transported by bus to the County Jail in Lockport, a ride that took about 30 minutes. The defendants arrived at the jail between 3:00 and 3:30 and were searched again and placed in cells.

23. While touring the juvenile detention facility, respondent received a call on his pager from his clerk, and when he returned the call, the clerk told him that the press was inquiring about his actions earlier that day. Respondent told the clerk that he would return to court and that the clerk should have the paperwork and a court reporter ready so that he could order the defendants' release. Respondent testified at the hearing that prior to receiving the call from his clerk, he reflected on his conduct and decided to contact his clerk to arrange for the defendants' release.

24. Respondent returned to court around 3:00 PM. About an hour later,

in a proceeding held in his chambers, he ordered the release of the 14 defendants who had been sent to the County Jail.

25. The 14 defendants were released at the County Jail in Lockport between 5:00 and 5:30 PM. They were not provided with transportation back to Niagara Falls.

26. After March 11, 2005, respondent did not preside in the Domestic Violence Part.

27. In his Answer and at the hearing in this matter, respondent acknowledged that his conduct was improper and inexcusable.

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. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

In an egregious and unprecedented abuse of judicial power, respondent committed 46 defendants into police custody in a bizarre, unsuccessful effort to discover the owner of a ringing cell phone in the courtroom. In doing so, he inexplicably persisted in his conduct over some two hours, questioning the defendants individually about the phone before committing them into custody, and ignoring the pleas of numerous

defendants who protested that his conduct was unfair and pleaded that he reconsider. Respondent's conduct, which resulted in the unjustified detention of the defendants for several hours and the incarceration of 14 defendants in the County Jail, caused irreparable damage to public confidence in the fair and proper administration of justice in his court.

The salient facts are undisputed. When the cell phone rang while respondent was presiding in a Domestic Violence Part, he immediately directed the owner to come forward or else "everybody could take a week in jail...Everyone is going to jail; every single person is going to jail in this courtroom unless I get that instrument now." It is shocking that respondent's immediate response to what was, at worst, a breach of courtroom etiquette by an unknown individual was a threat to incarcerate all the defendants present *en masse*. Even as a threat, such a reaction was disproportionate and improper. It is even more shocking that, over the next two hours, he methodically proceeded to carry out his threat without realizing that his extreme response was far more disruptive than a ringing phone.

When no one took responsibility for the phone, respondent directed that no one be allowed to leave the courtroom while court security conducted a search and respondent himself took a brief recess. Barring anyone from leaving the courtroom while the search was conducted was, in itself, an excessive response to the ringing phone since it affected scores of people who had done nothing wrong. Despite the opportunity during the recess to reconsider his actions, respondent did not withdraw the threat. Returning to court, he began to question the defendants individually, starting with the defendant who

had been standing before him when the phone rang. Although it was clear that that individual was not the owner of the phone – as respondent now concedes – respondent committed him into custody, revoking his recognizance release and setting $1,500 bail. He then proceeded to call the remaining cases on the calendar and to recall the cases of eleven defendants who had been released earlier that morning. After questioning each defendant about the phone, he revoked his or her recognizance release and reinstated bail or set additional bail, committing a total of 46 defendants into custody. After being placed in crowded holding cells which could scarcely accommodate the large numbers of individuals who were being committed, 32 defendants were released on bail, and the remaining 14 defendants who could not post bail were transported by bus, in handcuffs and shackles, to the County Jail in Lockport, where they were held for several hours until respondent came to his senses and ordered their release later that day.

In summarily committing the defendants into custody, respondent acted without any semblance of a lawful basis, disregarding the statutory criteria for bail or contempt of court. In doing so, he violated the trust of the defendants and of the public at large, who place their confidence in the administration of justice by the courts. Respondent also did a grave injustice to the Domestic Violence Part, its principles and its worthy aims. Except for three defendants who were appearing for the first time in the Part that day, all the defendants whom respondent committed had previously been released on recognizance or bail in connection with the terms of the Domestic Violence Program, having agreed to undergo counseling and other conditions for six months and to

report to court on a weekly basis so their progress could be monitored. Notably, all the defendants had previously appeared in court regularly as required, many for a dozen or more times. It was their understanding that as long as they fulfilled the requirements of the program, they would not be incarcerated. In fact, although two defendants who appeared before respondent that morning prior to the ringing phone had violated a condition of their release, respondent, who had discretion to incarcerate them for those lapses, did not do so. For all these defendants, including the majority who had not violated a single condition of their release, respondent's peremptory decision to hold them in custody because of a ringing cell phone can only have been perceived as a shocking injustice.

The record reveals that over the two hours in which respondent was ordering the defendants' detention, he had many opportunities to grasp the enormity of what he was doing. He inexplicably disregarded the comments of numerous defendants regarding the unfairness of his actions. When one defendant commented, "I know this ain't right," respondent replied, "You're right, it ain't right. Ain't right at all." When another said, "This is not fair to the rest of us," he replied, "I know it isn't," before committing the defendant. Another defendant perceptively observed, "I think the more people you send to jail, [the] less likely [the] culprit is to come forward." It is difficult to understand why these and other similar remarks did not cause respondent to reflect, reconsider and recognize the impropriety of his conduct. Instead, he continued to interrogate, chastise and commit the defendants while repeatedly blaming the "selfish"

individual who failed to take responsibility for the phone; he even compared the defendants' proclamations of ignorance concerning the phone's owner to a scene from "a mob movie."

It is sad and ironic that even as respondent was scolding the defendants for their behavior, in a court where trust and personal accountability were of paramount importance, respondent's own irresponsible behavior provided a poor example of such attributes. His conduct was injurious not only to the defendants themselves, but to the public as a whole, who expect every judge to act in a manner that reflects respect for the law the judge is duty-bound to administer. It is also ironic that in repeatedly berating the "selfish" and "self-absorbed" individual who "put their interests above everybody else's" and "[doesn't] care what happens to anybody," respondent failed to recognize that he was describing himself.

In committing the defendants, respondent ignored the special circumstances cited by several defendants who asked not to be taken into custody. Three defendants told respondent that their jobs would be at risk if they were incarcerated; another told the judge that he had to pick up his child that afternoon and asked if he could be sanctioned the following week instead. Oddly, in the midst of his wholesale incarceration of dozens of defendants, respondent handled several matters routinely and, somewhat arbitrarily, allowed four individuals to leave after interrogating them about the phone. One defendant was permitted to leave after his attorney vouched for him (of the 46 defendants committed by respondent, only one had an attorney who was present). The totality of the

circumstances – including the fact that there had been considerable traffic in and out of the court when the phone had rung and that only defendants (and not attorneys, counselors or court personnel who were present) were subjected to respondent's inquisition and punishment – compounded the appearance that respondent's actions were arbitrary and unjust.

Not until hours later that afternoon did respondent arrange for the release of the incarcerated defendants. Although he has testified that he reached an independent realization that he had acted improperly, it is undisputed that he took no steps to arrange for the defendants' release until he learned that the press was inquiring into his actions. By the time the 14 defendants were eventually released from the County Jail, they had been in custody for six or seven hours. Under these circumstances, we cannot give respondent credit for timely remorse or sensitivity to his ethical responsibilities. Indeed, while respondent now expresses remorse for his actions, we note that, except for a subsequent chance encounter with one individual who was incarcerated on March 11th, he has never apologized to the individuals who were deprived so unjustly of their liberty. In any event, as the Court of Appeals has stated with respect to contrition, in some instances "no amount of it will override inexcusable conduct." *Matter of Bauer*, 3 NY3d 158, 165 (2004).

Simply stated, we find no mitigating circumstances in the record before us. Respondent characterizes his behavior as aberrational and attributes it, at least in part, to certain stresses in his personal life. Such an explanation cannot excuse his behavior.

Presiding in a busy court presents every judge with significant challenges on a daily basis, and every judge is obliged to set aside his or her personal problems upon entering the courtroom and to be an exemplar of dignity, courtesy and patience (Rules, §100.3[B][3]). No doubt many if not most of the defendants in respondent's court were experiencing significant stresses in their own lives, but the message consistently imparted by the Domestic Violence Part, and indeed by every court, is the importance of self-control and personal accountability. Surely that message applies as well to the presiding judge.

We reject the dissent's argument that respondent's conduct was part of "a single *res gestae*" or a single episode of poor judgment. Rather, it was a painfully prolonged series of acts over several hours that transcended poor judgment.

We conclude that respondent's behavior was such a gross deviation from the proper role of a judge that it warrants the sanction of removal, notwithstanding his previously unblemished record on the bench and the testimony as to his character and reputation. *See, Matter of Shilling*, 51 NY2d 397, 399 (1980); *Matter of Blackburne*, 7 NY3d 213 (2006). "Judicial misconduct cases are, by their very nature, *sui generis*" (*Matter of Blackburne*, *supra*, 7 NY3d at 220-21). In causing 46 individuals to be deprived of their liberty out of pique and frustration, respondent abandoned his role as a reasonable, fair jurist and instead became a petty tyrant, abusing his judicial power and placing himself above the law he was sworn to administer. It is tragic that in a crowded courtroom, only the individual wearing judicial robes, symbolizing his exalted status and the power it conferred, seems to have been oblivious to the enormous injustice caused by

his rash and reckless behavior. Although "removal is not normally to be imposed for poor judgment, even extremely poor judgment" (*Matter of Sims*, 61 NY2d 349, 356 [1984]), respondent's actions "exceeded all measure of acceptable judicial conduct," bringing the judiciary into disrepute and irreparably damaging public confidence in his ability to serve as a judge (*Matter of Blackburne, supra*, 7 NY3d at 221). Such a "breach of the public trust" warrants the sanction of removal (*Matter of McGee*, 59 NY2d 870, 871 [1983]; *see also*, *Matter of Gibbons*, 98 NY2d 448, 450 [2002]).

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

Judge Klonick, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Mr. Felder dissents only as to the sanction and votes that respondent be censured.

CERTIFICATION

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

Dated: November 13, 2007

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