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

ROBERT J. PUTORTI,

a Justice of the Whitehall Town Court and
Whitehall Village Court, Washington County.

MEMORANDUM OF RESPONDENT ROBERT J. PUTORTI IN OPPOSITION OF THE RECOMMENDATION THAT RESPONDENT BE REMOVED

Dated: January 18, 2022

Respectfully submitted,

CERIO LAW OFFICES
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[redacted]

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PRELIMINARY STATEMENT

This Memorandum of Law is respectfully submitted by Counsel to Respondent Robert J. Putorti in opposition to the recommendation of removal for the Respondent's conduct and in support of the Commission rendering a determination that Robert J. Putorti ("Respondent") be admonished.

Respectfully, Respondent's misconduct does not rise to the level of the extreme penalty of removal, and, at most, the Respondent should be admonished.

PROCEDURAL HISTORY

An Agreed Statement of Facts was approved on or about December 9, 2021, and the relevant issue before the Commission is to determine the appropriate sanction. The parties agreed to waive oral argument and have the Commission determine the appropriate sanction, if any, on submission. Counsel for the Commission seeks removal, whereas Respondent believes admonishment is appropriate.

RESPONDENT'S BACKGROUND

Respondent Robert J. Putorti is a Justice of the Whitehall Town Court in Washington County. He has held this position since January 1, 2014. Respondent was also appointed as Acting Justice of the Whitehall Village Court in Washington County in June of 2014, until he was elected as Justice in April 2018. Respondent was again elected as Justice of the Whitehall Town Court and remains the Justice in both the Whitehall Town and Village Courts. (Agreed Statement of Facts, [hereinafter, "SF"], ¶1).

AGREED STATEMENT OF FACTS REGARDING CHARGE I

The Agreed Statement of Facts reveals that Respondent admits, in retrospect, his conduct was improper, but at the time of the incident he subjectively feared for his safety resulting in him brandishing his lawfully carried handgun while in the courtroom.

At a judicial training course in December 2013, Respondent was advised by an instructor that he could legally carry a concealed firearm at the bench. (SF, ¶11). Opinion 06-51 of the Advisory Committee on Judicial Ethics provides the following: "there is no prohibition in the Rules Governing Judicial Conduct barring [a judge] from carrying a firearm while performing...duties on the bench," provided that the judge otherwise abides by the Rules Governing Judicial Conduct and "there are no legal or administrative barriers that would preclude such possession." (SF, p. 3 FN 1). It had been Respondent's practice to carry his firearm with the chamber empty and concealed at the bench. (SF, ¶11).

At a judicial training conference in 2018, Respondent sought advice from Glens Falls City Court Judge Gary Hobbs ("Judge Hobbs"), the supervising judge, in front of other attending judges, by describing a situation he had encountered. (SF, ¶24). Respondent explained he had once brandished his handgun in the courthouse to an unidentified defendant because the man had rushed towards the bench, past the stop line, and came within a couple feet of Respondent. (SF, ¶24). Respondent told the defendant to stop and to move back behind the line, which the defendant did, then Respondent placed the gun back under the bench. (SF, ¶28). Notably, the defendant had been accused of attempting to kill another person with a knife. *See* Exhibit 2. Remarkably, even though Respondent claims Officer Joel Archambault and Assistant District Attorney Devin Anderson were present in the courtroom, the incident was so trivial that they have no recollection

of the event having occurred. (SF, p. 6 FN 4). There are evidently no witnesses to the incident at issue. (SF, p. 7 FN 6). There is a discrepancy between whether Respondent pointed his gun at the defendant, or whether he waved the gun in a fanning motion. (SF, p. 10 FN 9). As there are no witnesses, the discrepancy comes from Respondent's own recounting of the incident, and, regardless, he brandished the gun. Respondent believed the incident occurred about three years prior to the judicial training course. (SF, ¶28). Importantly, Respondent testified that he was seeking advice from his supervising judge about what to do in the future under similar circumstances. (SF, ¶¶24, 25).

Following the judicial training course, and only after another judge expressed concern, Judge Hobbs had a conversation with Respondent about the incident. (SF, ¶26). According to Judge Hobbs' contemporaneous memo, on October 25, 2018, he "contacted the Advisory Committee on Judicial Ethics to determine whether Judge Putorti's disclosure of this matter required a complaint to be filed with the Commission on Judicial Contact [sic]. I spoke with Laura L. Smith, Esq., Chief Counsel, Advisory Committee on Judicial Ethics. Ms. Smith indicated that *she did not believe the incident met the 2-prong requirement for mandatory reporting*, but that I could write and request a written opinion to obtain an official answer. Ms. Smith indicated that *counseling the judge on the issue seemed to be an appropriate response*." (Exhibit 4, p. 2 ¶4) (emphasis added).

On March 2, 2019, Judge Hobbs provided Respondent with a counseling memorandum agreeing to never display, use, or threaten to use a firearm in court unless he or someone else was facing deadly physical force, which Respondent willingly signed. *See* Exhibit 5. The counseling memorandum specifically stated, "a judge may only display, use or threaten to use a firearm while

in the courtroom when the judge reasonably believes it to be necessary to defend himself or someone else from what the judge reasonably believes to be the use or imminent use of deadly physical force by such individual."

Regardless of the counseling memorandum, Respondent had already began not carrying his gun into the courtroom since he was first counseled by Judge Hobbs in October 2018. (SF, ¶30). There have been no other incidents involving this subject since the 2015 incident. (SF, ¶32).

AGREED STATEMENT OF FACTS REGARDING CHARGE II

The Second Formal Written Complaint alleges Respondent participated in the solicitation of funds or fund-raising activities for his personal benefit and for the benefit of Whitehall Elks Lodge ("Elks Lodge") between October 24, 2019, and October 5, 2020, by posting and sharing posts on his personal Facebook page. (SF, ¶34). However, the record shows Respondent never lent the prestige of judicial office to the posts, which were mainly directed and open to members of the Elks Lodge.

Respondent has been a member of the Elks Lodge since 1992 wherein he has held various leadership positions, including having been elected as the Exalted Ruler, the highest-level position. (SF, ¶35). Between October 2019 and November 2020, Respondent maintained a Facebook account under the name "Robert Putorti Jr." and his occupation is listed as "Machinery Equipment Operator of Town of Whitehall." (SF, ¶38). Notably, *Respondent's Facebook account does not mention his position as a judge or any affiliation to the Whitehall Court anywhere*. (SF, ¶38).

On August 31, 2019, Respondent was involved in a motorcycle accident and suffered serious physical injuries and incurred medical expenses. (SF, ¶43). On October 24, 2019, Respondent's sister "tagged" him in a post for an event called "Spaghetti Dinner – Basket Party

Benefit For Robert Putorti Jr.," at the Elks Lodge. (SF, ¶43). The cost to attend was $10 and would be for the medical expenses incurred by Respondent. (SF, ¶43). *Nowhere in the post did it mention Respondent as a judge, nor his position or affiliation with the court.* (SF, ¶43). Respondent wrote above his sister's post, "I am very humbled by this, I hope to see as many people as I can. Thank you." (SF, ¶44). The money raised by his sister which went directly to Respondent's medical expenses.

Of around his 1,300 Facebook "friends", six were officers or attorneys affiliated with the court system, including two Whitehall Police Officers, a Washington County District Attorney, a Whitehall Police Sergeant, a Washington County Public Defender, and a Washington County Assistant Public Defender. (SF, ¶40). None of the six individuals attended any fundraiser for the Respondent. (SF, ¶41). Although some may have seen posts advertising the fundraiser, none of the six individuals felt any pressure to attend, while others did not see any post or know of the event. (SF, ¶41).

As a member of the Elks Lodge, Respondent shared a post created by the lodge to his Facebook page on July 20, 2020, for a drawing to help support the lodge staying open during COVID-19. (SF, ¶46). This event was open to members of the Elks Lodge only, *not the public*, and raised a total of $40, *none of which went to Respondent personally*. (SF, ¶46). Respondent shared a post made by the Lodge to his Facebook page on August 8, 2020, for a BBQ and asked for support of the lodge so that the Elks Lodge could give back to the people in the community. (SF, ¶47). This event was open to the public and raised a total of $1,460, *none of which went to the Respondent personally*. (SF, ¶47). Respondent shared a post made by the Elks Lodge to his Facebook page on September 11, 2020, for a chicken BBQ. (SF, ¶49). The event raised a total of

$1,978, *none of which went to Respondent personally.* (SF, ¶49). Respondent shared a post made by the Elks Lodge on September 16, 2020, for an event for members to support the lodge. (SF, ¶50). The member-only event raised a total of $152, *none of which went to the Respondent personally.* (SF, ¶50). Respondent shared a post made by the Elks Lodge on September 22, 2020, for an event, which raised a total of $242, *none of which went to Respondent personally.* (SF, ¶51). Lastly, Respondent shared a post made by the Elks Lodge to his Facebook on October 5, 2020, for an event for members only, and raised a total of $186, *none of which went to Respondent personally.* (SF, ¶52).

The above posts were made by the Elks Lodge, not Respondent, and merely shared by Respondent to his Facebook page. Respondent's intent in sharing the Elks Lodge's posts, as a member, was to raise funds for the Elks Lodge only, and not Respondent personally. (SF, ¶53). Five of the seven posts were for events that were only available to members. Even if the general public could have viewed the posts, they would not have been able to donate or attend the event. Not a single post referenced his judicial position.

Respondent was notified by letter dated November 12, 2020, that the Commission was investigating the Facebook posts. (SF, ¶53). After receiving the letter, Respondent did not share any further posts advertising any events or fundraisers of any kind. The prior events complained of above were viewable until January 20, 2021, because they were no longer relevant. Respondent did not believe he was violating any rules because (1) there is a long history in Whitehall of local justices being Exalted Leaders for the Lodge and Commanders for the American Legion, and (2) *he specifically never mentioned or used his judicial position in any way to further or advance anything for anyone.* (Exhibit 16, ¶14).

ARGUMENT

POINT I

RESPONDENT SHOULD NOT BE REMOVED FROM OFFICE

Respondent's behavior does not show a pattern of misconduct, nor does it demonstrate his unfitness for judicial office warranting his removal. Rather, Respondent's misconduct, although serious, is a limited lapse in judgment for which he acknowledged was improper, thoroughly cooperated in the inquiry process, learned from his mistakes, modified his behavior to ensure no further misconduct, and continues to serve as a respected member of his community. Respondent's behavior since the misconduct proves he is fit for judicial office.

The Commission on Judicial Conduct ("Commission") "may determine that a judge or justice be admonished, censured or removed from office for cause, including, but not limited to, misconduct in office, persistent failure to perform his or her duties, habitual intemperance, and conduct, on or off the bench, prejudicial to the administration of justice... *NY CLS Const. Art. VI, §22*. The purpose of judicial disciplinary proceedings "is not punishment but the imposition of sanctions where necessary to safeguard the Bench from unfit incumbents." *Matter of Waltemade*, 1975 NY LEXIS 2421 (Judiciary Court 1975), *see also Matter of Allman*, Ops State Comm. Jud. Conduct (March 23, 2005).

"Removal is excessive where the misconduct amounts solely to poor judgment, even extremely poor judgment." *Matter of Skinner*, 91 NY2d 142, 144 (1997); *see also Matter of Kiley*, 74 NY2d 364, 369-70 (1989); *see also Matter of Cunningham* 57 NY2d 270, 275 (1982) (determining censure over removal in part because removal should not be ordered for conduct that amounts simply to poor judgment, or even extremely poor judgment). The Court of Appeals has

"repeatedly noted that removal is the ultimate sanction and should be imposed only in the event of truly egregious circumstances." *Matter of Kiley*, 74 NY2d at 369; *see also Matter of Steinberg*, 51 NY2d 74, 83 (1980) ("removal should not be imposed absent truly egregious circumstances"). "Whether a judge's behavior crosses the line of what constitutes "truly egregious" conduct is a fact-specific inquiry because judicial misconduct cases are, by their very nature, sui generis." *Matter of Ayres*, 30 NY3d 59, 64 (2017) (internal citations omitted). Some aggravating factors in the determination include the inability to recognize the seriousness of the misconduct and the failure to heed a prior warning. *Matter of Ayres*, 30 NY3d at 64.

A. RESPONDENT'S ONE-TIME CONDUCT OF BRANDISHING A HANDGUN AT A DEFENDANT CHARGING THE BENCH AMOUNTS TO POOR JUDGMENT WARRANTING ADMONITION.

Here, the record established Respondent brandished a handgun at a defendant who rushed down the courtroom aisle past the stop line and up close to the bench where Respondent was sitting. The defendant had been accused of attempting to kill someone with a knife. Respondent's practice had been to always carry his handgun in the courtroom and place it on a magnet under the bench. The handgun was loaded, although the chamber was empty. Respondent is legally licensed to carry a concealed gun and there is no prohibition in the Rules Governing Judicial Conduct barring a judge from carrying a firearm while on the bench (Opinion 06-51 of the Advisory Committee on Judicial Ethics). The record established Respondent brandished the gun because he feared for his safety. Although, in retrospect, and taking into account all the surrounding circumstances, Respondent acknowledged his conduct was improper in that he had no reasonable basis to believe the defendant would use imminent deadly force against him.

The record further established there were no complaints made by the defendant, any attorneys in the courtroom, any police officers in the courtroom, or anyone else regarding

Respondent having brandished a gun. Despite there being multiple other people in the courtroom at the time, none of them even recall the incident. The matter came to the attention of the Commission because Respondent himself sought advice about security in the courtroom during a judicial training meeting roughly three years later. A fellow judge who overheard Respondent seeking advice regarding this incident submitted a complaint and Judge Hobbs counseled Respondent on the issue. Respondent was cooperative and forthcoming with Judge Hobbs at all times. Respondent genuinely was seeking advice on how to manage situations in the courtroom.

After being counseled, Respondent made the personal choice to stop carrying his gun in the courtroom and has not carried in the courtroom since. Judge Hobbs was informed by the judicial ethics committee that the counseling memorandum that Respondent signed, agreeing to only display his gun if he reasonably believes necessary to defend himself, was sufficient in this circumstance. Respondent signed the counseling memorandum in March 2019, more than thee and half years after the incident. Respondent had not been involved in any similar incidents during the interim, nor has he ever since, now more than six years later. Rather, Respondent continues to be an upstanding member of his community and has been re-elected to his judicial positions in both the Town and Village. The misconduct here, although serious, does not rise to the level warranting removal.

In the *Matter of Skinner*, a Town Justice was disciplined for his handling of two criminal matters. *Matter of Skinner*, 91 NY2d 142, 143 (1997). The first involved the Justice having scheduled an arraignment date without informing the district attorney, then holding a hearing without the district attorney or the complainant present where testimony was heard from the accused, before summarily dismissing the case. *Id.* The second involved the Justice failing to

apprise a defendant accused of passing a bad check of his right to counsel and sentencing him to jail for failing to pay back the money. *Id.* The Commission determined the Justice should be removed, with one member dissenting because the incidents were only two improper episodes in an otherwise unblemished judicial career warranting censure. *Id.* at 144. The Court of Appeals rejected the Commission's sanction of removal and imposed the sanction of censure. *Id.* at 144. Although the Court found the misconduct to be serious and deserving of sanction, the Court reasoned there were several factors suggesting removal to be unduly severe, including, that the Justice had been elected to office for nearly four decades with no prior complaints, he was not evasive or dishonest with the Commission, and he was not motivated by personal profit, vindictiveness, or ill will. *Id.* at 144.

In the *Matter of Edwards*, a Town Justice was charged by the Commission with having sought special consideration for his son in connection with a traffic citation. *Matter of Edwards*, 67 NY2d 153, 154 (1986). The Justice made *ex parte* contact with the Judge of the court where the citation was returnable, identified himself as a Judge, and inquired as to the procedures to be followed in resolving his son's case. *Id.* at 154. The Court reasoned that intervention in another court should result in removal generally, but mitigating factors and prior conduct should be considered. *Id.* at 155. There were several mitigating factors indicating censure was the appropriate sanction, including the Justice's conduct had never been previously called into question, his judgment was clouded by his son's involvement, he cooperated with the Commission, and forthrightly admitted the impropriety of his conduct. *Id.* at 155. The Court reasoned that "this single incident, which was fueled by extremely poor judgment, was an aberration" and imposed a sanction of censure. *Id.* at 155.

In the *Matter of Kiley*, the Commission charged a County Court Judge with, for the purpose of seeking lenient treatment of the defendants, having initiated several *ex parte* communications with prosecutors in one case, and with the Judge and prosecutor in another case. *Matter of Kiley*, 74 NY2d 364, 366-67 (1989). The Judge was also charged with providing testimony that was lacking in candor during the Commission's investigation. *Id.* at 366. The Commission determined removal was appropriate. *Id.* at 366. The Court of Appeals agreed with the finding of misconduct, however, disagreed with removal. *Id.* at 369. The Court explained that "[w]e have repeatedly noted that removal is the ultimate sanction and should be imposed only in the event of truly egregious circumstances." *Id.* at 369. The Court further noted, "removal is not warranted for conduct that amounts simply to poor judgment or even extremely poor judgment." *Id.* at 370. The Court reasoned the Judge was not motivated by personal gain, zero element of venality, selfish or dishonorable purpose, and there were no aggravating factors, thus a sufficient basis for removal was lacking. *Id.* at 370. The Court rejected the sanction of removal and determined censure was appropriate.

In the *Matter of Ciganek*, a part-time Justice was admonished for creating a dangerous situation by firing his gun at a wild turkey near a busy intersection at rush hour with a notable disregard for the safety of motorists and bystanders. *Matter of Ciganek*, Ops State Comm. Jud. Conduct (March 29, 2001). The conduct violated judicial standards and policies despite his belief that the turkey was endangering motorists. *Id.* The Justice's actions were in violation of the law, showed a lack of good judgment, and created a reckless and dangerous situation for the safety of others. *Id.* The Commission determined the appropriate sanction was admonition.

Here, similar to the *Matters of Skinner and Kiley,* Respondent was not motivated by any profit, vindictiveness, ill will, selfish or dishonest purpose, or for any personal gain in brandishing his handgun. The record is devoid of any evidence to show Respondent's conduct was truly egregious. At most, Respondent's conduct amounts simply to a single incident of poor judgment or extremely poor judgment (when Respondent was in fear of his life), which the Court of Appeals has repeatedly held removal is excessive. *See Matters of Edwards and Kiley, supra.*

Interestingly, in the *Matter of Ciganek*, the Justice was *admonished*, not removed, for shooting a gun near a busy intersection at rush hour, in clear violation of law, and endangering the safety of motorists and bystanders. Not only did the Justice there lack good judgment, but his actions were in direct violation of the law and put the lives of innocent people at risk.

Here, Respondent merely brandished his handgun in response to a specific, subjective threat, with the chamber empty. The rule purportedly violated is in fact a judgment call in itself. A judge may lawfully display, use, or threaten to use a firearm in the courtroom when the judge *reasonably believes* it to be necessary to defend himself. *See* Exhibit 5. The record established Respondent, at the time, feared for his safety based on the surrounding circumstances of the defendant and how he charged at the bench. Upon retrospect, Respondent admitted he was not justified in his decision, consequently, he exhibited poor judgment.

Respondent's conduct amounting to a poor judgment decision does not rise to the extreme level warranting removal. The record is devoid of any aggravating factors. In fact, the record established there are several mitigating factors warranting the reduced sanction of admonition to be the appropriate remedy here. *See Matter of Edwards, supra.*

i. Mitigating Factors.

The record established Respondent, a non-attorney, has had an otherwise unblemished judicial career since he was first elected in January 2014. There have been no prior or subsequent complaints about his judicial conduct (other than the charges herein), in fact, the issue was never discussed until three years later when Respondent himself sought advice. The conduct is not specifically in violation of any rule, but rather is a judgment call. There are no witnesses to the incident, including the attorneys, officers, district attorneys, and defendants present in the courtroom. While the incident is admittedly serious, seemingly no one even noticed or took issue with what transpired.

Respondent has been cooperative and contrite throughout the Commission's inquiry. Respondent participated in the investigation by Judge Hobbs and agreed to the counseling memorandum. Respondent has recognized and admitted, in retrospect, his conduct was improper. Respondent stopped carrying his handgun to court since he was first counseled by Judge Hobbs. Respondent has learned from this one-time poor judgment decision as evidence by the fact that there have been no complaints or incidents of a similar nature for over six years. *See Matter of Lew*, State Comm. Jud. Conduct (March 26, 2008) (noting the respondent had an otherwise unblemished record for five years as a factor in determining censure rather than removal). Respondent continues to be a respected member of his community and has been re-elected as both the Town and Village Justice. At most, the misconduct was an isolated lapse in judgment, a single incident, an aberration, in an otherwise unblemished record. *See Matter of Edwards* (censure was appropriate for a single incident fueled by extremely poor judgment that was an aberration).

Since the purpose of judicial discipline is not to punish but rather to safeguard the Bench from those that are unfit, removal is not appropriate for Respondent, who's conduct, at most, amounts to poor judgment. The Bench should include people like Respondent, who seek advice on how to manage situations they have encountered, so they can learn as opposed to being punished for their candor. The circumstances here, although can be considered a serious breach of judicial decorum, does not damage Respondent's effectiveness on the Bench, thus removal is not appropriate. *See Matter of Allman*, State Comm. Jud. Conduct (March 23, 2005

Accordingly, the appropriate determination is for Respondent to be admonished.

B. RESPONDENT DID NOT LEND THE PRESTIGE OF OFFICE TO ADVANCE INTERESTS IN SOCIAL MEDIA POSTS AND ADMONITION IS APPROPRIATE.

Here, the record established Respondent's conduct in sharing or being tagged in a limited number of Facebook posts warrant a determination of admonition. The extreme sanction of removal is not appropriate give the surrounding facts and circumstances. The Commission has repeatedly determined that admonition is appropriate for similar and even more severe conduct in connection with use of social media.

In the *Matter of Peck*, a Town Justice posted two photographs of himself wearing a County Sheriff's uniform and comments expressing his appreciation for law enforcement officers, to his publicly viewed personal Facebook page. *Matter of Peck*, State Comm. Jud. Conduct (March 19, 2021). The Justice further posted about his appearance at a "Back the Blue" event, supporting law enforcement. *Id.* The posts and photographs garnered hundreds of "likes" and comments, including one identifying him as a Judge. *Id.* Importantly, the Justice had been *previously cautioned by the Commission* for inappropriate Facebook posts. *Id.* Nonetheless, the Commission

determined the appropriate sanction was admonition, given the Justice had admitted the conduct warranted public discipline and pledged to comply with the rules. *Id.*

In the *Matter of Whitmarsh*, a Town Justice was charged with having made improper public comments to her Facebook page regarding a matter pending in another court and allowing comments about the matter made by her court clerk to remain on the post. *Matter of Whitmarsh*, State Comm. Jud. Conduct (December 28, 2016). There, the Justice maintained a public Facebook page and made a post criticizing the investigation and prosecution of a matter in another court. *Id.* The Justice also publicly "liked" comments made by others on her posts. *Id.* In one post, the Justice even referred to her judicial position. *Id.* The Commission determined the appropriate sanction was admonition. Some additional factors taken into consideration were that the Justice was cooperative and contrite throughout the inquiry, she recognized her commenting about cases was impermissible, and she averred to refrain from all similar conduct.

In the *Matter of Schmidt*, a Town Justice maintained a personal Facebook account wherein he made several improper posts. *Matter of Schmidt*, State Comm. Jud. Conduct (November 3, 2020). The Justice posted the following: a meme about President Bill Clinton having killed Jeffrey Epstein, a link to a campaign for a local Town Council candidate, "liked" a comment about the Town Council candidate being a "good man", a meme about Red Flag laws, a meme about gun control, and a meme of a Nazi book burning. *Id.* Further, the Facebook page listed his occupation as "Judge" and "Local Criminal Court Judge." *Id.* The Justice continued to publicly post comments about defendants in his court and the bail reform laws. *Id.* The Commission took into consideration that the Justice had no prior discipline, admitted his conduct warranted discipline,

and had committed to being more circumspect in his use of social media. The Commission determined the appropriate sanction was admonition. *Id.*

In the *Matter of VanWoeart*, a Town Justice maintained a Facebook account under her personal name and was the administrator of a Facebook group she created for her campaign entitled "Friends to Elect..." *Matter of VanWoeart*, State Comm. Jud. Conduct (March 31, 2020). The Justice publicly "liked" a post made to the campaign page referencing the judicial opponent as "#outwiththetrash" and a comment by another referencing the judicial opponent as "Dirt Bag" and "Sh*t Head." *Id.* The Justice posted about the opponent's flyers being packed full of lies and "liked" a comment stating the person would like to "shove the flyers up [judicial opponent]'s butt!" *Id.* The Justice again "liked" a "gif" posted to the campaign page showing a man throwing a bag of trash down a driveway into a trash can and congratulated her on the win by stating, "The Trash has been taken out!" *Id.* The Commission took into consideration that the Justice had been cooperative and contrite throughout the inquiry and removed the inappropriate comments. She had also previously been disciplined for an unrelated matter. The Commission determined the appropriate sanction was censure.

Here, unlike in the *Matters of Peck, Whitmarsh, Schmidt, and VanWoeart*, Respondent did not post, share, or "like" anything that was political in nature, relating to a campaign, relating to pending court matters, disparaging of other elected officials, or identifying him as a Judge. His personal Facebook page, although public at the time, did not signify his affiliation with the court system or judicial position in any manner. Aside from one post Respondent was tagged in, the remaining posts at issue dealt with supporting the local Elks Lodge, most of which were for members only.

First, Respondent was "tagged" in a post made by his sister regarding a spaghetti dinner fundraiser for him to help with medical bills as a result of a motorcycle accident while on the way to CAP performing his Judicial duties. *See* Exhibit 16. Respondent was humbled and simply commented that he hoped to see as many people there as he could. Respondent simply wanted to see people after suffering a near death experience. *See* Exhibit 16. The post did not refer to Respondent as a judge, nor his affiliation with the court. Although he commented, Respondent did not create or share the post. The record established that of the six "friends" that were officers or attorneys, none of them attended any fundraiser. Some of those six "friends" may have seen the post but did not feel any pressure to attend, and others did not see any posts.

Second, Respondent made or shared seven posts in connection with the Elks Lodge. Five of those seven events were only for members of the Elks Lodge to attend. The remaining two were open to the public to support the Elks Lodge so it could support the community. The money raised was nominal, and none of which went to Respondent personally. None of the posts referred to Respondent as a Judge or his affiliation with the court system. Again, none of Respondent's "friends" in the legal community felt any pressure to attend any event, nor did they, or even recall seeing the posts.

After receiving a letter dated November 12, 2020, regarding the Commission investigating the Facebook posts, Respondent reviewed the issue, refrained from making any further posts, and changed his settings from public to private. Notably, Respondent answered the inquiry letter that he considered his conduct at the time was consistent with the rules and, "[t]here was no way that I would have thought otherwise because there is a long history in Whitehall of local justices being Exalted Leaders for the Lodge, as well as Commanders for the American Legion." *See* Exhibit 16.

Respondent further stated, "At no time did I mention or use my judicial position in any way to further or advance anything for anyone." *See* Exhibit 16. There have been no complaints of similar conduct since receiving the letter. Clearly, Respondent understood the issue, acknowledged the conduct, and made changes in order to comply with the rules. Since he did not lend the prestige of judicial office to advance the interests of himself or the Elks Lodge, Respondent was not aware at the time that he was violating of any rules. Immediately upon being informed, Respondent made the necessary changes to refrain from similar conduct.

i. Mitigating Factors.

Similar to the *Matters of Peck, Whitmarsh, Schmidt, and VanWoeart*, the Respondent has not only been cooperative and contrite in the Commission's investigation, but he has recognized the posts as being impermissible and has refrained from any similar conduct. Respondent has shown his commitment to being more circumspect in his use of social media as evidence by his personal page being changed to private and having refrained from making or sharing similar posts. There was no prior disciplinary issues or similar conduct regarding the use of social media. He never used his judicial position in any posts to influence event turnout. Once Respondent became aware that the posts were improper, he immediately ceased any similar conduct and was cooperative with the investigation.

Given the substance and nature of the posts, as well as the several mitigating factors, removal is not appropriate.

Accordingly, the appropriate determination is for Respondent to be admonished.

CONCLUSION

By reason of the foregoing, it is respectfully submitted that the Commission should render a determination that Respondent Robert J. Putorti should be admonished for the misconduct set forth in the Agreed Statement of Facts.

Dated: January 18, 2022
Syracuse, New York

Respectfully submitted,

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