D-144-14 (076315)

SUPREME COURT OF NEW JERSEY
ADVISORY COMMITTEE ON
JUDICIAL CONDUCT

DOCKET NO: ACJC 2013-015

IN THE MATTER OF GERALD J. COUNCIL, JUDGE OF THE SUPERIOR COURT	:	**PRESENTMENT**

The Advisory Committee on Judicial Conduct (the "Committee") hereby presents to the Supreme Court its Findings and Recommendation in this matter in accordance with Rule 2:15-15(a) of the New Jersey Court Rules. The Committee's findings demonstrate that the charges of inappropriate and unwanted touching of a court employee that demeaned, belittled and publicly humiliated that employee, as delineated in the Formal Complaint against Gerald J. Council, Judge of the Superior Court ("Respondent"), have been proven by clear and convincing evidence. In respect of that same court employee, the Committee's findings demonstrate that the charges concerning Respondent's attempt, on a separate occasion unrelated to the touching incidents, to silence that employee at the conclusion of a court proceeding, have not been proven by clear and convincing evidence.

The Committee's findings also demonstrate that while the circumstances relating to Respondent's use of nicknames when referring to court personnel, lawyers and court participants appearing before him, as was charged in the Formal Complaint and revealed during the Formal Hearing, have been proven by clear and convincing evidence, that behavior, though inappropriate, does not constitute conduct for which judicial discipline is warranted by itself or in the aggregate.

As a consequence of these findings, the Committee recommends Respondent be suspended from the performance of his judicial duties, without pay, for a period of one month for his demeaning and offensive touching of a court employee. The Committee further recommends that the remaining charges against Respondent be dismissed without the imposition of discipline.

I. PROCEDURAL HISTORY

This matter was initiated with the filing of an ethics grievance against Respondent by A.J., a Judiciary employee, on September 18, 2012.[1] See Presenter's Exhibits Volume I at P1.

[1] To preserve the privacy interests of the victims in this matter, of which there were three alleged in the Formal Complaint, and in accordance with the New Jersey Supreme Court's directive in In re Seaman, the Presenter identified the victims in the Formal Complaint by their initials (i.e. "A.J."; "D.E. and "R.N."). In re Seaman 133 N.J. 67, 75 (1993) (directing that "judicial-disciplinary cases involving . . . activities that humiliate or degrade those with whom a judge comes into contact, should preserve the anonymity of the alleged victim."). We continue this practice in our Presentment to the Court.

A.J. supplemented her ethics grievance by facsimile dated December 10, 2012 to which was attached a copy of her letter to the Honorable Glenn A. Grant, J.A.D., Acting Administrative Director of the Courts, seeking to appeal His Honor's final determination in respect of A.J.'s Equal Employment Opportunity/Affirmative Action ("EEO/AA") complaint against Respondent, the essence of which concerned the same conduct as is alleged in her ethics grievance.[2] Id. at P2. A.J., through her counsel, augmented her ethics grievance a second time by

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[2] On April 30, 2012, the Mercer Vicinage EEO/AA Officer filed a complaint on A.J.'s behalf with the Judiciary's EEO/AA Unit "alleging that Respondent subjected [her] to discriminatory and inappropriate treatment based on sexual harassment and sex/gender, in violation of the Judiciary's *Policy Statement on Equal Employment Opportunity, Affirmative Action and Anti-Discrimination* (EEO/AA Policy)." See Presenter's Exhibits Volume I at P5. Notably, A.J.'s EEO/AA complaint included the instant allegation that Respondent, on two occasions, touched A.J. in an inappropriate and demeaning fashion, and on a third occasion humiliated A.J. by "shushing" her with the palm of his hand held directly to her face, while both were in the courtroom and in the presence of a court participant. Id. Investigators under contract with the Judiciary's EEO/AA Unit conducted a preliminary and supplemental investigation into A.J.'s allegations, which collectively spanned more than four months and included multiple interviews of A.J. and Respondent, as well as interviews of seventeen Judiciary personnel, some of whom were interviewed twice. Id. at P8. Following those investigations, Judge Grant issued a final determination on November 26, 2012 finding that though the alleged incidents of touching occurred, neither incident was motivated by A.J.'s sex/gender and, as such, did not implicate the EEO/AA Policy provisions on sexual harassment and sex/gender discrimination. Id. at P5. As to the "shushing" incident, Judge Grant dismissed that allegation finding that Respondent "had a legitimate business reason" for the manner in which he interacted with A.J. on that occasion. Id. at P1, bates label "ACJC0016."

letter dated October 8, 2013 to which was attached additional documentation in support of A.J.'s claims against Respondent. Id. at P4.[3]

In her grievance and supplemental correspondence, A.J. recounted a series of incidents involving Respondent in which she contended Respondent demeaned and publicly humiliated her by touching her inappropriately on two occasions and speaking to her harshly and in an unprofessional manner on several other occasions. Id. at P1 thru P4. In respect of the two incidents of demeaning and offensive touching, A.J. asserted that during the first such incident Respondent singled her out from among a group of court employees gathered at a court sponsored event, placed his hands around her neck and shoulders and directed her away from her colleagues and out of the event to which she had been invited, indicating that she had work to do, which A.J. found humiliating and belittling. Id. at P1. On the second occasion, A.J. contended that Respondent "grabbed" her by her ear and "escorted" her out of a room at the conclusion of a meeting, in full view of several other individuals, which A.J. found offensive and demeaning. Ibid.

[3] In accordance with its longstanding practice, the Committee withheld consideration of A.J.'s grievance pending the resolution of her EEO/AA complaint, as both concerned the same conduct.

As to the remaining allegations, A.J. recounted several instances during which she alleged Respondent mistreated her and caused her to feel harassed and degraded, including one such incident when Respondent purportedly "shushed" A.J. while holding the palm of his hand to her face and stating that he did not want to hear from her. Ibid. This incident is alleged to have occurred in the courtroom and in the presence of a Drug Court participant with whom A.J. was having a disagreement. Ibid. On two other occasions, Respondent is alleged to have either "yelled" at A.J. in the presence of others or been openly dismissive of her professional opinion, leaving her to feel debased and belittled. Ibid.

The Committee conducted an extensive investigation into these allegations and, as part of that investigation, interviewed nine individuals, including A.J.[4] In addition, the Committee requested and received Respondent's written comments in respect of A.J.'s allegations and collected and reviewed documentation relevant to those allegations, including the Judiciary's EEO/AA Unit's investigative file. See Presenter's Exhibits Volume I at P3, P5 thru P8; see also Presenter's

[4] The record before the Committee does not contain the transcripts of two of the court employees interviewed during the course of the Committee's investigation, though copies of those transcripts were provided to Respondent in discovery.

Exhibits Volume II at P9; Presenter's Exhibits Volume III at P10 thru P16.

As a consequence of that investigation, the Committee issued a Formal Complaint against Respondent on April 1, 2014 charging him with conduct in contravention of Canons 1, 2A and 3A(3) of the Code of Judicial Conduct in several material respects: (1) demeaning and publicly humiliating A.J. on three separate occasions - twice by touching her inappropriately in an effort to remove her from his presence, and once by silencing her with a "shush" and a hand gesture while both were in the courtroom and in the presence of a Drug Court participant; and (2) treating certain court employees discourteously and in an undignified manner by referring to those employees using nicknames rather than their given names.

Respondent filed an Answer to the Complaint on May 2, 2014 in which he effectively denied a majority of the factual allegations contained in the Complaint using conventional language borrowed from the New Jersey Rules of Court (i.e. "Respondent has insufficient information to respond to this allegation"). R. 4:5-3. Though Respondent indicated an intention to file an Amended Answer upon receipt of discovery, no such pleading was ever filed with the Committee. Respondent denied violating the canons of the Code of Judicial Conduct as charged in the Complaint.

The Committee convened a Formal Hearing on January 13, 2015, which was subsequently continued for three nonconsecutive days - January 15, February 5 and February 19, 2015 - until its conclusion. Respondent appeared, with counsel, and offered testimony in defense of the charges as well as that of five witnesses. The Presenter called seven witnesses in support of the asserted disciplinary charges and one rebuttal witness. Exhibits were offered by the Presenter and Respondent all of which were admitted into evidence. See Presenter's Exhibits Volumes I thru III; see also R1.

The Presenter and Respondent filed post-hearing briefs with the Committee on April 16 and April 17, 2015, respectively, both of which were considered by the Committee. In addition, Respondent, through his counsel, sought and was granted leave to supplement his post-hearing brief on April 29, 2015 to include documentation concerning Respondent's attendance at "sensitivity training" in mid-August 2012. See Correspondence from Alan Dexter Bowman, Esq. to John A. Tonelli, Executive Director, ACJC, dated April 27, 2015. This training was provided to Respondent by the Administrative Office of the Courts at the direction of his Assignment Judge.[5] Ibid.

[5] On August 1, 2012, Judge Grant issued his initial determination in respect of A.J.'s EEO/AA complaint in which he found the evidence insufficient to substantiate her claim of sexual harassment, but sufficient to substantiate her allegations of

After carefully reviewing all of the evidence, the Committee makes the following findings, supported by clear and convincing evidence, which form the basis for its recommendation.

II. FINDINGS

A.

Respondent is a member of the Bar of the State of New Jersey, having been admitted to the practice of law in 1983. See Formal Complaint and Answer at ¶1. At all times relevant to this matter, Respondent served as the Presiding Judge of the Criminal Division of the Superior Court in the Mercer Vicinage, a position he continues to hold. Id. at ¶2. During the pendency of this matter, Respondent also presided over the Mercer County Drug Court Program ("Drug Court"), a position he likewise continues to hold. Id. at ¶4.

Drug Court is a "specialized" court within the Superior Court structure designed to address nonviolent drug related cases utilizing a "team of specially trained court staff, attorneys, probation officers, substance abuse evaluators and

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inappropriate touching. See Presenter's Exhibits Volume I at P1 at "ACJC0013." These touching incidents, though not sexual in nature, "were [as determined by Judge Grant] inappropriate and contrary to the sex/gender based harassment provisions of the Judiciary's Policy Statement." Id. at "ACJC0018." Judge Grant referred Respondent to his Assignment Judge who then referred him for sensitivity training. Id.

treatment professionals" (the "Drug Court team") who work collectively to "support and monitor a Drug Court participant's recovery" while that participant is in treatment for drug and/or alcohol addiction, and serves as an alternative to incarceration. N.J.S.A. 2C:35-14; see also Presenter's Exhibits Volume II at P9 at "ACJC0540;" R1 ("Drug Court Judicial Benchbook").

Though a collaborative effort, all members of the Drug Court team are subordinate to the Drug Court judge. 1T8-24 to 1T9-4; 1T10-10-14; see also R1 at Chapter 3.[6] Indeed, in his capacity as the Drug Court judge during the relevant time period (i.e. spring of 2012), Respondent led the Drug Court team and maintained absolute "authority [over] and responsibility" for all "team decisions." See Presenter's Exhibits Volume II at P9 at "ACJC00567;" see also Formal Complaint and Answer at ¶5; R1 at p.23. In this context, Respondent would meet weekly with his Drug Court team in advance of his regularly scheduled Drug Court sessions to discuss with them the treatment status of the Drug Court participants scheduled to appear before him that week. 1T43-6 to 1T44-9. All members of the Drug Court team were required to and did routinely attend those meetings, which were

[6] "1T" refers to the Transcript of Formal Hearing, In re Council, ACJC 2013-015, conducted on January 13, 2015.

held in either a conference room or a courtroom. 1T44-3-16; 1T45-5-7.

Following those meetings, Respondent, with the participation of his team, would conduct Drug Court sessions at which Drug Court participants would appear and address Respondent concerning their treatment status. 1T45-8-24. This process would repeat itself on a weekly basis and involve the same participants over the course of several years, with the aim that each participant eventually "graduate" from the program and assume a more traditional probationary status. See Presenter's Exhibits Volume II at P9 at "ACJC0532 - 0602"; see also R1.

A.J., a member of the Mercer County Drug Court team for approximately nine years (i.e. 2003 - 2012), served initially as a probation officer assigned to the Drug Court until her appointment in December 2008 as the Mercer County Drug Court Coordinator (the "Coordinator"), a position she held until May 2012.[7] 1T40-1-14; 1T79-5-24. As the Coordinator, A.J. remained a part of the Drug Court team, working closely with Respondent with whom she interacted on a daily basis. 1T41-15-18; 1T50-9-13.

[7] In May 2012, following the filing of her EEO/AA complaint against Respondent, A.J. was transferred from the Drug Court to the Probation Division, where she worked for approximately one year before becoming a mediator in the Family Division in the Mercer vicinage. 1T39-23-25; 1T74-1-6.

By all accounts, Respondent and A.J. initially enjoyed a friendly working relationship. 1T49-13-20; 1T50-14-24; 1T169-2-11. Respondent, in fact, had encouraged A.J. to apply for the Coordinator position and fought for her to get it, believing she was one of the best probation officers on his Drug Court team at that time. 4T8-23 to 4T9-22.[8] A.J., in turn, confided in Respondent on at least one occasion concerning a personal matter about which she sought his guidance in or around November 2010. See Presenter's Exhibits Volume III at P16 at "ACJC1036."

Irrespective of their cordial relationship, however, A.J. understood Respondent to be her superior both in respect of Drug Court and the Criminal Division generally given his dual status as the Drug Court judge and the Criminal Division presiding judge in Mercer County. See Plaintiff's Exhibits Volume II at P9 at T14-10 to T15-10.

Their working relationship, however, began to sour in mid-2011. 1T50-25 to 1T51-17; 4T9-23 to 4T12-6. Though A.J.'s and Respondent's testimony differed as to the reasons for that deterioration, those reasons are immaterial to the conduct at issue. Ibid.

That conduct, as detailed in the testimony of several eyewitnesses before this Committee, includes two incidents of

[8] "4T" refers to the Transcript of Formal Hearing, In re Council, ACJC 2013-015, conducted on February 19, 2015.

unwanted and inappropriate touching of A.J. by Respondent during a two week period in the spring of 2012, the effect of which demeaned and publicly humiliated A.J. in front of her colleagues and others. Though Respondent denied any recollection of such incidents and produced several witnesses at the Formal Hearing who stated that they did not observe the second incident of offensive touching (i.e. the "ear pulling" incident), the record is devoid of any evidence undermining the credibility of Presenter's considerable eyewitness testimony as to both incidents, all of which unequivocally confirmed their occurrence.[9] It is axiomatic that a failure on the part of some to observe an event is not evidence of its nonoccurrence nor do we consider it as such in this instance.

As to the first such incident, we heard from A.J. and two eyewitnesses to the event -- former Drug Court investigator D.E. and Drug Court Senior Probation Officer Jessica Sanchez -- all of whom testified that on March 22, 2012, during a Judiciary sponsored event in the Mercer vicinage to welcome that vicinage's new Assignment Judge (the "Meet & Greet"), Respondent, in full view of A.J.'s colleagues, placed his hand on A.J.'s upper back, in close proximity to her neck, and compelled her to leave the

[9] One of the Presenter's eyewitnesses to the ear pulling incident -- former Drug Court Team Leader Rebecca Cegielski -- was specifically identified by Respondent as a person *with* knowledge of Respondent's "daily behavior." See Presenter's Exhibits Volume I at P3, "ACJC0131."

room and return to work immediately. 1T64-1 to 1T66-8; 2T84-2 to 2T85-23;[10] 3T7-6 to 3T10-14; 3T24-5-13.[11] Though each witness's testimony as to the precise placement of Respondent's hand on A.J.'s upper back/neck area differed slightly, all agreed that he touched her in an effort to remove her from the room. Ibid. This testimony is consistent with that given by each of these witnesses to the EEO/AA investigators in May 2012, and to that provided by these same witnesses to the Committee's staff during its investigation into these matters in August 2013. See Presenter's Exhibits Volume I at P8, Tabs 2, 7, 8, 18, 20 and 24; see also Presenter's Exhibits Volume II at P9; Presenter's Exhibits Volume III at P10, P13, P16 at "ACJC1031."

The circumstances surrounding this incident are similarly undisputed. The Meet & Greet event, which was open to all Mercer vicinage staff, occurred in the ceremonial courtroom in the Mercer County Courthouse located at 209 South Broad Street in Trenton, New Jersey, and was attended by approximately fifty to one hundred Judiciary employees. 1T64-1-10; 3T7-6-16; 4T16-8-14. On arriving at the event, A.J. introduced herself to the new Assignment Judge, enjoyed some light refreshments and, while eating, stopped to speak with several of her colleagues,

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[10] "2T" refers to the Transcript of Formal Hearing, In re Council, ACJC 2013-015, conducted on January 15, 2015.

[11] "3T" refers to the Transcript of Formal Hearing, In re Council, ACJC 2013-015, conducted on February 5, 2015.

including D.E. and Ms. Sanchez. 1T64-1-15; 2T84-2 to 2T85-23; 3T7-23 to 3T9-10. Within minutes, Respondent approached the group, exchanged pleasantries with those assembled and abruptly placed his hand on A.J.'s upper back/neck area and directed her to return to work. 1T64-22 to 1T665-22; 2T85-1 to 2T87-7; 3T9-11-17; see also Presenter's Exhibits Volume III at P10 at T16-9 to T17-18; P13 at T7-8 to T9-10. According to D.E. and Ms. Sanchez, Respondent's hand remained on A.J.'s upper back/neck while he escorted her away from her colleagues and out of the Meet & Greet event. 2T87-3-7; 2T102-8 to 2T104-25; 3T12-15; see also Presenter's Exhibits Volume III at P10 at T5-3 to T8-10.

A.J. was visibly surprised by Respondent's conduct in touching her in that fashion and in ordering her to return to work given their otherwise professional relationship and the short period of time during which she had been at the event.[12] 1T65-24 to 1T66-4. Notably, though D.E. was employed at that time as an investigator with the Drug Court, Respondent did not direct him to return to work or place his hands on D.E. or, for that matter, Ms. Sanchez. 2T87-3-15; 3T20-1-10.

[12] Prior to this incident, there were no indications from any member of the Judiciary, including Respondent, that A.J. had any issues completing her work assignments in a timely fashion. 3T131-1-12. Rather, her performance evaluations during this time period were consistently complementary of A.J. and her work. See Presenter's Exhibits Volume I at P4 at Exhibits B & C.

A.J. was made to feel very uncomfortable and embarrassed by Respondent's treatment of her at the Meet & Greet and conveyed her feelings of embarrassment to D.E. later that day. 1T65-23 to 1T66-4; 2T88-4-17; see also Presenter's Exhibits Volume I at P8, Tab 8 at "ACJC0231;" Presenter's Exhibits Volume III at P13 at T11-4 to T12-25. Though disturbed by his conduct, A.J. was reluctant to and, in fact, did not immediately report this incident to her superiors or the Mercer vicinage's EEO/AA officer due to Respondent's standing as a jurist and her fear that any such complaint would result in her termination.[13] See Presenter's Exhibits Volume I at P8, Tab 18 at "ACJC0317." For their part, D.E. and Ms. Sanchez were startled by Respondent's treatment of A.J., particularly his conduct in touching her. 2T87-21 to 2T88-3; 3T21-4-11; see also Presenter's Exhibits Volume I at P8, Tab 7 at "ACJC0226," Tab 8 at "ACJC0231." Indeed, immediately following the incident D.E. expressed his surprise at Respondent's conduct, stating to Ms. Sanchez, "Wow, you believe he just . . ., did that to her?" 2T87-21 to 2T88-3.

[13] A.J. ultimately reported Respondent's demeaning and offensive touching of her to Susan Wright, her union representative, on or about the third week in April 2012, following the second incident of offensive touching on April 2, 2012. 1T67-6-25; 1T70-20 to 1T71-6. Ms. Wright advised A.J. to speak with the Mercer Vicinage EEO/AA officer, which A.J. did on April 26, 2012, resulting in the filing of an EEO/AA Complaint on April 30, 2012. 1T70-20 to 1T71-6; see also Presenter's Exhibits Volume I at P8.

The second and more egregious touching incident occurred several days later on April 2, 2012 at the conclusion of a Drug Court team meeting. 1T60-2 to 1T61-22; 1T132-20 to 1T134-10; 2T7-10-15 to 2T9-3; 2T29-22 to 2T34-6; 2T139-12 to 2T141-23. As to this incident, we heard from A.J. and three former Drug Court team members, each of whom witnessed the event -- former Drug Court Substance Abuse Evaluator Christian Garcia, former Drug Court Senior Probation Officer R.N. and former Drug Court Team Leader Rebecca Cegielski. All four individuals testified unequivocally that Respondent grasped A.J. by her ear at the conclusion of a Drug Court team meeting and escorted her out of the room by her ear, a distance of approximately two to three steps. 1T60-2-25; 1T132-20 to 1T134-1; 1T161-14 to 1T162-22; 2T7-12 to 2T-22; 2T14-12 to 2T16-7; 2T29-22 to 2T31-9; 2T38-40; 2T77-78; 2T135-36; 2T139-140.

Though each witness's testimony differed as to the precise location of this incident, i.e. a courtroom or a conference room, and the individuals present when it occurred, all agreed as to the essential fact at issue; namely, that Respondent took A.J. by her ear and physically escorted her out of the room. This testimony is consistent with that given by A.J., Mr. Garcia and Ms. Cegielski to the EEO/AA investigators in the spring and fall of 2012, and to that provided by all four of these witnesses to the Committee's staff during its investigation into these matters

in the fall of 2013.[14] See Presenter's Exhibits Volume I at P8, Tabs 2, 12, 18, 28 and 30; see also Presenter's Exhibits Volume II at P9; Presenter's Exhibits Volume III at P11, P12, P14, P16 at "ACJC1014-1016," "ACJC1026-1028;" "ACJC1031-1036."

In addition, A.J. testified that while being led out of the room by her ear Respondent said, "come on, come on," as though she was not moving quickly enough. 1T60-9-25; 1T61-13-16. This testimony is consistent with her prior statement to the EEO/AA investigator in May 2012 and to that of Ms. Cegielski in November 2012 concerning this same incident. See Presenter's Exhibits Volume I at P8, Tab 2 at "ACJC0196," see also Presenter's Exhibit's Volume III at P16 at "ACJC1016." Mr. Garcia likewise testified that he too heard Respondent say to A.J., "come on," and also heard Respondent include the words, "my troubled child." 2T31-24 to 2T34-12.

Notably, Respondent, by all accounts, enjoyed a good working relationship with R.N. and Ms. Cegielski during their respective tenures in the Drug Court, a fact we find lends significant weight to the credibility of their testimony.[15] 2T5-

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[14] R.N. was not questioned by the EEO/AA investigators during that office's investigation into A.J.'s EEO/AA complaint. 2T9-4-20; see also Presenter's Exhibits Volume I at P8 at "ACJC0154;" "ACJC0156."

[15] R.N. served as a senior probation officer in the Drug Court for approximately six years, beginning in August 2007 and continuing until her reassignment as a senior probation officer

21 to 2T6-1; 2T137-20 to 2T138-8; 4T26-13 to 4T27-9. Indeed, Respondent conceded during the Formal Hearing that R.N. was one of his "favorite" employees. 4T26-13-25. Both R.N. and Ms. Cegielski, likewise, readily acknowledged before this Committee that they considered Respondent, with whom they worked closely while in the Drug Court, and in R.N.'s case for many years prior, to be a good judge. 2T5-21 to 2T6-15; 2T16-8 to 2T17-3; 2T150-1-14.

As a consequence of this incident, A.J. was further demeaned and humiliated by Respondent and conveyed her feelings of embarrassment to Mr. Garcia later that same day. 1T61-17-22; 1T165-7-19; 2T34-19 to 2T35-25. Though again distressed by his conduct, A.J. was reluctant to and, in fact, did not immediately report this incident to her superiors or the Mercer vicinage's EEO/AA officer due to Respondent's standing as a jurist and her

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in the juvenile department in February 2013. 2T3-18 to 2T5-1 R.N., however, has known Respondent since 1998, having appeared before him on behalf of the Division of Child Protection and Permanency (formerly the "Division of Youth and Family Services") during Respondent's tenure in the Family Division. 2T5-2-20.

Ms. Cegielski served as the Drug Court Team Leader for a one year period between May 2011 and May 2012 until assuming her current position as Assistant Family Division Manager in the Mercer vicinage. 2T136-5 to 2T137-19.

fear that any such complaint would result in her termination.[16] See Presenter's Exhibits Volume I at P8, Tab 18 at "ACJC0317."

These two touching incidents were preceded by an exchange between Respondent and A.J. on March 6, 2012 at the conclusion of a Drug Court session during which A.J. took offense at Respondent's treatment of her. As charged in the Formal Complaint, Respondent, while speaking with a Drug Court participant at the close of a Drug Court session on March 6, 2012, "shushed" A.J. while placing his hand directly in front of her face and telling her that he did not want to hear from her. See Formal Complaint at ¶¶7-12.

As to this occurrence, we heard testimony from A.J., Mr. Garcia and Respondent, each of whom had a specific recollection of this event. Their testimony revealed little disagreement vis-à-vis the immediate circumstances surrounding this encounter between Respondent and A.J. In this regard, each stated that following a Drug Court session on March 6, 2012, Respondent entered the well of the courtroom and engaged in a conversation

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[16] A.J. expressed throughout her testimony before this Committee a fear of losing her job due to Respondent's treatment of her and others, and her belief that the Criminal Division Manager and her direct supervisor, the Assistant Criminal Division Manager, acting at Respondent's behest, divested her of several of her job duties and ignored her earlier complaint about Respondent's treatment of her on March 6, 2012 (i.e. the "shushing" incident) to be discussed in the next paragraph. 1T51-23 to 1T52-22; 1T62-23 to 1T63-4; 1T99-8 to 1T132-12; 1T156-1-15.

with a Drug Court participant who was visibly upset after speaking with A.J. concerning the participant's treatment schedule and its possible impact on her new employment opportunity. 1T53-18 to 1T54-20; 2T25-4 to 2T26-9; 2T27-1-12; 4T14-13-18. By her own admission, A.J. interceded in that conversation. 1T54-13 to 1T55-1; 1T96-1-6.

The testimony, however, diverged in respect of what occurred following A.J.'s attempt to intercede in that discussion. Though all agreed that Respondent rebuffed A.J.'s intrusion, they disagreed as to the manner in which he did so. A.J. claimed Respondent "shushed" her and placed the palm of his hand directly in her face. 1T98-12 to 1T99-1. Mr. Garcia, though corroborating the "shushing" incident and Respondent's use of his hand to quiet A.J., stated that Respondent was an "arms-length" away when he raised his hand in A.J.'s direction, not directly in her face. 2T28-25 to 2T29-2. Respondent, in turn, denied having "shushed" A.J., whom he contends was "yelling" over him, and further denied placing his hand directly in her face. 4T15-3-6; 4T42-20 to 4T43-6. Respondent, rather, contended that he simply directed A.J. to "stop" speaking with his hand raised in her direction though not directly in her face, all in an effort to quell the situation. 4T15-6-10; 4T42-20 to 4T43-6.

Presenter, in her post hearing brief to the Committee, acknowledged that, even with these discrepancies, Respondent's conduct, as revealed in the record, "served the purpose of avoiding [the] escalation of a difficult situation" and, as such, "may not amount to misconduct under the Code of Judicial Conduct." Pb12 at FN8.[17] Respondent, through counsel, similarly argued that his conduct in respect of this incident was justified to address the "conflict between [A.J.] and a Drug Court participant." Rb40.

The remaining charge against Respondent, i.e. his use of nicknames when referring to R.N. and D.E., was the subject of extensive testimony during the Formal Hearing. That testimony exceeded the bounds of the initial charge and included Respondent's use of nicknames in reference to other Drug Court team members, as well as probation officers, lawyers and Drug Court participants. In this regard, we heard testimony from eight witnesses, including A.J., and from Respondent who conceded to using certain nicknames within the Drug Court setting.

As is charged in the Formal Complaint, Respondent has been accused of behaving discourteously and in an undignified manner

[17] Consistent with Rule 2:6-8, references to the Presenter's and Respondent's post-hearing briefs will be designated as "Pb" and "Rb" respectively. The number following this designation signifies the page at which the information may be found.

towards two members of the Drug Court team, in violation of Canons 1, 2A and 3A(3) of the Code of Judicial Conduct, by referring to those individuals using a nickname rather than their given name. Specifically, Respondent is alleged to have referred to R.N. on one occasion as his "little pet" during a "staff meeting" in front of several other Drug Court team members, and to D.E. as "Hop-a-long" on two separate occasions following D.E.'s hip replacement surgery and resultant limp. See Formal Complaint at ¶¶25-26; ¶¶28-29. Respondent, in his Answer, denied behaving discourteously or in an undignified manner towards R.N. or D.E. See Answer at ¶¶25-26; ¶¶28-29.

In respect of R.N., Respondent disclaimed any recollection of referring to her as his "little pet" and contended that if he did so it was meant as a term of endearment. 4T26-13 to 4T27-11; 4T53-9 to 4T54-2. For her part, R.N. testified credibly before this Committee that eight years ago, during a staff meeting in 2007, Respondent had once referred to her as his "little pet." Finding the term objectionable, R.N. promptly corrected Respondent stating, "I'm not your pet." 2T10-7-18 to 2T11-7. Several witnesses, including A.J. and Ms. Cegielski, corroborated this testimony. 1T72-22 to 1T73-25; 2T145-3-17. Though R.N. did not appreciate Respondent's reference to her as his "little pet," she interpreted his use of the phrase as a

"term of endearment" given their longstanding and cordial working relationship. 2T19-2-10.

In respect of D.E., Respondent admitted referring to him as "Hop-a-long" on one occasion during an informal gathering of Judiciary employees and Drug Court participants in the Drug Court offices, but denied doing so in reference to his limp. 4T20-2-16. Respondent, rather, claimed that D.E. and others referred to him as "Hop-a-long" in jest as a lighthearted reference to a famous football player and to D.E.'s declining athletic abilities, not his limp. Ibid.; 4T53-3-8. Two other witnesses - Ms. Cegielski and Sherriff's Officer Cox - testified similarly that others in the Drug Court, specifically team members and "older" participants, referred jokingly to D.E. as "Hop-a-long," and that D.E. understood it to be a joke. 2T143-4 to 2T144-11; 3T46-17 to 3T47-25.[18]

D.E., however, testified that he understood Respondent's two references to him as "Hop-a-long" - once when both men were leaving the courthouse and again during a Drug Court team meeting - to refer to his limp, not his waning athletic prowess, and though not personally offended by it, believed

[18] As a rule, Officer Cox did not refer to D.E. or any other person associated with the Mercer County Criminal Court by a nickname believing that he was prohibited from doing so by virtue of the "higher standard" to which he is held as an officer, and out of a concern for how that conduct would be construed by others. 3T67-8 to 3T68-4.

Respondent's use of the name inappropriate given his limp. 2T90-10 to 2T94-18; 2T111-22 to 2T114-14.

We heard from several other witnesses, as well as Respondent, about various other names Respondent would use in the context of Drug Court proceedings to refer to Drug Court team members, probation officers, lawyers and Drug Court participants, some as recently as this year . 3T155-17 to 3T156-9; 4T90-16-18; 4T96-23 to 4T97-2. As it relates to Drug Court team members, Respondent conceded referring to new and less experienced team members -- including an assistant deputy public defender, two probation officers and a representative of a drug treatment provider -- as "Grasshopper," implying that they were not yet learned in their craft. 3T156-21; 3T159-1-20; 3T178-5 to 3T179-7; 4T25-16 to 4T26-12; 4T54-3-16; 4T56-16 to 4T58-7; 4T89-18 to 4T90-18; 4T94; 4T96. This was not a term that others on the Drug Court team would use when referring to these individuals. 4T94-6-19. Respondent contended that in doing so he was attempting to inject levity into the otherwise difficult circumstances attendant to Drug Court, and did not intend the term as a slight. 4T25-16 to 4T26-12; 4T54-3-16.

Respondent likewise conceded that he referred to then Supervisor of Probation Services Arlene Johnson as "Mama Johnson," a nickname that Respondent claimed Ms. Johnson used when referring to herself and one that was coined by a Drug

Court participant. 4T54-17 to 4T56-15. Respondent maintained that he referred to Ms. Johnson in this fashion on one occasion as a term of endearment. Ibid. Though testimony was elicited by the Presenter on rebuttal concerning Ms. Johnson's negative opinion of the phrase "Mama Johnson," we attribute no weight to that testimony given the absence of any corroborating testimony by Ms. Johnson in this regard, and in light of Respondent's counsel's proffer to the contrary. 4T93-20 to 4T94-5; 4T99-10-25; 4T108-18 to 4T109-13; 4T112-3-24.

Finally, Respondent conceded to referring to at least three Drug Court participants, in open court, by sobriquets they had coined for themselves. 4T28-2 to 4T30-8. To wit, Respondent would routinely refer to one such participant as "Pretty Ricky," a name Respondent claims was not only conceived by the participant, but was actually the participant's preferred designation when appearing in Drug Court. 4T28-2 to 4T29-1. Mercer County Assistant Deputy Public Defender Diane Lyons, when testifying before this Committee at the Formal Hearing, corroborated Respondent's testimony claiming that this participant actually laughed when he was referred to by Respondent in this fashion. 3T155-7-15.

Respondent referred to another participant by the name "Sexy Chocolate," a moniker that this participant evidently created for himself and one which Respondent claimed he

preferred over his given name. 4T29-2-16. As for the third participant, Respondent conceded calling him "Rev," a shortened form of the term "reverend," and again contended that the participant coined the name for himself. 4T29-17 to 4T30-8.

We also heard testimony from Assistant Deputy Public Defender Lyons and Assistant Prosecutor William Haumann concerning one instance in which Respondent, not the participant, created the nickname. In that instance, Respondent referred to a participant by the name "Farmer Mosely," presumably in reference to his guilty plea to a second degree marijuana charge for growing a substantial amount of marijuana in his sister's home. 3T154-21 to 3T155-6; 4T100-19 to 4T101-16.

Additionally, Mr. Haumann offered testimony concerning three separate occasions on which Respondent mocked either a Drug Court team member or Drug Court participants. On one such occasion, Respondent referred to a participant, who was evidently prone to getting emotional during Drug Court sessions, as a "crybaby" in open court. 4T102-9-20. On another occasion in 2013, Respondent referred to a participant who was addressing the court about an issue in her case as a "problem child." 4T102-21 to 4T103-5. Respondent repeated this phrase when addressing a Drug Court probation officer in 2013 during a Drug Court event, again calling her a "problem child." 4T97-13 to

4T99-1. While Prosecutor Haumann recalled these three specific instances, he was unable to recollect the precise circumstances of each event, a fact we attribute to the intervening number of years since their occurrences (i.e. two or more years). 4T97-13 to 4T103-5.

B.

In defense of these matters, Respondent denied any impropriety and offered testimony in defense and explanation of the charged conduct, none of which, he contends, amounts to actionable misconduct. As it relates specifically to the two incidents of demeaning and offensive touching, Respondent, when questioned during the EEO/AA investigation in July 2012, claimed to have no recollection of touching A.J. during the Meet & Greet event and "emphatically denied" pulling A.J. by her ear out of a room, calling that claim "absurd." See Presenters Exhibits Volume I at P8 at Tab 3, "ACJC0204, ACJC0206;" and Tab 15 at "ACJC0302." Conversely, when questioned by this Committee during its investigation into these matters in the spring of 2013, and during his testimony, under oath, at the Formal Hearing, Respondent equivocated as to his touching of A.J.'s ear, claiming that he had no recollection of either touching incident. Respondent, however, staunchly denied touching A.J. in the manner described in the Complaint and contended that, if either incident occurred, neither was "sufficiently egregious" so as to

"denigrate the integrity and impartiality of the judiciary . . . ." Id. at P3; Rb40.

In addition, Respondent took aim at A.J. and, with the exception of Ms. Sanchez, her witnesses claiming that each had a motive to disparage him due to their poor work performance and had, in fact, fabricated their testimony in respect of the touching incidents. 4T17-16 to 4T25-9. As to Ms. Sanchez, however, Respondent testified that he knew of no reason for her to "fabricate" her testimony before this Committee. 4T38-6-11; 4T48-1 to 4T50-7; 4T51-10 to 4T52-23; 4T70-5 to 4T75-2.

We find Respondent's defenses on balance wanting and his attempts to cast aspersions on the credibility of the Presenter's witnesses unpersuasive. As Respondent acknowledged at the Formal Hearing, his testimony in respect of the Presenter's witnesses' credibility was premised entirely on speculation. 4T18-1 to 4T19-23; 4T22 to 4T24-16; 4T49-4-8; 4T70-7 to 4T72-8; 4T75-10 to 4T78-3; 4T82-10-25. That speculation is not borne out by any objective evidence or supported by any corroborating testimony, but rather in certain instances is actually undermined by the evidence in the record. Such speculative testimony is wholly insufficient to defeat the persuasive evidence proffered in support of these charges, which is substantial.

Beginning with A.J., Respondent contended that to his surprise she inexplicably fabricated these charges against him despite their otherwise good working relationship and his consistent attempts over the years to support and encourage her in her position as Drug Court Coordinator. 4T10-23 to 4T12-6. Respondent theorized that A.J.'s motive for doing so may have been related to the stress she was allegedly experiencing in her personal life and the toll that stress may have exacted on her ability to function in her professional life. Ibid.; see also P3. The record, however, is bereft of any evidence that A.J. was suffering personally during the relevant time period or that such suffering had any effect on her job performance. Rather, the evidence indicates that A.J. consistently performed the duties of a Drug Court Coordinator to the satisfaction of her superiors and was not the subject of any administrative action. 1T46-9 to 1T49-12; 3T85-3-9; 3T88-15-17; 3T129-17 to 3T131-12; P4 at Exh. B, Exh. C.

As to those witnesses who corroborated the two instances of demeaning and offensive touching - D.E., R.N., Ms. Cegielski and Mr. Garcia - Respondent posited that these four individuals likely colluded with A.J. to fabricate the instant allegations. 4T18-1 to 4T19-23; 4T22 to 4T24-16; 4T49-4-8; 4T70-7 to 4T72-8. Respondent predicated this theory on his assumption that each witness, whose membership on the Drug Court team predated his

own, harbored a bias against him for his role in changing the otherwise purportedly lax culture of the Mercer County Drug Court prior to his arrival. 4T22-25 to 4T23-9; 4T24-15-16 ("I assume that I was viewed as the guy who stopped the party"); 4T75-10 to 4T76-3. Respondent, nevertheless, also surmised that D.E. and R.N. likely harbored a bias against him for his failure to assist them in their efforts to *remain* in the Drug Court, presumably despite his strict management style, when each faced an imminent transfer to a different division in 2013. 4T18-10 to 4T19-23; 4T22 to 4T24-16; 4T49-4-8; 4T70-7 to 4T72-8.

As to D.E., specifically, Respondent presumed that he harbored some animus towards Respondent due to Respondent's alleged refusal to intercede on D.E.'s behalf with Criminal Division Manager Alfred Federico who purportedly sought to transfer D.E. out of Drug Court in 2013 due to his poor work performance. 4T18-10 to 4T19-23. Respondent acknowledged, however, that he never told D.E. of his similarly negative view of D.E.'s job performance or of his agreement with Mr. Federico's decision to reassign D.E. out of the Drug Court. D.E.'s knowledge of these things would seemingly be central to Respondent's claim of bias and the absence of that knowledge significantly undermines Respondent's theory on this issue. 4T18-5 to 4T19-23.

Moreover, noticeably absent from this record is any evidence concerning D.E.'s job performance and subsequent transfer while assigned to the Drug Court or testimony from Mr. Federico on that subject. Further, the record reveals that D.E.'s transfer occurred *after* D.E.'s interviews with both the Judiciary's EEO/AA Unit in the spring of 2012 and this Committee in the fall of 2013. 2T80-19 to 2T82-25; see also Presenter's Exhibits Volume III at P13 at T2-12 to T3-12. This fact, standing alone, fatally undermines Respondent's theory that D.E. had a motive to testify falsely in this matter. 2T80-22 to 2T82-25; P13 at T2-18 to T3-9. For his part, D.E. denied harboring any ill will towards Respondent. 2T133-16-21.

In the case of R.N., Respondent again surmised that R.N., who worked as a Drug Court probation officer during the relevant time period, harbored some animus towards him due to his alleged refusal in February 2013 to intercede on her behalf with then Drug Court Probation Supervisor Arlene Johnson, who purportedly sought to have R.N. reassigned out of the Drug Court, a decision with which Respondent evidently disagreed. 4T27-2 to 4T28-1; 4T70-22 to 4T72-18. This testimony, however, is inconsistent with that of R.N. who testified before this Committee that she and Respondent enjoyed a "very good" working relationship, one that spanned more than fourteen years, and that she continues to hold Respondent in a very favorable light. 2T4-4 to 2T6-1.

Respondent echoed these sentiments when testifying before this Committee, characterizing R.N. as a "great employee" and his relationship with her as that of father and daughter. 4T27-2 to 4T27-22; 4T71-1-7; 2T13-8 to 2T14-11; 2T16-8 to 2T17-17. The record further evinces that, contrary to one harboring animus for Respondent, R.N. never participated as a witness in the EEO/AA investigation and did not volunteer to participate in this proceeding, but rather was subpoenaed to do so by the Presenter. 2T9-4-20.

As to Respondent's alternate theory that R.N. was motivated to testify falsely out of some sense of loyalty to A.J. and her former Drug Court team, we find this theory similarly unpersuasive. 4T70-22 to 4T72-18; 4T22-25 to 4T24-16. The evidence in the record indicates that R.N. joined the Drug Court team in August 2007, a mere month before Respondent, and over the course of her career has worked successfully with Respondent for a significantly longer period of time, i.e. in excess of fourteen years, than with her former Drug Court team with whom she worked for roughly six years. 2T4-4 to 2T5-20; 4T26-22 to 4T27-11; P12 at T5-14 to T6-24. Given R.N.'s and Respondent's professed mutual respect for each other and the absence of any evidence in the record to suggest that R.N. enjoyed a similarly close relationship with A.J. such that she would be tempted to

fabricate testimony for A.J.'s benefit, we can find no evidence to substantiate Respondent's claim of bias against R.N.

Similarly, Respondent's suggestion that Ms. Cegielski colluded with the other Drug Court team members to fabricate her testimony in this proceeding is without merit. 4T70-71. When asked for his comments by this Committee in May 2013, Respondent actually identified Ms. Cegielski as a person with knowledge and information about his "daily behavior." 4T47; P3. Like R.N., Ms. Cegielski, a Judiciary employee for twenty years, testified that she believed Respondent to be a good judge and had enjoyed her time as his team leader in the Drug Court. 2T137. This testimony was corroborated by her supervisor, Assistant Division Manager Janet VanFossen, who testified that Respondent and Ms. Cegielski enjoyed an amicable relationship. 3T142. Given this testimony and the lack of any evidence as to Ms. Cegielski's relationship with A.J., then or now, we can find no evidence to substantiate Respondent's claim of bias on the part of Ms. Cegielski either for A.J. or against Respondent.

As to Mr. Garcia, Respondent admittedly "speculate[d]" that Mr. Garcia had "a serious ax to grind" with him following Respondent's conduct in allegedly reporting Mr. Garcia to Mr. Federico for his purported abuse of time, i.e. leaving work without permission. 4T22-22 to 4T24-1. The record, however, is devoid of any evidence to substantiate Respondent's theory and

though Mr. Federico was implicated in these matters he did not offer any testimony concerning Mr. Garcia's alleged misuse of time.

Though there was a suggestion in the record that Mr. Garcia and R.N. are related by marriage, that fact, even if true, does not readily correlate with a motive on the part of Mr. Garcia to fabricate his testimony for the benefit of A.J. or as a basis for Mr. Garcia to harbor animus towards Respondent. 4T70-24 to 4T71-1; 4T72-23 to 4T73-13. On this record, we again cannot find any evidence of bias against Respondent as it relates to Mr. Garcia.

In respect of Respondent's use of nicknames, he maintained that those names were intended as terms of endearment and, with regard to Drug Court participants specifically, were in keeping with the Drug Court's objective of promoting "personal engagement" with its participants. 4T25-10 to 4T26-21; 4T28-2 to 4T30-16; see also R1 at Chapter 10.3. Indeed, we heard testimony from Deputy Public Defender Lyons that those participants to whom Respondent referred using nicknames actually preferred those names over their given names. 3T154-15 to 3T156-20.

While Respondent may have viewed some of the names referenced during the hearing in respect of the Drug Court team members as commensurate with terms of endearment, i.e. "Grasshopper" and "Mama Johnson," or as a shared and understood

joke, i.e. "Hop-a-long," we question Respondent's use of terms like "crybaby," "problem child" and "Farmer Mosely," which the record reveals Respondent used, albeit on a limited basis, in respect of participants and Drug Court team members alike. Even in the context of Drug Court, terms like "crybaby" and "problem child" are inherently disparaging and derisive and, when uttered by the Drug Court judge convey a measure of intolerance and impertinence that is both inconsistent with the mission of Drug Court to develop a "cooperative courtroom atmosphere" to aid in a participant's recovery, and unbefitting a member of the Judiciary. See Presenter's Exhibits Volume II at "ACJC0540."

Similarly, a term like "Farmer Mosely," given its obvious reference to the charges related to that Drug Court participant's criminal conduct in cultivating marijuana plants, regardless of Respondent's intent, undermines both the seriousness of the criminal offense for which rehabilitation is sought and Respondent's role as the leader and ultimate authority figure in that rehabilitative process. So too, we are cognizant of the possible negative effect such ribbing may have on those similarly situated participants listening to Respondent's exchange with "Farmer Mosley" and making light of their own offenses. Cf. R1 at Chapter 3.3 ("[D]rug court participants acknowledge that by sitting in the gallery and watching the proceedings as others receive incentives and sanctions sends the message 'it could be

me,' which assists them in keeping clean."). Terms that serve to disparage and undermine the Judiciary, its members, users and the justice system as a whole, should be assiduously avoided particularly by jurists who serve as the foremost bastion of judicial integrity and impartiality.

III. Analysis

The burden of proof in judicial disciplinary matters is clear-and-convincing evidence. Rule 2:15-15(a). Clear and convincing evidence is that which "produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence, so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the precise facts in issue." In re Seaman, 133 N.J. 67, 74 (1993) (citations and internal quotations omitted). This standard may be satisfied with uncorroborated evidence. In re Williams, 169 N.J. 264, 273 n.4 (2001) (citing In re Seaman, supra, 133 N.J. at 84).

In this judicial disciplinary matter, Respondent has been charged with four separate violations of Canons 1, 2A and 3A(3) of the Code of Judicial Conduct as a consequence of his treatment of A.J. on three separate occasions and his use of sobriquets when referring to Drug Court team members, probation officers, lawyers and Drug Court participants. We find, based on our review of the significant evidence in the record, that

the charges of inappropriate and unwanted touching of A.J. that demeaned, belittled and publicly humiliated her have been proven by clear and convincing evidence and, consequently, that Respondent's conduct violated the cited canons of the Code of Judicial Conduct. We further find that the charges concerning Respondent's "shushing" of A.J. at the conclusion of a court proceeding and in view of a Drug Court participant, have not been proven by clear and convincing evidence and should be dismissed.

As to the remaining conduct -- Respondent's use of nicknames -- we find that while the circumstances relating to this conduct as was charged in the Formal Complaint and developed during the Formal Hearing have been proven by clear and convincing evidence, that behavior does not constitute conduct for which judicial discipline is warranted and should likewise be dismissed.

Canon 1 of the Code of Judicial Conduct requires judges to maintain high standards of conduct so that the integrity and independence of the Judiciary are preserved. Canon 2A directs that judges conduct themselves in a manner that promotes public confidence in the integrity and impartiality of the Judiciary.

As the Commentary to Canon 2 explains:

> Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance

> of impropriety and must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on personal conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

Code of Judicial Conduct, Canon 2, Commentary.

This Commentary emphasizes the special role that judges play in our society and the significance of their public comportment. "[J]udges have a special responsibility because they are 'the subject of constant public scrutiny;' everything judges do can reflect on their judicial office. When judges engage in private conduct that is irresponsible or improper, or can be perceived as involving poor judgment or dubious values, '[p]ublic confidence in the judiciary is eroded.'" In re Blackman, 124 N.J. 547, 551 (1991).

Canon 3A(3), likewise, requires judges to be "patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, ..."

In the instant matter, the evidence demonstrates, clearly and convincingly, that Respondent failed on two occasions to conduct himself in a manner consistent with these high ethical standards, and in both instances did so intentionally, for which public discipline is warranted.

We begin our analysis with a discussion of those two incidents, both of which involved Respondent's unwanted and inappropriate touching of a Judiciary employee who was left demeaned and humiliated by the experience. Respondent, throughout these proceedings, has disclaimed any memory of touching A.J. in the manner alleged in the Complaint and contends that if he did so it was neither "mean-spirit[ed]" nor occasioned by any "ill will," and was not "sexual in nature." In Respondent's view, his touching of A.J., if it occurred, was "only potentially unbecoming" and "at worst marginally inappropriate" and did not impugn the integrity and impartiality of the Judiciary. Rb42-43. We disagree.

As to their occurrence, the evidence in the record establishes, clearly and convincingly, that Respondent touched A.J. on two occasions - once on her upper back/neck area and again by grasping her ear - and that he did so on each occasion to remove her from a room where her colleagues and others were gathered. Multiple witnesses attested to these facts, each of whose account was substantially consistent with that of their prior statements to the Judiciary's EEO/AA Unit and, as between each other, was consistent as to the fundamental facts at issue. In re Seaman, supra, 133 N.J. at 88 (internal citations omitted) ("Consistency of testimony, both internally and between witnesses, is an important indicator of truthful testimony.").

Irrespective of its asexual nature, that touching was nonetheless offensive, publicly humiliating and highly inappropriate particularly for one holding the title of jurist. To suggest, as Respondent does, that touching of an asexual nature cannot violate the canons of the Code of Judicial Conduct is to ignore the longstanding principle first enunciated by our Supreme Court more than two decades ago, namely that there are "many forms of offensive interpersonal behavior that would violate the *Code of Judicial Conduct*" though "not meet the legal definition of sexual harassment." In re Seaman, supra, 133 N.J. at 75. The touching at issue here and the harm it inflicted on A.J. fits squarely within those boundaries.

We can think of no circumstance where it would be "only potentially unbecoming" or simply "marginally inappropriate" for Respondent to grasp another individual by the ear, especially one occupying a subordinate position to his own, and escort that individual out of a room, regardless of the distance, in full view of others. By its very nature, such conduct is designed to humiliate its intended target and, in this instance, the record evinces that A.J. was amply embarrassed by its occurrence. Add to that, the verbal rebuke Respondent imparted to A.J. while engaging her by the ear, saying minimally "come, come on" as though she was not moving quickly enough for him, and the

offensive and demeaning quality of that conduct is simply undeniable.

Similarly, we are satisfied that Respondent's touching of A.J. while both were at the Meet & Greet, albeit less intrusive, was nonetheless personally offensive and demeaning to A.J. While there are undoubtedly instances wherein Respondent could, in the normal course of a professional exchange, touch an individual, even a subordinate, on her upper back/neck area without infringing on his ethical obligations under the Code of Judicial Conduct, the circumstances at issue here are qualitatively distinguishable from any such conventional and anticipated interaction between professionals.

In this instance, the evidence indicates that Respondent singled A.J. out from among her colleagues, all of whom were subordinate to Respondent, abruptly placed his hand on her upper back/neck area while she was engaged in conversation with those colleagues and, with food in her hand, physically directed her out of a Judiciary sponsored event claiming she had unfinished work to complete. Respondent's conduct, particularly his abrupt touching of A.J., was sufficiently disturbing to those assembled that it caught the attention of D.E. and Ms. Sanchez both of whom were startled by Respondent's behavior. A.J. was again embarrassed and degraded by this incident, feelings she expressed to D.E. shortly after its occurrence.

Though possessing the requisite authority in each instance to direct A.J. out of the room, Respondent exceeded that authority and the ethical precepts by which he is bound during both interactions when he placed his hands on A.J. in an offensive and demeaning manner. Touching of this sort undeniably diminishes the stature and integrity of Respondent's judicial office, a circumstance wholly inconsistent with and in violation of Canons 1 and 2A of the Code, and constitutes an abuse of his judicial authority and supervisory responsibilities to treat those with whom he deals in an "official capacity" (i.e. the Drug Court Team) with respect, in violation of Canon 3A(3). Indeed such touching betrays a lack of respect for others in direct contravention of Canon 3A(3). Cf. In re Seaman, supra, 133 N.J. at 95 (finding judge abused his authority in respect of his supervisory responsibilities over a subordinate employee towards whom he behaved offensively in violation of Canons 1, 2A, 3A(3) and 3A(4)). In addition, it raises significant concerns about Respondent's judgment and self-control both of which are fundamental in the proper exercise of his judicial duties.

We turn next to Respondent's treatment of A.J. at the conclusion of a Drug Court session on March 6, 2012 during which the record reveals Respondent raised his hand in A.J.'s direction and instructed her to cease speaking to him while he

was engaged in a conversation with a Drug Court participant. This conduct, it is alleged, demeaned and humiliated A.J. and constituted a further violation of Canons 1, 2A and 3A(3) of the Code of Judicial Conduct. We disagree.

While there was some dispute in the record as to the manner in which Respondent directed A.J. to stop speaking, i.e. whether by "shushing" her with his hand held directly to her face or simply directing her to stop with his hand held in her direction, that dispute is largely immaterial. By her own admission, A.J. interrupted Respondent's discussion with this participant, who was visibly upset following a conversation with A.J. concerning the participant's reentry into a drug treatment program. The record reveals that Respondent, in attempting to quiet A.J., sought simply to deescalate the situation. In so doing, Respondent exercised his discretion appropriately and in conformity with his ethical obligations under the canons of the Code of Judicial Conduct for which no misconduct is evident.

This leads us to the final charge against Respondent - his use of nicknames when referring to Drug Court team members - which it is alleged constitutes an additional violation of Canons 1, 2A and 3A(3) of the Code of Judicial Conduct. While Respondent's conduct in this regard and the circumstances to which it relates are principally undisputed, he has maintained throughout these proceedings that such conduct does not violate

the Code of Judicial Conduct. We find, given the evidence adduced at the hearing, that, though injudicious, Respondent's use of these nicknames in the context of Drug Court and when referring to Drug Court team members, lawyers and participants did not, as a general matter, rise to the level necessary to warrant disciplinary action. Cf. In re Subryan, 187 N.J. 139, 146-148 (2006)(finding that Respondent's comments and jokes about sex and gender while in chambers did not violate the Code of Judicial Conduct, but characterized such remarks as inappropriate in a judicial setting).

Respondent's penchant for using sobriquets when referring to individuals within the Drug Court setting extended well beyond the two members of the Drug Court team - D.E. and R.N. - initially identified in the Formal Complaint. We heard testimony from multiple witnesses, including Respondent, concerning his use of nicknames to refer to Drug Court team members as well as probation officers, lawyers and even Drug Court participants.

To the extent those nicknames were used in the context of Drug Court and were either tolerated or preferred by those to whom they were directed, we find such conduct insufficient to warrant the imposition of discipline under the Code of Judicial Conduct. That being said, a jurist's use of nicknames when referring to anyone with whom that jurist deals in an official capacity has the clear propensity to detract from the overall

dignity of the Judiciary, the Drug Court team and the participants in the Drug Court program. For this reason, use of nicknames should be avoided.

A more difficult question is posed by those names Respondent created and subsequently used in a manner that could be construed as derisive of the person or his circumstance; names such as "Farmer Mosely," "crybaby" and "problem child." These terms and the circumstances to which they relate are at best sarcastic and at worst disparaging. In either case, they have no place in a courtroom, and in the normal course would constitute a violation of the high standards to which jurist are held under Canons 1, 2A and 3A(3) of the Code of Judicial Conduct. See In re Sadofski, 98 N.J. 434, 441 (1985) ("No matter how tired or vexed, . . . judges should not allow their language to sink below a minimally-acceptable level . . . ."); In re Mathesius, 188 N.J. 496, 525 (2006) ("[P]etulance, sarcasm, anger, and arrogance . . . have no place in the exercise of judicial duties."). Given, however, Respondent's limited use of these terms within the Drug Court setting and his subsequent attendance at sensitivity training, we trust that he now appreciates their impropriety and will refrain from such references in the future.

Having concluded that Respondent violated Canons 1, 2A and 3A(3) of the Code of Judicial Conduct by touching A.J. in a demeaning and offensive manner, the sole issue remaining for our

consideration is the appropriate quantum of discipline. In this undertaking, we are mindful of our obligation to examine, with care, the facts and circumstances underlying Respondent's misconduct, including any aggravating or mitigating factors that may bear upon that misconduct. In re Collester, 126 N.J. 468, 472 (1992); see also In re Connor, 124 N.J. 18, 22 (1991); In re Mathesius, supra, 188 N.J. 496; In re Seaman, supra, 133 N.J. at 98 (1993). We are also cognizant of the primary purpose of our system of judicial discipline, namely to preserve the public's confidence in the integrity and independence of the judiciary, not to punish a judge. In re Seaman, supra, 133 N.J. at 96 (1993) (citing In re Coruzzi, 95 N.J. 557, 579 (1984)); In re Williams, supra, 169 N.J. at 275.

The aggravating factors considered by the Court when determining the gravity of judicial misconduct include the extent to which the misconduct demonstrates a lack of integrity and probity, a lack of independence or impartiality, misuse of judicial authority, and whether the conduct has been repeated or has harmed others. In re Seaman, supra, 133 N.J. at 98-99 (citations omitted). Factors considered in mitigation include the length and quality of the judge's tenure in office, the judge's sincere commitment to overcoming the fault, the judge's remorse and attempts at apology or reparations to the victim, and whether the inappropriate behavior is susceptible to

modification. In re Subryan, supra, 187 N.J. at 154 (citations omitted).

In this instance, Respondent has engaged in serious misconduct the impact of which, both for A.J. who was subjected to the abuse and for those in the Mercer County Drug Court program who witnessed it, has been considerable. By virtue of Respondent's misconduct, A.J. was purposefully and publicly humiliated and, thereafter, displaced from her position as Coordinator in the Mercer County Drug Court program, a job she, by all accounts, performed well.

Throughout these proceedings, Respondent has denied any wrongdoing, claiming no recollection of his own conduct and attacking the veracity of those who testified as to its occurrence, casting them as malcontents and liars. While Respondent certainly has the right to defend himself in this ethics proceeding, he is also obligated as a member of the bench and bar to testify with complete candor before this tribunal, which this record suggests he has failed to do. RPC 3.3; R. 1:18 ("It shall be the duty of every judge to abide by and to enforce the provisions of the Rules of Professional Conduct, the Code of Judicial Conduct and the provisions of R. 1:15 and R. 1:17."). We find this circumstance exceedingly troubling and a substantially aggravating factor in assessing the appropriate quantum of discipline for Respondent's ethical breaches.

We are also cognizant of several other aggravating factors present in this matter that bear on the appropriate quantum of discipline to be imposed. First, the misconduct at issue involved Respondent's intentional mistreatment of a subordinate employee, conduct which demonstrates a considerable lack of integrity, sound judgment and self-control on Respondent's part. In re Seaman, supra, 133 N.J. at 98 (citing In re Coruzzi, 95 N.J. 557, 572 (1984)). The deliberate nature of Respondent's misconduct, particularly the evident sense of entitlement he displayed in grapsing A.J. by her ear, demonstrates a disturbing lack of respect for others.

Second, Respondent's conduct harmed A.J. who was left embarrassed and offended by Respondent's unwanted and demeaning treatment of her and displaced from her chosen position as Drug Court Coordinator. That harm was compounded by the very public nature of Respondent's misconduct, which was witnessed by several of her colleagues and became the subject of two extensive investigations.

Finally, we note the obvious imbalance in Respondent's and A.J.'s professional relationship, which rendered her extremely vulnerable to this mistreatment. Cf. In re Jones 211 N.J. 116 (2012) (adopting the findings and recommendation of Presentment ACJC2011-122 concluding that the vulnerability of those women touched inappropriately by the judge, all of whom were

subordinate to him, constituted an aggravating factor for purposes of determining discipline); In re Seaman, supra, 133 N.J. at 100 (finding "especially important the vulnerability of respondent's victim," i.e. his law clerk, which was deemed an aggravating factor for purposes of imposing discipline); In re Subryan, supra, 187 N.J. at 155 (stating that the judge's unwanted advance to his law clerk was unacceptable "in any workplace setting" and "particularly troubling in the context of the judge-law clerk relationship" given the "inequality inherent in that relationship."); In re Yengo, 72 N.J. 425, 438 (1977) (finding the vulnerability of the victim of the judge's abusive language, who was a litigant appearing before the judge, significant: "She (the victim) was disadvantaged and defenseless . . . whereas he was a *judge* and his conduct must be evaluated as such.") (emphasis in original).

Respondent acknowledged this power imbalance during the hearing, stating repeatedly that as the presiding Drug Court judge he was the ultimate authority figure in the Drug Court. For her part, the record reveals that A.J. was acutely aware of her vulnerability in respect of Respondent and understood her position relative to him as that of a subordinate. Given this imbalance, A.J. expressed a strong reluctance to report Respondent's mistreatment of her out of a fear that to do so would result in her termination. It was not until the Mercer

Vicinage EEO/AA officer filed the EEO/AA complaint against Respondent on A.J.'s behalf that word of Respondent's misconduct surfaced.

In respect of any mitigating factors, the record before us is largely silent. We commend Respondent's dedicated service as a Superior Court judge for the past seventeen years, eight of which as the Mercer County Presiding Criminal Division Judge. We cannot, however, as Respondent urges, consider the mitigating factors present in Subryan, supra, as applicable here as such evidence has not been made a part of this record. Rb43-44. In addition, while Respondent has advanced as a mitigating factor his "voluntary" attendance at sensitivity training, the record before us indicates that he was, in fact, required to attend that training at the behest of his Assignment Judge.

In any event, while this case does not involve any sexual misconduct or sexual touching, it does involve unwanted physical and degrading touching which, in our view, warrants a suspension.

IV. RECOMMENDATION

For the foregoing reasons, the Committee recommends that Respondent be suspended from his judicial duties for a period of one month, without pay, for his violations of Canons 1, 2A and 3A(3) of the Code of Judicial Conduct. This recommendation takes

into account the seriousness of Respondent's ethical infractions and the significant aggravating factors present in this case.

While there is nc precedent of which we are aware for this Committee to recommend that Respondent be reassigned from his position of leadership within the Judiciary, the Court may wish to consider that issue in connection with this Presentment.

Respectfully submitted,

ADVISORY COMMITTEE ON JUDICIAL CONDUCT

July 22, 2015

By: _____
Hon. Edwin H. Stern

Joined by: Vincent E. Gentile, Esq.; A. Matthew Boxer, Esq.; Susan A. Feeney, Esq.; David P. Anderson and Karen Kessler

Justice Long and Judges Skillman and Davis, concurring in part and dissenting in part:

We concur in the part of the Presentment that concludes Respondent violated Canons 1, 2A and 3A(3) of Code of Judicial Conduct by touching A.J. in a demeaning and offensive manner on March 22, 2012 and April 2, 2012. However, because the recommended penalty of suspension is disproportionate to the violations committed by Respondent and inconsistent with the discipline imposed in previous cases, we conclude that censure of Respondent would be the most appropriate discipline for this violation of the Canons. Therefore, we dissent from the part of the Presentment which recommends that Respondent be suspended for a period of one month without pay.

Respondent has been a Superior Court Judge for seventeen years. Eight years ago, Respondent was assigned to the position of Presiding Judge of the Criminal Division in Mercer County. In this position, Respondent also presides over the Mercer County Drug Court Program. In these capacities, Respondent has supervisory responsibility for a substantial number of support staff in the Criminal Division. Respondent's violations of the Canons consisted of improperly touching one member of that support staff on two occasions.

Respondent testified that "The Criminal Division . . . was in shambles" when he became Presiding Judge (4T32-19 to 20) and

that he felt a need to be a "task master" in performing the responsibilities of that position (4T32-15). Whether or not Respondent's perception of the condition of the Criminal Division was accurate, his view of the Division and the approach he had to take to effectively perform his supervisory responsibilities is relevant to a determination of whether a suspension from judicial office is required here or whether censure is a more appropriate sanction under all the circumstances of this case.

The censure of a Judge is considered very serious discipline. This point is illustrated by In re Connor, 124 N.J. 18 (1991). In that case, a Superior Court Judge, while operating his car in a highly inebriated condition, rammed the vehicle in front of him, and then fled from the scene of the accident at a high rate of speed. Id. at 20. After driving two miles, the Judge lost control of his car, traveling partially off the road for seventy feet, then crossing back and forth over the highway, finally leaving the road and coming to a stop with his right side striking a group of trees. Id. at 23. After his arrest, the Judge first denied being involved in any accident and then gave the police a false version of how the accident occurred. Id. at 24. Following this incident, the Judge enrolled in a residential treatment program for substance abuse. Id. at 25. In concluding that censure was the appropriate

discipline for the Judge's conduct in driving while inebriated, fleeing the scene of an accident, and giving false information to the police, the Court stated that "Respondent's offenses went beyond drunk driving, posing an actual serious risk to the safety of others, as well as to the proper and effective administration of important laws affecting public safety." Id. at 27. The Court concluded that the Judge's misconduct did not rise to the level requiring a suspension from judicial service "because of his good record as a judge and because his transgressions do not directly affect the performance of his judicial duties." Id. at 28.

Although the differences between the nature of the violations involved in Connor and in this complaint complicates a comparison of the two cases, we are unable to conclude that Respondent's violations were more serious than those in Connor. Respondent did not engage in conduct that posed a risk to public safety or that obstructed an official investigation by giving false information to a police officer. Although Respondent's violations did involve the performance of judicial duties, those duties were part of the additional supervisory responsibilities he was assigned as a result of his appointment as Presiding Judge of the Criminal Division and Judge of the Drug Court and did not relate to his contacts with litigants or the general public. Moreover, the violations consisted of two isolated

incidents occurring within a ten-day period in the spring of 2012.

Further, Respondent's improper touching of A.J. was different in nature from the improper touching involved in the two cases the Presentment primarily relies upon in concluding the Respondent should be suspended from judicial service, In re Seaman, 133 N.J. 67 (1993) and In re Subryan, 187 N.J. 139 (2006). Both of those cases involved Judges who repeatedly engaged in sexually aggressive conduct towards their law clerks, which included in the case of one judge attempting to put his hand under her skirt on two occasions and attempting to place her hand on his crotch on another occasion, In re Seaman, supra at 76-78, 84-87, 95, and in the case of the other judge kissing the law clerk against her will and rubbing her shoulders, In re Subryan, supra, 187 N.J. at 148-52. Although we concur in the Presentment's finding that Respondent's touching of A.J., which consisted of placing his hand on her upper back-neck area on one occasion and grabbing her ear on another occasion, was offensive, we do not believe it reached the same level of impropriety as the sexually aggressive acts of the Judges in Seaman and Subryan. Furthermore, although there was no possible motivation for the Judges' conduct in those cases other than pursuing their own sexual gratification, Respondent's improper touching of A.J., wrongful as it may have been, occurred in the

context of him directing her to get back to work, which was within the scope of his responsibilities as a Presiding Judge. Indeed, if Respondent had given A.J. that direction only verbally, without touching her, there would have been no basis for any disciplinary action.

Finally, we note that since these charges were brought, Respondent has attended sensitivity training and that there has been no recurrence of the kind of conduct which gave rise to the charges.

Under all these circumstances, and in light of the majority's recommendation that the Court consider removing Respondent from his position as Presiding Judge of the Criminal Division, we conclude that censure of Respondent would be the most appropriate discipline to assure the public and employees under Respondent's supervision that judicial misconduct is not condoned and to protect against any recurrence of the conduct that resulted in this Presentment. See In re Seaman, supra, 133 N.J. at 96-97.