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OCT - 4 2013
COMMISSION ON JUDICIAL CONDUCT

1 **BEFORE THE COMMISSION ON JUDICIAL CONDUCT**
2 **OF THE STATE OF WASHINGTON**

3
4 In Re the Matter of:)

5 The Honorable Gary Tabor,)
6 Thurston County Superior Court Judge)

CJC No. 7251-F-158

**STIPULATION, AGREEMENT
AND ORDER OF ADMONISHMENT**

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8 The Commission on Judicial Conduct and Gary R. Tabor, Judge of the Thurston
9 County Superior Court, stipulate and agree as provided herein. This stipulation is submitted
10 pursuant to Article IV, Section 31 of the Washington Constitution and Rule 23 of the
11 Commission's Rules of Procedure and shall not become effective until approved by the
12 Washington Commission on Judicial Conduct.

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14 **I. STIPULATED FACTS**

15 1. Judge Gary Tabor (Respondent) is now, and was at all times referred to in this
16 document, a judge of the Thurston County Superior Court. Respondent has served in that
17 capacity since 1997.

18 2. On November 6, 2012, the people of the State of Washington passed
19 Referendum Measure 74. This vote approved same-sex marriages in the State of Washington
20 as previously authorized by legislation passed by the Washington legislature and signed by the
21 governor. The effective date of this change in the law was December 6, 2012. Interested
22 persons could apply for a marriage license beginning on that date.

23 3. Shortly before Referendum 74 was to take effect, during an administrative
24 meeting attended only by judges and some court personnel, Respondent informed those present
25 that he felt "uncomfortable" performing same-sex marriages and asked his colleagues who did
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1 not have similar personal objections to officiate in his stead over such marriages at the
2 courthouse.¹

3 4. Respondent's statement that he felt uncomfortable performing same-sex
4 marriages was broadly publicized after reporters learned about his position from an
5 unidentified source. After the publication of several newspaper articles and related online
6 comments, Respondent responded to press inquiries in order to clarify his position. He stated
7 that his decision not to marry same-sex couples was a very personal one, based on his religious
8 views. Respondent reasoned that since judges are not required, but are only permitted, to
9 perform marriages, he believed he was within his rights to personally decline to perform same-
10 sex marriages, so long as those seeking to have their marriages solemnized had access to
11 another judge without delay.

12 5. The Commission contacted Respondent on March 2, 2013, after receiving
13 complaints following publicity about Respondent's position. Respondent timely answered the
14 Commission's Statement of Allegations on March 18, 2013. Following contact by the
15 Commission, of his own volition, Respondent ceased performing all marriages in his judicial
16 capacity.

17 6. Between December 6, 2012 (when Washington's Marriage Equality Act became
18 effective) and when Judge Tabor ceased performing all marriages in his judicial capacity, he
19 solemnized approximately ten weddings, all involving opposite-sex couples. He was not given
20 the option to perform a same-sex marriage ceremony during that time and did not expressly
21 decline to solemnize any specific same-sex marriage. (The Commission's investigation,
22 however, indicates a court employee aware of Judge Tabor's position redirected a same-sex
23 couple scheduled to be married during Judge Tabor's regular wedding rotation to another
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25 ¹ At that time, each of the eight Thurston County Superior Court judges had agreed to take weekly turns
26 being the "on-call" judge to perform civil wedding ceremonies after court hours for people who request to be
married by a judge.

1 judicial officer at the courthouse. Neither the couple nor Judge Tabor were told of the
2 substitution of judges.)

3 4 II. AGREEMENT

5 1. Respondent accepts the Commission's determination that he created an
6 appearance of impropriety in contravention of Canon 1 (Rules 1.1 and 1.2) and Canon 3 (Rule
7 3.1(C)) of the Code of Judicial Conduct by publically stating he would not perform same-sex
8 marriages in his judicial capacity while continuing to perform opposite-sex marriages.

9 2. Rules 1.1, 1.2 and 3.1(C) of the Code oblige judges to avoid impropriety and the
10 appearance of impropriety by acting at all times in a manner that promotes public confidence in
11 their independence, integrity and impartiality.²

12 3. Washington State's law against discrimination, RCW 49.60, sets forth classes of
13 people protected by law against discrimination. Sexual orientation is included in the classes of
14 people protected. Respondent accepts the Commission's determination that, by announcing he
15 would not solemnize same-sex marriages due to his philosophical and religious concerns while
16 continuing to solemnize opposite-sex marriages, he appeared to express a discriminatory intent
17 against a statutorily protected class of people thereby undermining public confidence in his
18 impartiality. As a comment to Rule 3.1 of the Code explains: "Discriminatory actions and
19 expressions of bias or prejudice by a judge, even outside the judge's official or judicial actions,
20 are likely to appear to a reasonable person to call into question the judge's integrity and
21 impartiality."

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24 ² Canon 1, Rule 1.1 provides, "A judge shall comply with the law, including the Code of Judicial
25 Conduct"; Canon 1, Rule 1.2 provides, "A judge shall act at all times in a manner that promotes public confidence
26 in the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of
impropriety"; and Canon 3, Rule 3.1(C) states, "A judge may engage in extrajudicial activities, except as
prohibited by law or this Code. However, when engaging in extrajudicial activities, a judge shall not participate
in activities that would undermine the judge's independence, integrity or impartiality."

1 **(A) Characteristics of the Misconduct**

2 (1) *Whether the misconduct is an isolated instance or evidence of a pattern of*
3 *conduct.* Though Respondent repeated his position several times and continued to solemnize
4 opposite-sex marriages for several months, the conduct at issue was singular and uniquely
5 isolated to the circumstances covered by this stipulation. Respondent amended his conduct
6 when the issue was brought to his attention. This does not, under these facts, amount to a
7 pattern of misconduct.

8 (2) *The nature, extent, and frequency of occurrence of the acts of misconduct.*
9 Respondent's decision to perform only opposite-sex marriages discriminated against a
10 protected class of people. Discriminatory behavior undermines public confidence in the
11 integrity and impartiality of the judiciary. At the time Respondent originally announced his
12 position, he stated he believed it would be an internal, administrative matter, and that he did
13 not intend to make a public statement, but to act consistently with his personal, sincere
14 religious beliefs, without depriving citizens of their statutory right to marry. Despite his
15 intention, his decision was widely publicized, whereupon Respondent stated he made the
16 decision to address it publicly trying to alleviate concerns about impartiality. He voluntarily
17 removed himself from the superior court's marriage rotation to further alleviate those concerns.

18 (3) *Whether the misconduct occurred in or out of the courtroom.* The conduct
19 occurred in the courthouse and in Respondent's capacity as a judge, but not while engaging in
20 official judicial duties.

21 (4) *Whether Respondent flagrantly and intentionally violated the oath of office.*
22 Respondent did not flagrantly or intentionally violate his oath of office. He indicates he
23 initially concluded, in good faith, that he could ethically decline to perform same-sex weddings
24 based upon his personal religious views so long as same-sex couples were accommodated by
25 having access to another judge without delay. Respondent now recognizes his analysis did not
26 adequately take into account the unique and integral role judicial officers play in our

1 constitutional scheme of justice, and how a judge must not only be impartial, but must also be
2 perceived as impartial, in order to properly fulfill that role.

3 Both the right to be free from discrimination and the First Amendment right to free
4 exercise of religion are significant and weighty. The Code acknowledges that judges are
5 individuals with personal rights and beliefs. Ultimately, the Code requires that judges conform
6 their conduct in their judicial capacity to the Code of Judicial Conduct and other law. For
7 example, (while Respondent is not charged with violating this Rule), Comment 2 to Rule 2.2
8 states "Although each judge comes to the bench with a unique background and personal
9 philosophy, a judge must interpret and apply the law without regard to whether the judge
10 approves or disapproves of the law in question."

11 *(5) The effect the misconduct has upon the integrity of and respect for the*
12 *judiciary.* In order to maintain the public's confidence in judicial decisions, a judge must not
13 only be, but appear to be, free from bias and prepared to rule based strictly on the law and facts
14 that come before the court, regardless of the extraneous characteristics of the parties. By even
15 temporarily acting in a discriminatory fashion toward gay men and lesbians, in stating that he
16 would not solemnize their marriages when he continued to solemnize heterosexual marriages,
17 and by commenting on that decision publicly, a reasonable person could objectively conclude
18 that he might act in a discriminatory fashion toward gay or lesbian litigants, lawyers, or
19 witnesses. The Commission's investigation has shown no indication that Respondent is in fact
20 biased in the manner in which he conducts his judicial duties, and he has a reputation for being
21 a scrupulous and well-informed, hard-working judge.

22 *(6) Nature and extent to which the acts of misconduct have been injurious to*
23 *other persons.* The injury is to public confidence in Respondent's impartiality on issues that
24 may come before him involving same-sex couples or even toward gay or lesbian lawyers,
25 litigants, or witnesses. In addition, marriages sometimes lead to litigation and Respondent
26 could well have created the impression he might be less than fair to a lesbian or gay person in a

1 dissolution or custody dispute matter. Respondent has credibly stated, and his conduct toward
2 this proceeding has demonstrated, that he takes very seriously his responsibility to avoid the
3 appearance of impropriety, and that he has deep respect for the institution of the court and its
4 reputation for impartiality.

5 (7) *The extent to which Respondent exploited his official capacity to satisfy*
6 *personal desires.* There is no indication Respondent exploited his position to satisfy personal
7 desires. Respondent has stated that his position was a personal one, and that he had no
8 intention to politicize or publicize it.

9 **(B) Service and Demeanor of the Judge**

10 (1) *Whether Respondent has acknowledged or recognized that the acts*
11 *occurred.* Respondent has acknowledged and recognized that the acts occurred and has shown
12 a clear and sincere understanding of the concerns of the Commission regarding his actions and
13 the Code.

14 (2) *Whether Respondent has evidenced an effort to change or modify the*
15 *conduct.* On his own volition, Respondent stopped solemnizing marriages in his capacity as
16 judge.

17 (3) *Respondent's length of service in a judicial capacity.* Respondent has been
18 an elected superior court judge for over 16 years. The Commission's investigation has shown
19 he has a reputation for being a fair and impartial jurist, and one who is hard-working and well-
20 informed in law.

21 (4) *Whether there has been prior disciplinary action concerning Respondent.*
22 There has been no prior disciplinary action involving Respondent.

23 (5) *Whether Respondent cooperated with the Commission's investigation and*
24 *proceeding.* Respondent has cooperated with the Commission investigation and has conducted
25 himself in a highly professional manner in all respects concerning this proceeding.

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1 (6) *Respondent's compliance with an ethics advisory opinion, if any.* The
2 conduct covered by this stipulation took place at a time of change, when longstanding law was
3 just changed, after an extended campaign and a challenge to the legislature's and governor's
4 passage of a new same-sex marriage law. The views of the majority of the population are
5 plainly in flux, and this set of circumstances has not previously been squarely set before the
6 court or a judicial ethics advisory body. Respondent recognizes that part of the purpose of
7 Commission action is to inform other judges and the public of the meaning of the Code, and in
8 that way to serve an education function.

9 2. Based upon the stipulated facts, upon consideration and balancing of the above
10 factors, Respondent and the Commission agree that the imposition of an admonishment is
11 appropriate in this matter. An "admonishment" is a written action of the Commission of an
12 advisory nature that cautions a respondent not to engage in certain proscribed behavior and
13 may include a requirement that the respondent follow a specified corrective course of action.
14 An "admonishment" is the least severe disciplinary action available to the Commission.

15 3. Respondent agrees that he will not repeat such conduct in the future, mindful of
16 the potential threat any repetition of his conduct poses to public confidence in the integrity and
17 impartiality of the judiciary and to the administration of justice.

18 4. Respondent agrees he will promptly read and familiarize himself with the Code
19 of Judicial Conduct in its entirety.

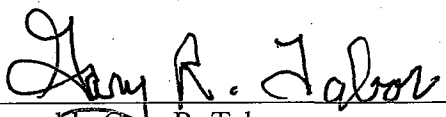
20 Standard Additional Terms and Conditions

21 5. Respondent agrees that by entering into this stipulation and agreement, he
22 waives his procedural rights and appeal rights in this proceeding pursuant to the Commission
23 on Judicial Conduct Rules of Procedure and Article IV, Section 31 of the Washington State
24 Constitution.

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6. Respondent acknowledges and represents that he either consulted or has had an opportunity to consult with counsel of his choosing regarding this stipulation and proceeding. Respondent represents he voluntarily enters into this stipulation and agreement.

7. Respondent further agrees that he will not retaliate against any person known or suspected to have cooperated with the Commission, or otherwise associated with this matter.



Honorable Gay R. Tabor
Thurston County Superior Court Judge

Sept. 13, 2013
Date



J. Reiko Callner
Executive Director
Commission on Judicial Conduct

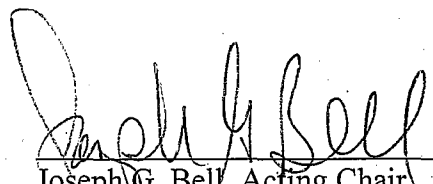
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IV. ORDER OF ADMONISHMENT

Based on the above Stipulation and Agreement, the Commission on Judicial Conduct hereby orders Respondent, Judge Gary R. Tabor, ADMONISHED for violating Canon 1, Rules 1.1 and 1.2, and Canon 3, Rule 3.1 of the Code of Judicial Conduct. Respondent shall not engage in such conduct in the future and shall fulfill all of the terms of the Stipulation and Agreement as set forth therein.

DATED this 4 day of October, 2013.



Joseph G. Bell, Acting Chair
Commission on Judicial Conduct