STATE OF MICHIGAN

BEFORE THE JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

Hon. Steven R. Servaas
63rd District Court
105 Maple Street
Rockford, MI 49341

_____/

Formal Complaint No. 84
Special Master: Hon. Casper O. Grathwohl

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RESPONDENT JUDGE STEVEN R. SERVAAS'S OBJECTIONS TO REPORT OF MASTER

Respondent, the Honorable Steven R. Servaas, through his attorneys, Miller Johnson, objects to the Special Master's Report dated May 12, 2008 as follows. These Objections are supported by the attached Brief.

Count I: Vacating Judicial Office by Failing to Reside in Election Division of Judicial District.

1. The Master erred in finding that Judge Servaas violated Article VI, Section 20 of the Michigan Constitution by moving his principal residence from the 1st Division of the 63rd Judicial District to the 2nd Division of the 63rd Judicial District in 2005, resulting in a vacation of his judicial position.

2. The Master erred in finding that Judge Servaas violated MCL 600.8201 by moving his principal residence from the 1st Division of the 63rd Judicial District to the 2nd Division of the 63rd Judicial District in 2005.

3. The Master erred in concluding that Judge Servaas's conduct violated Canon 2.B of the Code of Judicial Conduct.

Count III: Rude and Sexually Inappropriate Comments and Conduct.

1. The Master erred in finding that Judge Servaas engaged in sexually inappropriate comments and conduct toward female court employees.

2. Specifically, the Master erred in finding that Judge Servaas's joke to a clerk about the size of her sweatshirt in relation to her small frame was degrading and sexual in nature, that it created a hostile work environment, that Judge Servaas is her superior and controlled her work environment, and that Judge Servaas has made similar comments to other staff.

3. The Master also erred in finding that Judge Servaas created doodles that compromised the court's integrity and demeaned the female staff.

4. The Master erred in concluding that Judge Servaas's conduct constituted sexual harassment in violation of MCL 37.2101, demonstrated a lack of personal responsibility for his behavior and respect for female staff in violation of MCR 9.205(A), and was contrary to justice ethics, honesty or good morals in the treatment of his female staff in violation of MCR 9.104(A)(3). He also erred in concluding that Judge Servaas failed to establish, maintain and observe high standards of conduct to preserve the integrity of the judicial system in violation of Canon 1 and failed to treat every person with courtesy and respect without regard to gender in violation of Canon 2.B.

MILLER JOHNSON
Attorneys for Respondent, Hon. Steven R. Servaas

Dated: June 12, 2008

By _____

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BRIEF IN SUPPORT OF RESPONDENT JUDGE STEVEN R. SERVAAS'S OBJECTIONS TO REPORT OF MASTER

INTRODUCTION AND FACTS

Respondent, the Honorable Steven R. Servaas, is currently the longest-serving judge in the Michigan state court system and arguably one of the most loved and respected. In his 35 years as a judge of the 63rd District Court in Rockford, Michigan, he has served the community well and has developed a reputation among lawyers, judges, and litigants alike for being a fair, honest, and respectful jurist who exhibits cordiality, integrity, and wisdom of the law (Hillary testimony, Tr. pp. 299-302; Wallin testimony, Tr. pp. 314-315).

In the words of the Director of the Kent County Defender's Office and the Chief Assistant Prosecutor for Kent County, he represents "all of those things that judicial excellence comprises" and deserves the "highest possible rating" available to a member of the legal community (Hillary testimony, Tr. pp. 299-302; Wallin testimony, Tr. pp. 314-315). Litigants believe that the judge gives everyone a fair shake, and their experiences in his courtroom have been described as "uniformly excellent" (Kolenda testimony, Tr. pp. 329-330). Other judges have modeled their judgeships on his example (Buter testimony, Tr. pp. 321-322; Kolenda testimony, Tr. pp. 328-329). The Kent County Prosecutor's Office considers Judge Servaas's court to be "one of our prized courts from a standpoint of educating our young attorneys" and routinely assigns its newest assistant prosecutors to that court for training (Wallin testimony, Tr. pp. 312-313). And although the Special Master would not allow the testimony, dozens of judges, prosecutors, public defenders, lawyers in private practice, and court clerks sought permission to testify on Judge Servaas's behalf.

The members of the Grand Rapids Bar Association gave Judge Servaas the highest possible designation in the last election, ranking him "exceptionally well-qualified" (**Exhibit A**). And former presidents of the Grand Rapids Bar Association wrote a letter to the

editor of The Grand Rapids Press praising Judge Servaas and lamenting the Judicial Tenure Commission's investigation (**Exhibit B**). But perhaps the best indication of the quality of Judge Servaas's service to the community and the honor he brings to the judiciary is the number of articles, notes of support, and letters to the editor written by members of the community supporting him (**Exhibit C**). Not one negative letter appeared. The former Executive Director of the Judicial Tenure Commission, Allan Sobel, even reported that he had never seen such overwhelming support.

One wonders, therefore, what brings Judge Servaas before the Judicial Tenure Commission. On the afternoon of January 16, 2008, the Executive Director of the Judicial Tenure Commission, Paul Fischer, appeared unannounced in Judge Servaas's chambers with an armed Michigan State Police Lieutenant who secretly recorded the conversation. A copy of the recording and transcript eventually produced by the Executive Director are attached for the Commission's review as **Exhibits D and E**, respectively. The Executive Director presented Judge Servaas with a resignation letter prepared on Judge Servaas's letterhead, and demanded that Judge Servaas sign the resignation letter "immediately" to avoid having "shame, proceedings, accusations of perjury" brought against him (Exhibit E, pp. 4-5). The Executive Director threatened "to drag your name through the mud" and to have Judge Servaas "thrown off the bench" (Exhibit E, pp. 11-12). When Judge Servaas asked for time to consider the charges and seek the advice of counsel, the Executive Director denied the request, only giving him until 9:00 the following morning to resign (Exhibit E, pp. 4-5).

The "charges" claimed by the Executive Director at that surprise meeting had to do with Judge Servaas "living outside his *district*" and engaging in "sexual harassment" (Exhibit E, pp. 3 and 5) (emphasis added). The Executive Director and the state police lieutenant also

seized a gun from Judge Servaas that day, which he possessed lawfully and with the required permits. Ultimately, the gun issue mysteriously disappeared and the Formal Complaint stated claims that Judge Servaas violated Michigan law by moving his principal residence from the 1st *Division* of the 63rd District to the 2nd *Division* of the 63rd District, and that he "sexually harassed" court personnel by making a comment about the size of a clerk's sweatshirt in relation to her small frame and by creating a doodle of breasts and a penis.

As explained in more detail below, the residency issue is a pure legal issue involving the interpretation of the Michigan Constitution and residency statutes. Judge Servaas does not dispute that he had (and still has) a home in the 1st Division of the 63rd District (where he holds court) and a home in the 2nd Division of the 63rd District, and that he changed his principal residence from the home in the 1st Division to the home in the 2nd Division in 2005. Both homes are within his *district*. Assuming that Judge Servaas misinterpreted the sparse and cryptic law on this subject and erred in moving from the 1st *Division* of his district to the 2nd *Division* of his district, such conduct is not judicial misconduct or grounds for discipline.

Also, as explained in more detail below, the claims of "sexual harassment" are unfounded. While at a retirement party for a clerk at the Cascade court (in the 2nd Division of the 63rd District), Judge Servaas approached a group of clerks who were engaged in social conversation. One clerk began joking with him and he joked back, without incident. A second clerk began joking with him about his dislike for the University of Michigan and he joked back about the size of her University of Michigan sweatshirt. This joke, however, fell flat and the clerk ended up expressing offense and making an issue out of it. While Judge Servaas regrets offending the clerk, he meant the comment as a joke, did not intend to hurt her feelings, and later apologized. Such a joke is not judicial misconduct and does not warrant discipline.

Finally, as further explained below, the Executive Director claimed that Judge Servaas "sexually harassed" his court staff by creating a "doodle" of a penis on a sticky note attached to a court file, and by creating a "doodle" of breasts on a note inside a court file. It is unclear what these doodles actually represent and whether Judge Servaas drew both of them. However, some things are clear: first, the judge did not "present" them to the clerks or otherwise discuss the doodles with them, and second, the clerks found them to be funny and did not feel angry, offended, embarrassed, upset, or sexually harassed by them. Creating these doodles, which have bothered no one except the Executive Director, does not constitute judicial misconduct and does not warrant discipline.

Judge Servaas's illustrious 35-year career should not be stained because of a wrong address, two doodles, and a joke.

BURDEN OF PROOF AND STANDARD OF REVIEW

The Michigan Court Rules state that:

> . . .The examiner shall present the evidence in support of the charges set forth in the complaint, **and at all times shall have the burden of proving the allegations by a preponderance of the evidence.**

MCR 9.211 (A) (emphasis added). In the present case, with respect to each count, the Examiner failed to meet his burden of proving his claims against Judge Servaas by a preponderance of the evidence. In fact, the great weight of the evidence supported Judge Servaas's position, even though the Respondent bore no burden of disproving the Examiner's claims. Yet, after a four-day hearing and testimony from twenty-one witnesses, the Master's Report consisted of only nine pages of text (including a recitation of the undisputed procedural history), and contained very little reasoning or citation of the evidence supporting his conclusions. He failed to consider the testimony of the majority of witnesses who testified, and singled out the few morsels of

testimony, most of which were contradicted, that could be used to support the Examiner's claims.

The Master's Report is subject to a *de novo* review by the Commission. *In re Chrzanowski*, 465 Mich 468, 480 (2001). In *Chrzanowski*, the Michigan Supreme Court noted that the Commission "reviews the findings and conclusions of law of the master de novo, and that the [Commission] is not compelled to defer to the master's findings of fact." *Id.* In the present case, the Commission should conduct a *de novo* review of the record and reject the Master's findings of fact and conclusions of law as being unsupported by the weight of the evidence and inconsistent with Michigan law, as more specifically explained below. That process will lead to the only reasonable conclusion: that all counts against Judge Servaas must be dismissed.

OBJECTIONS

I. COUNT I: VACATING JUDICIAL OFFICE BY FAILING TO RESIDE IN ELECTION DIVISION OF JUDICIAL DISTRICT.

Whether Judge Servaas vacated his judicial seat by moving from the 1st Division of the 63rd District Court to the 2nd Division of the 63rd District Court is a purely legal issue; it turns on the interpretation of Michigan's Constitution and the statutory requirements for district court judges. Judge Servaas does not dispute that, in 2005, he made his home at 201 Honey Creek in Ada, Michigan, his principal residence. There is also no dispute, however, that this home is within the 63rd Judicial District, even if it is not within the 1st Division of the district. The Special Master erred in concluding that a judge who lives in his district, but not in his division of that district, violates the residency requirements for district court judges.

A. The Master Erred in Concluding that Judge Servaas Violated Article VI, Section 20 of the Michigan Constitution by Moving his Principal Residence from the 1st Division of the 63rd District to the 2nd Division in 2005.

In Count I, the Examiner alleged that Judge Servaas vacated his judicial office by making the house at 201 Honey Creek, in Ada, his principal residence. This address, however, is undeniably within the 63rd District. While the address may be within the 2nd Division, as opposed to the 1st Division, of the 63rd District, there is no constitutional support for the proposition that a judge vacates his office if his principal residence is *inside* his district, yet *outside* his division.

The constitutional basis for the Examiner's claim that Judge Servaas vacated his office is Article 6, § 20 of the 1963 Michigan Constitution. This section states:

> Whenever a justice or judge removes his domicile beyond *the limits of the territory from which he was elected or appointed*, he shall have vacated his office.

Const 1963, Art 6, § 20 (emphasis added).

The issue, under this provision, is whether Judge Servaas removed his domicile beyond "the limits of the territory from which he was elected."

1. The "territory from which [Judge Servaas] is elected" is the Entire 63rd District.

Under the plain language of Article 6, § 20 of the Constitution, a judge only vacates his office if he removes his domicile "beyond the limits of the territory from which he was elected." Judge Servaas has not done so.

The territory from which Judge Servaas was elected is the 63rd District. This is one *district*, with two *divisions*. MCL 600.8130(4). The fact that it has two *divisions* does not make it two *districts*. In fact, the legislature, in creating divisions of a district court, explicitly stated: "The provisions for election divisions of a judicial district have no effect on the

administration of a judicial district." MCL 600.8102. Judge Servaas's residence at 201 Honey Creek Drive in Ada is undeniably within the 63rd District. Judge Servaas has always maintained his principal residence in the 63rd District.

In concluding that the "territory from which [Judge Servaas] was elected" is the 1st Division of the 63rd District, as opposed to the entire 63rd District, the Special Master relied on the official comment from the constitutional convention, which states, "The word 'territory' has been substituted for 'jurisdiction', inasmuch as the section refers to physical moving." The Special Master did not explain, however, why he believes that this cryptic statement supports the position that Judge Servaas physically removed his domicile beyond the limits of the territory from which he was elected. The language of the comment does not support this conclusion, and the history of the provision does not either.

In fact, a review of the Official Record of the Constitutional Convention for the 1963 Constitution shows that Article 6, § 20 received scant attention from the framers. At the convention, Article 6, § 20 was referred to as section b to Committee Proposal 96. While some sections of Article 6 were extensively debated, section 20 was not. The entire debate over section 20 is as follows:

> SECRETARY CHASE: Section b:
>
> [Section b was read by the secretary. For text, see above, page 1478.]
>
> CHAIRMAN VAN DUSEN: Mr. Danhof.
>
> MR. DANHOF: Mr. Chairman, members of the committee, for the committee report in this particular section, I would like to yield to the delegate from Bad Axe, Mr. McAllister.
>
> MR. McALLISTER: Mr. Chairman and fellow delegates, I don't believe that this section needs much of an explanation. It means just what it says. If a judge moves out of the district in which he was elected, then, of course, his office is deemed vacant and he is

> deemed to have vacated the office. I recommend that this section be adopted.
>
> CHAIRMAN VAN DUSEN: Are there any amendments to section b? If not, section b will pass.

1 Official Record, Constitutional Convention 1961, p 1506.

Indeed, there is nothing in the Official Record of the Constitutional Convention that supports the notion that the "territory from which [a district court judge] is elected" is his division, as opposed to his district.

2. Other Statutes Show that the "territory from which [Judge Servaas] is elected" is the Entire 63rd District.

The Special Master erred in failing to interpret the phrase "the territory from which [Judge Servaas] was elected" in Article 6, § 20 of the Constitution *in pari materia* with other statutes addressing the residency requirement for judges. *House Speaker v. Governor*, 195 Mich App 376, 387 (1992) (holding that, while not controlling, legislative enactments are persuasive on the interpretation of the constitution). Particularly relevant is MCL 168.467c, which governs the candidacy of incumbent district court judges. It states:

> An incumbent district court judge may become a candidate in the primary election for the office of which he or she is an incumbent by filing with the secretary of state an affidavit of candidacy . . . *The affidavit of candidacy shall contain statements that the affiant is an incumbent district court judge for the district or election division in which election is sought, <u>that he or she is domiciled within the district **or** election division</u>,* and that he or she will not attain the age of 70 by the date of election, and a declaration that the affiant is a candidate for election to the office of district court judge.

(emphasis added).

Under the plain language of MCL 168.467c, an incumbent district court judge need not be a resident of the election division in which he is seeking re-election. Rather, under MCL 168.467c, an incumbent need only be domiciled in the district <u>or</u> the election division for

which he seeks office. If the legislature had intended to require incumbents to be domiciled in both the election division and the district, it would have used "and" instead of "or" in MCL 168.467c. This provision shows that the legislature itself does not view the "territory from which [a district court judge] is elected" as the division. Rather, the "territory from which [a district court judge] is elected" is the entire district. If the "territory from which [a district court judge] is elected" is the division of a district, then MCL 168.467c would be unconstitutional, because it would allow candidates from outside the "territory" to be judges.

3. The Location of the Proposed New Courthouse, which will Not be Located in the 1st Division of the 63rd District, Shows that the "territory from which [Judge Servaas] is elected" is the Entire 63rd District.

The fact that the "territory from which [Judge Servaas] is elected" is the entire 63rd District, and not a particular division of a district, is evidenced by the fact that Kent County is in the process of building a single new courthouse for the 63rd District (**Exhibit F**). This courthouse, if ultimately approved, will consolidate the two existing courthouses into a single building—that is, it will house *both* the 1st Division *and* the 2nd Division of the 63rd District Court. The new courthouse, however, will *not* be located in the 1st Division. Rather, it will be in the 2nd Division.[1] It would certainly be ironic to discipline Judge Servaas for not residing in the 1st Division, when his courthouse may soon be in located the 2nd Division.

B. The Master Erred in Concluding that Judge Servaas Violated MCL 600.8201 by Moving his Principal Residence from the 1st Division of the 63rd District to the 2nd Division in 2005.

In addition to his claim that Judge Servaas has violated the constitutional residency requirement, the Examiner also claims that Judge Servaas violated a statutory residency requirement. The Examiner cited to MCL 600.8201 as the statutory basis for Count I.

[1] The proposed new courthouse will be located in Grand Rapids Township, which is in the 2nd Division of the 63rd District. MCL 600.8130(4)(b).

1. Judge Servaas has Always Complied with MCL 600.8201.

MCL 600.8201 states in its entirety:

> A candidate for and ***a judge of the district court shall be licensed to practice law in this state and shall be a registered elector of the district and election division in which he seeks and holds office.*** Except in any district or election division in which there is a vacancy and in which a registered elector qualified to practice law in this state has not filed nominating petitions by the filing deadline for the primary election, ***a registered elector of an adjoining district or election division within the district who is qualified to practice law in this state shall be eligible for the office of district judge by filing nominating petitions signed by the required number of qualified electors of the district or election division in which he seeks election*** within 5 days after such deadline

(emphasis added).

This statute requires a judge to be a "registered elector" of the district and election division in which he holds office. It does not, by its plain terms, require a judge to maintain his principal residence in the district and election division in which he holds office.

Judge Servaas has always met the requirements of MCL 600.8201, because during his entire career on the bench, he has always been licensed to practice law in this state and he has always been a registered elector of the 63rd District and 1st Division—the district and election division in which he holds office. Even when his principal residence was 201 Honey Creek, Judge Servaas was a registered elector in the 1st Division; he remained registered to vote according to his second home at 8631 Belding Road. He has always met the requirements of MCL 600.8201.

2. Failing to Satisfy MCL 600.8201 does Not Cause an Office to be Vacated.

Assuming, *arguendo*, that he has been improperly registered as an elector of the 1st Division because his primary residence was in the 2nd Division from 2005 to 2008, MCL 600.8201 does not say that Judge Servaas has vacated his office. In fact, the second sentence of MCL 600.8201, quoted above, provides that a judicial candidate from another election division—and even from another district altogether—is qualified to be a judge for a district in which he does not reside if he simply files the required nominating petitions signed by electors within the district. This undermines the Examiner's position that a district court judgeship is automatically vacant if the judge lives outside the district—indeed, the Legislature contemplated that, in some instances, a district court judge may come from outside the district.

3. Other Statutes Governing Judges Show that there is No Statutory Residence Requirement for District Court Judges.

The Commission should also compare the statutes governing the residence requirement for Court of Appeals judges, Circuit Court judges, and Probate Court judges with the statute for district court judges. That is, the Legislature has enacted several statutes stating that judges of the Court of Appeals, Circuit Court, and Probate Court vacate their office if they move out of their district, but it has not enacted a statute stating that district court judges vacate their office if they move outside their election division.

For example, MCL 168.409j states, "The office of judge of the court of appeals shall become vacant upon the happening of any of the following events before the expiration of the term of office: . . . his ceasing to have his domicile in the district from which he was elected . . ." Similarly, MCL 168.422 states, "The office of circuit court judge shall become vacant upon the happening of any of the following events before the expiration of the term of office: . . . his ceasing to be an inhabitant of the circuit for which he shall have been elected or

appointed or within which the duties of his office are required to be discharged . . ." Probate judges face the same requirement. MCL 168.442 states, "The office of probate judge shall become vacant upon the happening of any of the following events before the expiration of the term of office: . . . his ceasing to be an inhabitant of the county for which he shall have been elected or appointed, or within which the duties of his office are required to be discharged . . ."

There is, however, no counterpart statute governing district court judges. Rather, the statute regarding removal of district court judges does not state that a district court judgeship becomes vacant if a judge moves outside his district. Instead, MCL 168.467*l* states:

> Any person holding the office of district judge may be removed from office upon conviction in impeachment proceedings for the reasons and in the manner set forth in section 7 of article 11 of the state constitution, or the governor shall remove any district judge upon a concurrent resolution of 2/3 of the members elected to and serving in each house of the legislature, and the cause for such removal shall be stated at length in such resolution, as provided in the state constitution . . .

There is no statute that requires a district court judge to maintain his principal residence within the district. Presumably, the difference between the requirements for district court judges and all other judges is a result of the Legislature's recognition that it may be difficult to keep district court judgeships filled if a vacancy would be created every time a judge moved outside of the district.

4. The Residency Issue is Moot, Because Judge Servaas is now Principally Residing in the 1st Division of the 63rd District.

In any event, the residency issue is moot. In response to the Examiner's complaint, and in an effort to resolve the current dispute, Judge Servaas moved his primary residence from Honey Creek Avenue in Ada to 10175 Shaner Road. The Shaner Road address is within the 1st Division of the 63rd District. Judge Servaas changed his driver's license and

voter's registration to reflect this move. He also rescinded his Homestead Principal Residence Exemption for his home on Honey Creek Avenue in the 2nd Division.

Therefore, his primary residence is currently in the 1st Division of the 63rd District, consistent with his driver's license and voter's registration, and there can be no doubt that he is a proper "registered elector of the district and election division in which he seeks and holds office." MCL 600.8201.

II. COUNT III: RUDE AND SEXUALLY INAPPROPRIATE COMMENTS AND CONDUCT.

A. The Master Erred in Finding that Judge Servaas's Comment About the Size of a Court Clerk's Sweatshirt Compromised The Court's Integrity and Constituted Sexual Harassment.

Judge Servaas admits that he commented on the size of a sweatshirt that a Cascade court clerk, Rebecca Andrus, was wearing and its relation to her small frame. However, the Special Master erred when he found that the comment was a "hurtful, degrading remark made at a clerk's work station, not at the party. It was a cutting comment made to a long-serving employee of the 63rd District Court" (Master's Report, p. 8). The Master also erred when he concluded that the comment satisfied the elements of a sexual harassment claim under the Elliott-Larsen Civil Rights Act (Master's Report, p. 10).

The comment was made at a retirement party for a member of the Cascade court staff, and was made in a good-natured manner following some banter between Judge Servaas and another clerk, and in response to Andrus's pro-University of Michigan taunt to the judge of "Go Blue." While perhaps not funny, the comment was meant to be a joke, and was viewed as such by those who witnessed it. The joke was not sexual in nature, as it simply referred to the size of the sweatshirt in relation to the clerk's small frame, and could have applied to the clerk whether male or female. Finally, the comment did not create a hostile work environment or impact

Andrus's employment in any way. It is undisputed that Andrus is an employee of the Cascade court and that Judge Servaas sits in the Rockford court. Judge Servaas is not her superior, does not control her work environment, and rarely comes into contact with her. They do not work on the same cases or even in the same building.

For these reasons, Judge Servaas objects to the Master's Report on the portion of Count III dealing with the sweatshirt comment.

1. The Comment Was Meant as a Good-Natured Joke at a Party, and Could Not Reasonably be Viewed as "Hurtful," "Degrading," or "Cutting."

As a preliminary matter, the Special Master erred on the simplest point: he incorrectly found that the statement was not made during a party. The testimony clearly established that the comment was made at a lunchtime retirement party, not while Judge Servaas was on the bench or during other official work time. Judge Servaas testified that he arrived at the Cascade court after the party had started, and that some of the clerks were gathered around a work station talking to each other (Servaas testimony, Tr. pp. 148-149). The Cascade court clerks who witnessed the incident testified that Judge Servaas arrived at the Cascade court during the lunch hour, between noon at 12:30, and that the encounter took place at the beginning of the party (Banhagel testimony, Tr. pp. 167, 170). Judge Servaas was not on the bench or otherwise working (Banhagel testimony, Tr. p. 170). The clerks were not working either; they were socializing at their work stations (Alflen testimony, Tr. p. 196; Dodgson testimony, Tr. p. 182). They were "waiting for the rest of the Rockford staff to come and join us at the party" and they "were having a little bit of chitchat until everybody got there" (Banhagel testimony, Tr. pp. 167-168).

The Master also erred in finding that this off-duty comment was degrading and hurtful in nature. As Judge Servaas arrived at the Cascade court for the retirement party, he

approached a gathering of five clerks—one from Rockford and four from Cascade—who were engaged in social conversation. He knew several of these clerks quite well, and had a friendly relationship with them. Nancy Dodgson was a friend, Kelli Alflen used to work with him at the Rockford court, and Carrie Flowers works with him in Rockford (Banhagel testimony, Tr. pp. 175-176). Alflen testified that she knew the judge had a sense of humor and liked to joke around (Alflen testimony, Tr. p. 197). It was a lighthearted and fun atmosphere (Banhagel testimony, Tr. p. 171). The Rockford clerk, Carrie Flowers, asked Judge Servaas when they, like the Cascade clerks, could dress casually on Fridays (Servaas testimony, Tr. p. 152). Flowers testified that she meant this to be a joke (Flowers testimony, Tr. p. 205). The judge had long disliked the idea of casual Fridays and it was well-known that he would not allow them. But because he has a reputation for being "a lousy dresser" himself, he responded that the clerks have such bad taste that he would be afraid to let them dress down (Servaas testimony, Tr. p. 153). Both the judge and Flowers understood that their banter was done "jokingly" (Servaas testimony, Tr. p. 153; Flowers testimony, Tr. p. 214). Flowers found his comment to be funny because everyone knows that she is, "hands down," a better dresser than the judge (Flowers testimony, Tr. p. 214). The other clerks observing this banter also understood the judge's comment to be a joke (Alflen testimony, Tr. pp. 196-197; Banhagel testimony, Tr. pp. 171-172).

After this playful exchange between Judge Servaas and Carrie Flowers, the judge noticed that another clerk in the group, Rebecca Andrus, had a "big sweatshirt on with letters" (Servaas testimony, Tr. p. 152). He asked her what it said (Servaas testimony, Tr. p. 153). Although the shirt read "Michigan," Andrus turned toward him, stretched out her shirt to let him read it, and responded, "Go Blue!" (Servaas testimony, Tr. p. 153). The judge thought she was poking fun at him because everyone knows that he is not a University of Michigan fan (Servaas

testimony, Tr. p. 154). Another Cascade clerk in attendance, Kelli Alflen, as well as a magistrate who was nearby, Varis Klavins, also understood Andrus to be poking fun at the judge over his dislike of that school (Alflen testimony, Tr. p. 197; Klavins testimony, Tr. p. 466).

According to Andrus, Judge Servaas then "chuckled and he said, 'That's an awfully small chest for that.' He said, 'You should wear—you should have gone to a smaller school like Alma. It would have fit on your small chest better and you could read it'" (Andrus testimony, Tr. p. 31). Judge Servaas was simply trying to poke fun at her in response to her poking fun at him (Servaas testimony, Tr. p. 154). He did not mean to offend Andrus (Dodgson testimony, Tr. p. 191). The clerks who observed this exchange also understood Servaas to be joking with Andrus and in fact found it to be funny (Alflen testimony, Tr. p. 197; Dodgson testimony, Tr. pp. 184-185; Flowers testimony, Tr. pp. 214-215). They certainly didn't believe that he was trying to hurt Andrus's feelings (Alflen testimony, Tr. p. 198). One of the clerks explained that, while some people would find that comment funny, Andrus is the type who makes mountains out of molehills and might not see the humor (Dodgson testimony, Tr. pp. 184-185). Evidencing the fact that the judge did not mean to hurt Andrus's feelings, days later, when he learned that Andrus had been offended, he called her to apologize (Servaas testimony, Tr. pp. 163-164). She would not take his calls, so he left an apology on her voice mail (Servaas testimony, Tr. pp. 163-164).

In light of the testimony about the atmosphere of the party, the banter between the judge and the clerks, Andrus's poking fun at the judge's dislike for her school of choice, and his good-natured response about her oversized sweatshirt, the terms "hurtful," "degrading," and "cutting" simply do not fit. While Judge Servaas did not intend to hurt Andrus's feelings and

regrets any offense he caused, this mere joke, for which he apologized, does not come close to constituting judicial misconduct.

2. The Comment Was Not Sexual in Nature.

The Examiner failed to make a prima facie case of sexual harassment because Judge Servaas's comment simply was not sexual in nature. By its own terms, it related to the size of the sweatshirt in relation to Andrus's small frame, not to Andrus's actual breast size. Even accepting Andrus's version of the comment (which is the version most in her favor), Judge Servaas "chuckled and he said, 'That's an awfully small chest for that.' He said, 'You should wear—you should have gone to a smaller school like Alma. It would have fit on your small chest better and you could read it'" (Andrus testimony, Tr. p. 31). This comment could have been made to anyone wearing an oversized sweatshirt, whether male or female, and it was the size of the sweatshirt that Judge Servaas meant to comment on (Servaas testimony, Tr. p. 154; Klavins testimony, Tr. p. 465-466). He did not intend a sexual meaning, and it requires a stretch of the imagination to find one (Servaas testimony, Tr. p. 154). By all accounts, Andrus is "thin" and "petite," and the sweatshirt she was wearing was "oversized," "loose," and " a large one for her small frame" (Klavins testimony, Tr. pp. 465-466; Banhagel testimony, Tr. pp. 172, 175). All the judge noticed about her was that she had a "big sweatshirt on with letters" (Servaas testimony, Tr. p. 152).

3. The Comment Did Not Create a Hostile Work Environment.

The Examiner failed to make a prima facie case of sexual harassment because Judge Servaas's comment to Rebecca Andrus did not create a hostile work environment. The only evidence the Master cited in support of his conclusion that the comment created a hostile work environment was the testimony of Cascade court clerk, Nancy Dodgson, that "there was a

lot of turmoil in Cascade caused by this incident (Master's Report, p. 10). However, the Master took Dodgson's statement out of context and ignored her clear explanation that the "turmoil" was caused by Andrus's lack of sense of humor and her propensity to make mountains out of molehills, not by the judge's joke.

As Dodgson explained, Andrus was "extremely upset and she had everyone pretty upset" (Dodgson testimony, Tr. p. 191). Dodgson hoped that Judge Servaas's apology would end "this big uproar that it was causing in our court, **by her**" but doubted that Andrus would even accept the judge's call (Dodgson testimony, Tr. p. 192) (emphasis added). When asked what she meant by the "uproar" in the court, Dodgson responded, "Well, **she causes** a lot of turmoil" (Dodgson testimony, Tr. p. 192) (emphasis added). She put Andrus's overreaction to the judge's comment in context:

> Q Let's go back to what you observed or what you saw. Did you have a reaction to what Judge Servaas said to Becky in response to – including on her sweatshirt? Did you have a response?
>
> A How I felt about the comment –
>
> Q Yes.
>
> A You mean?
>
> Q Yes.
>
> A Yes, I guess I did. I thought people make all kinds of comments truthfully in a court from day to day that some people would find inappropriate, other people would not. **Certainly Rebecca would be one that maybe you wouldn't make that kind of a comment to. Somebody else, it might just roll off their back and – or they would laugh. And that was my thought about it when I heard him say that.**
>
> Q When you heard about that in terms of some person it might roll off their back – apparently it did not roll off Ms.

Andrus' back – **did you have an indication that she had a reputation of making mountains out of a molehill**?

A **Constantly, all the time.**

Q **That's her reputation?**

A **Yes.**

Q Did you indicate that to Mr. Fischer?

A Yes.

(Dodgson testimony, Tr. pp. 184-185) (emphasis added). Dodgson further explained that she has observed Andrus make mountains out of molehills throughout the more than 13 years they have worked together (Dodgson testimony, Tr. p. 185). Therefore, when viewing Nancy Dodgson's statement in context, it becomes clear that the Master selected only portions of her testimony and ignored the rest. Put simply, no evidence of a hostile work environment was presented, and the only evidence of problems in the Cascade court was that those problems were created by Rebecca Andrus herself.

4. Judge Servaas Was Not a Superior of Rebecca Andrus, Nor Did he Control her Work Environment.

Finally, the Examiner did not make a prima facie case of sexual harassment because Judge Servaas is not Rebecca Andrus's superior. Andrus is a clerk at the Cascade court, where Judge Smolenski presides. She has never been a clerk at the Rockford court, where Judge Servaas presides. She has worked at the Cascade court for almost 19 years (Andrus testimony, Tr. p. 25). By her own admission, even while the Cascade clerks' work stations were physically located within the Rockford courthouse due to the Cascade courthouse's mold infestation, Andrus was working for Judge Smolenski and was "not associated with Judge Servaas" (Andrus testimony, Tr. p. 58). She did not view Judge Servaas as her superior, as they were merely

working in the same building (Andrus testimony, Tr. p. 59). As Andrus emphasized, she has never worked for Judge Servaas, even while training his staff: "In all the years I've worked there, I've always worked for Judge Smolenski. When I went to Rockford to help out train people because of my seniority, or because I was asked to, I worked with his staff" (Andrus testimony, Tr. p. 60). The Master entirely disregarded this testimony and cited no evidence to support his erroneous statement that Judge Servaas "was a superior of Rebecca Andrus" and "controlled her work environment."

5. The Master Erred in Finding that Judge Servaas has made Similar Statements to his Own Court Staff.

The Master seemed to support his conclusion that Judge Servaas's joke to Rebecca Andrus was degrading on the Master's unfounded notion that Judge Servaas has made similar comments to his female clerks in the past (Master's Report, p. 8). However, there was no evidence presented to support this statement. The Master seems to have taken out of context the testimony of Bobbi Thelen in order to support this statement. The Master states that Thelen testified that after the sweatshirt comment, Judge Servaas said words to the effect, "I say that kind of stuff to you *(referring to the Rockford clerks)* and no one ever complains about it" (Master's Report p. 8). However, the Master simply paraphrased words that the Examiner tried to put in Thelen's mouth, without acknowledging Thelen's full statement. This was the exchange between the Examiner and Thelen on cross-examination:

> Q Did Judge Servaas say to you sometime after that [the sweatshirt incident], "I always say that stuff to you," meaning your staff up there, "and no one ever complains"?
>
> A He jokes around with all of us and we don't complain.
>
> Q Did he say words to that effect: "I say that kind of stuff to you and no one ever complains about it"?

A It was something like that.

(Thelen testimony, Tr. p. 346).

But the Master ignored Thelen's further explanation that Judge Servaas has never made offensive or sexual comments to the clerks (Thelen testimony, Tr. p. 347). Thelen has never complained about Judge Servaas or any comments, and has never even wanted to complain (Thelen testimony, Tr. p. 347).

On re-cross, the Examiner again tried to trick Thelen by asking her what type of "comments" she was talking about. Thelen clarified that Judge Servaas has never made any such comments. She stated that he jokes with the staff, but not in a sexual way, and certainly not about anyone's breast size or chest size. (Thelen testimony, Tr. p. 347).

Because the Special Master ignored this testimony and reached his desired result by focusing solely on words that the Examiner put in Thelen's mouth on cross-examination (which she later clarified), his conclusion that "Regrettably, Judge Servaas has made similar statements to his Rockford female clerks" was unsupported by the evidence and cannot support a conclusion that the judge should be disciplined.

B. The Master Erred in Finding that Judge Servaas Created Doodles Which Compromised The Court's Integrity and Demeaned the Staff, and in Concluding that Such Conduct Constitutes Judicial Misconduct.

The Special Master erred when he concluded that Judge Servaas created sexually inappropriate doodles, that this was "sick humor" about which the clerks laughed only "because he was the judge" and "because they did not want to incur his displeasure," and that it undermined the integrity of the court and demeaned the staff (Master's Report pp. 6 and 9).

First, it is unclear whether either of the doodles actually depicts anything sexual. (See a copy of the "penis doodle," attached as **Exhibit G**.) The clerks testified that they weren't

sure what the "penis doodle" depicted; some of them thought it looked like a rocket ship or a finger with a reminder string around it. Someone deemed it to be a penis for the comedic factor. As for the "breast doodle," the Examiner brought these allegations without ever having seen it, and a copy of the "breast doodle" never surfaced during the Examiner's investigation or presentation of his case. Two of the clerks testified that they did not view the doodle as depicting breasts, and one of the clerks re-created the doodle on cross-examination as a wavy vertical line not resembling breasts at all. Again, the clerks testified that someone deemed it to be breasts for the benefit of comedy.

Second, there is absolutely no evidence linking Judge Servaas to the "penis doodle." No one saw him draw it or saw it in his possession. No one heard him talk about it. No one had known the judge to make such doodles in the past. The only evidence presented by the Examiner was that Judge Servaas was one of many people who came into contact with the file that ultimately contained the doodle.

The conclusion that the judge created the so-called "penis doodle," which follows from only one paragraph of discussion in the Master's Report and which was reached with virtually no reasoning, seems to be based on the simple fact that the Master already found Judge Servaas responsible for the so-called "breast doodle," so he must be responsible for the "penis doodle" too. The Master acknowledged the court reporter/courtroom clerk's testimony that she had never known Judge Servaas to doodle anything sexual in nature, and also acknowledged Judge Servaas's testimony that he did not draw the "penis doodle." The Master then concluded with the *non sequitur* that "Judge Servaas authored the penis doodle, even though he denied it." There is no evidence to support this statement, and, in fact, the weight of the evidence suggests otherwise.

Finally, the Master erred in concluding that the doodles diminished the integrity of the court or demeaned the female staff. The clerks testified that they were not upset, angry, or offended by either of the doodles. No one complained, wanted to complain, or felt sexually harassed. The doodles simply weren't an issue until the Examiner made them one.

For these reasons, Judge Servaas objects to the Master's Report on the portion of Count III dealing with the doodles.

1. The Examiner Failed to Prove that the "Penis Doodle" Actually Depicts a Penis.

As a preliminary matter, it is unclear whether the doodle even depicted a penis. Carrie Flowers didn't know if the "penis doodle" depicted a penis. She testified that she viewed it as a penis, but that it could be described as a number of things, such as finger or a rocket ship (Flowers testimony, Tr. p. 216). Jean Lima commented that it looked like a finger with a reminder string around it (Lima testimony, Tr. p. 436). In fact, no one came up with a good explanation for why, it if was a penis, it had a string around it. As Joyce Musk explained, "it was just a drawing and I don't even know that it was a penis. We labeled it as that. Someone did. I did not label it as that, but that's what they were calling it. So, obviously I did, too" (Musk testimony, Tr. p. 415).

2. The Record is Devoid of Evidence Connecting Judge Servaas to the "Penis Doodle."

The Master erred in finding that Judge Servaas created the "penis doodle" because the record is devoid of evidence connecting Judge Servaas to the doodle. Assuming that it does depict a penis, the only facts the Master cites in support of his unwarranted conclusion that Judge Servaas created it is that a clerk, Carrie Flowers, placed a file with a sticky note on the bench, and that when she retrieved the file after Judge Servaas concluded his docket, "the sticky note

now had a doodle of a male penis with a string around it" (Master's Report p. 6). While this is insufficient to find, by a preponderance of the evidence, that Judge Servaas created the doodle, the evidence was not even as conclusive as the Master reported it. The Master misstated the sequence of events, making it sound as though the only two people who touched the file were Flowers and Judge Servaas. To the contrary, Flowers testified that she didn't even know if the sticky note was on the same file when she retrieved it from the courtroom as the file she had initially placed it on (Flowers testimony, Tr. pp. 207-208). All she knew is that she saw the doodle at some point after the sticky note returned from the courtroom (Flowers testimony, Tr. p. 208). She never stated that it had a string around it. Flowers also testified as to how many people come into contact with court files between the time she prepares them for entry into the courtroom and the time she receives them back for filing. In fact, the Master completely ignored Flowers' testimony given in response to the Master's own questioning:

> THE COURT: All right. Before we do that, Ms. Flowers, I have some questions for you, please. And this has to do with that sticky note, and that sticky note—when you first affixed it to the file, you said, "See second file"; is that correct?
>
> THE WITNESS: Correct.
>
> THE COURT: And what happened to that file? Did it go to Judge Servaas?
>
> THE WITNESS: Yes. They went into the courtroom.
>
> THE COURT: All right. And then when did you get that back?
>
> THE WITNESS: After whatever—if he was—I'm not sure if he was doing arraignments with it or if he was doing sentencing. I'm not sure. I don't remember exactly what he was doing. But after he would be finished with the arraignment or sentencing, I would go into the courtroom and get them back.
>
> THE COURT: And that's what you did?

THE WITNESS: Yes.

THE COURT: **And does anybody else handle those files between the time you give them to the judge and he handles them or takes care of them during arraignment until the time you get them back?**

THE WITNESS: **Yes. Bobbi Thelen, my supervisor**. We usually get the files ready and make notes on them, and she a lot of times will take the—like if they're for video arraignments, she'll take them into the courtroom. The judge sees them. **Lynn, the court recorder**, handles them because he'll usually hand them over the bench. She takes them, puts the bench notes inside, **I come in or Melissa or any number of clerks could go in and pick up the files**.

THE COURT: Does anybody else put any language or diagrams on those sticky notes other than the judge?

THE WITNESS: Like if Bobbi made a notation like on that one where I wrote "See second file," Bobbi notes sticky notes all the time that go into the courtroom for the judge.

THE COURT: **Are you suggesting that she might have made that notation?**

THE WITNESS: Of the drawing or—

THE COURT: Yes.

THE WITNESS: **I don't know who made that.**

(Flowers testimony, Tr. pp. 217-218) (emphasis added). Flowers went on to testify that while many files with sticky notes enter the courtroom each day, the files usually leave the courtroom and return to the clerks' work areas without the sticky notes on them because either the judge or his court reporter remove the sticky notes following the hearing and before the files are returned to the clerks, and throw the notes away (Flowers testimony, Tr. pp. 219-220). Further, she testified that the judge does not typically write on the sticky notes (Flowers testimony, Tr. p. 220).

Further, the court reporter/courtroom clerk, Lynn Martorell, testified as to the public's access to files and the number of people who come into contact with files on a daily basis. The files get put on the bench before the day's hearings and before the courtroom is attended by court staff, and attorneys often grab the files before the judge sees them in order to review them before the hearings start (Martorell testimony, Tr. pp. 353-354). Magistrate Varis Klavins and former Magistrate Tom VandenBosch also testified as to their use of the courtroom for hearings and weddings, and the number of people who enter the courtroom and have access to files (Klavins testimony, Tr. pp. 459-460; VandenBosch testimony, Tr. pp. 478-479). The Master disregarded this testimony when he found that, contrary to Judge Servaas's testimony and the testimony of his clerks, Judge Servaas created the doodle.

In fact, the great weight of the evidence supports the conclusion that Judge Servaas did not author the doodle. The court reporter/courtroom clerk, Lynn Martorell, never saw the "penis doodle" before the litigation began, and testified that Judge Servaas never handed it to her (Martorell testimony, Tr. p. 360). When a hearing has concluded and the judge is done with the file, he gives the file to Lynn so she can complete her paperwork before returning the file to the clerks' work area for filing (Martorell testimony, Tr. p. 356). Martorell then removes any sticky notes that remain on the file. Certainly, if the judge had drawn a penis on a sticky note and then handed it to Martorell, she would have seen it before returning the file to the clerks.

None of the clerks saw Judge Servaas create the doodle, saw him in the doodle's presence, or can connect him to the doodle (Flowers testimony, Tr. pp. 210-211; Thelen testimony, Tr. pp. 344-345; Martorell testimony, Tr. pp. 349-350; Musk testimony, Tr. p. 416). In fact, none of the clerks have ever known the judge to doodle anything sexual in nature, and

have not seen any other "sexual" doodles on any of the thousands of files that he has handled in his 35 years on the bench (Thelen testimony, Tr. pp. 345-346; Martorell testimony, Tr. pp. 365; Carroll testimony, Tr. p. 385; Lima testimony, Tr. p. 434). Even Lynn Martorell, the court reporter/courtroom clerk who spends approximately 80% of each workday in the courtroom with Judge Servaas, has never known him to doodle anything sexual in nature (Martorell testimony, Tr. pp. 351, 365).

Judge Servaas himself testified that he had never seen the doodle before the Examiner showed it to him, and that he had never doodled a penis in his life (Servaas testimony, Tr. p. 155).

3. The Clerks Found the "Penis Doodle" to be Funny.

The Master erred in concluding that the doodles diminished the integrity of the court and demeaned the staff. Even assuming that the "penis doodle" depicted a penis and that Judge Servaas drew it (conclusions which are unsupported by the record), there was no evidence that he presented it to the staff or intended them to see it.

And when the clerks did see the doodle, they found it to be funny. Joyce Musk saw the "penis doodle" for the first time when she heard Carrie Flowers giggling with a file and Musk asked what it was. Carrie Flowers, Joyce Musk, and Melissa Bosley all laughed about it (Flowers testimony, Tr. p. 208; Musk testimony, Tr. p. 415). Jean Lima overheard the laughing, and joined in the fun (Lima testimony, Tr. p. 436). Even Dona Gillson, the Court Administrator who gave the doodle to Judge Smolenski for reporting to the Judicial Tenure Commission, laughed when she saw the note and did not appear to be angry or upset (Musk testimony, Tr. p. 415; Lima testimony, Tr. p. 436). Gillson admits that a group of clerks, including Flowers, Musk, and Lima, were laughing (Gillson testimony, Tr. p. 254). Lima was not offended, and no

one else indicated offense either (Lima testimony, Tr. p. 437). Lima never discussed it with the judge because there was no reason to do so (Lima testimony, Tr. p. 437).

Martorell never saw the "penis doodle" before the litigation began, but heard about it because the clerks were laughing about it (Martorell testimony, Tr. pp. 360, 374-375). She did not feel offended, angry, upset, or sexually harassed (Martorell testimony, Tr. pp. 361, 365). Rather, it was a silly thing that the clerks enjoyed to break the monotony of the day (Martorell testimony, Tr. pp. 361, 365). No one complained or expressed offense; they all just laughed about it (Martorell testimony, Tr. pp. 361, 365).

Carrie Flowers and Timber Carroll told Bobbi Thelen about the "penis doodle." The three of them laughed about it (Thelen testimony, Tr. p. 340). Thelen, the supervisor, was not offended by it, and simply found it funny (Thelen testimony, Tr. p. 341). Flowers and Carroll were not complaining about it and did not express anger or offense by it (Thelen testimony, Tr. p. 341). Thelen saw the doodle for the first time when Dona Gillson showed it to her. (Thelen testimony, Tr. p. 342). Gillson was laughing and did not express any anger (Thelen testimony, Tr. p. 342). When Thelen saw the doodle, she laughed and was not angry or offended by it either, nor did she feel sexually harassed (Thelen testimony, Tr. p. 343-344).

The clerks did not discuss the doodle with the judge (Flowers testimony, Tr. p. 216; Musk testimony, Tr. p. 416). Nor did Dona Gillson (Gillson testimony, Tr. p. 263). No one complained about the doodle (Flowers testimony, Tr. p. 215).

4. The Examiner Failed to Prove that the "Breast Doodle" Constitutes Judicial Misconduct.

The Examiner accuses Judge Servaas of doodling breasts. He never produced this doodle, and it was not introduced into evidence. Judge Servaas testified that he does not recall

doodling breasts, although his court clerks found such a doodle after a well-endowed female litigant—wearing inappropriate dress—appeared at the Rockford court.

Lynn Martorell, Judge Servaas's court clerk, explained the situation:

> Q When did you come into contact with this doodle for the first time?
>
> A It was in the courtroom and it was during a hearing. Well, it was during court. I can't say it was specifically during a hearing. And then I saw it and it was gone, and I really didn't take any action or think about it. But at the same time that this happened was the time that we had the young lady in the courtroom who was inappropriately dressed, pretty much exposed, and we were e-mailing back and forth. The clerks and I were e-mailing about the dress of the individual that was in the courtroom.
>
> Q Were you expressing humor –
>
> A Yes.
>
> Q --at the woman's dress?
>
> A Yes.

(Martorell testimony, Tr. pp. 363-364).

When Carrie Flowers and Joyce Musk received Lynn Martorell's e-mail message alerting them to the presence of a well-endowed woman whose clothing partially exposed her breasts, they were amused and wanted to see the woman when she left the courtroom (Flowers testimony, Tr. p. 213; Musk testimony, Tr. p. 407). When the doodle later surfaced, Flowers and Musk shared the joke with other clerks, Melissa Bosley and Susan Smirker, and the four of them laughed about it (Musk testimony, Tr. pp. 407-408; Martorell testimony, Tr. p. 365). No one was offended by the doodle or felt angry, upset, or sexually harassed by it. (Musk testimony, Tr. 408; Martorell testimony, Tr. p. 365). No one complained about it (Flowers testimony, Tr. p. 215). As Joyce Musk best explained it, she didn't complain about the doodle:

> . . .because there was nothing to complain about. I didn't find it offensive. It was just something to pass the time. Actually until this all came up, I had really forgotten about the drawing.

(Musk testimony, Tr. p. 410).

Bobbi Thelen, the supervisor of all clerks at the Rockford court, testified that she never saw the "breast doodle" and that no one ever complained to her about it or expressed anger, offense, or that they felt sexually harassed (Thelen testimony, Tr. pp. 344-345). She never even heard about it until the Examiner brought the allegations (Thelen testimony, Tr. p. 345). And Thelen is the person to whom the clerks would go if they had a complaint about the judge (Thelen testimony, Tr. p. 344). In fact, she only heard about it from her supervisor, the Court Administrator, Dona Gillson, who was laughing about it and seemed to find it funny. Nor did the clerks complain to Judge Servaas about the doodle (Musk testimony, Tr. p. 410).

And why would any of the clerks complain about it or be offended by it? These women were clearly amused by the idea of a large-breasted woman exposing herself in court, and stayed on the lookout to catch a glimpse of the woman when she left the courthouse. Certainly, such women would not be offended when they later see a doodle of breasts. Further, the testimony was less than convincing that the doodle actually depicted breasts; more likely, one or more of the clerks simply labeled it as such in light of the woman's earlier appearance in court.

5. There is No Support for the Conclusion that the Clerks Were Intimidated into Laughing at the Doodles.

As explained above, each and every one of the clerks who testified regarding the doodles testified unequivocally that they found the doodles to be funny, that they were not offended by them, and that they had no reason to complain about them. They also testified that Judge Servaas was never part of their conversations about the doodles and that they had never

seen Judge Servaas with the doodles. There was not one shred of evidence suggesting that the clerks "laughed because he was the judge" or "because they did not want to incur his displeasure" (Master's Report, p. 9).

In fact, since the clerks looked at and discussed these doodles outside Judge Servaas's presence and entirely without his knowledge, there would be no reason for them to laugh "because he was the judge" or "because they did not want to incur his displeasure." Yet, to support his unsubstantiated assumption that the clerks were intimidated into laughing about the doodles, the Master cites an incident in which Judge Servaas reprimanded Rebecca Andrus, an employee of the Cascade court, for creating havoc in Judge Servaas's Rockford court and asked her not to return, and an incident in which Judge Servaas criticized Dona Gillson, the Administrator of the 63rd District Court, for her mismanagement of staff, her providing of inaccurate legal advice (without a license) to an attorney, and her interference with the work of an assistant prosecuting attorney who was not in her employ. Referring to these incidents without citing the facts surrounding them, the Master states that the clerks "knew what happened to Rebecca Andrus. They also knew what happened to Dona Gillson, the able Court Administrator of the 63rd District Court. She suffered the same fate as Rebecca Andrus" (Master's Report, p. 9). The Master makes it sound as though Andrus and Gillson were treated unfairly by Judge Servaas for not laughing at a joke or for otherwise "incurring his displeasure." In reality, the only evidence presented of the "fate" they suffered was that both were legitimately criticized for poor job performance.

RECOMMENDATION AS TO POSSIBLE SANCTIONS

For the reasons explained above, all counts of the Complaint against Judge Servaas should be dismissed because: (1) they were not proved by the Examiner; and (2) any that may have been proved do not rise to the level of judicial misconduct. However, if the Commission were to determine that Judge Servaas's actions rose to the level of judicial misconduct, any discipline beyond a reprimand would be disproportionate to the severity of his conduct and wholly unwarranted.

If the Commission were to accept all of the Examiner's allegations in Count I as true, then Judge Servaas is guilty of, at worst, making a reasonable misinterpretation of rather cryptic residency requirements, the proper interpretation of which has never been enforced by the Commission or determined by a Michigan court. If the Commission were to accept all of the Examiner's allegations in Count III as true, then Judge Servaas is guilty of, at worst, making an ill-advised joke at a party to another judge's clerk who did not find it funny, and of privately creating a couple of doodles that his own clerks ended up seeing and finding hilarious.

The Michigan Supreme Court set forth the following guidelines for the Commission when recommending the appropriate sanction:

> (1) misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct;
>
> (2) misconduct on the bench is usually more serious than the same misconduct off the bench;
>
> (3) misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety;
>
> (4) misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does;

> (5) misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated;
>
> (6) misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery;
>
> (7) misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.

In re Brown, 461 Mich 1291, 1292-93 (2000).

Application of these factors to the present case militates in favor of the least extreme sanction possible. While these factors demonstrate the Court's desire to protect the actual administration of justice and the conduct of judges while on the bench, none of Judge Servaas's alleged conduct is prejudicial to the administration of justice or even occurred in the judge's official capacity. With regard to factors 2, 3, and 4, all of Judge Servaas's alleged conduct appeared while he was "off the bench." Even if he created the doodles while physically seated on the bench, the doodles were private and did not affect the administration of justice.

With regard to factor 1, Judge Servaas's alleged actions were isolated instances and not part of a pattern of misconduct. The move from one home to another, the joke, and the doodles were separate, unrelated incidents. With regard to factor 5, the alleged conduct was spontaneous rather than deliberated and premeditated. No planning and scheming went into cracking a joke or making a couple of doodles; these incidents happened, if at all, in a matter of seconds. And the only issue with regard to his residence is a difference of opinion on the legal interpretation of the residency requirements.

Factors 6 and 7 focus on the operation of the judicial system and misconduct that affects the outcome of actual cases. No such allegations are made here.

In cases where more serious conduct was proven, the Michigan Supreme Court has only imposed the sanction of a public censure. For example, in *In re Runco,* 463 Mich 517 (2000), the respondent judge engaged in self-dealing as an attorney and failed to file a timely response to a judicial discipline complaint. The judge hid a business relationship from a client, as a result of which he profited $41,000. For his actions, he received only a public censure.

Similarly, in *Matter of Justin,* 456 Mich 1220 (1998), the respondent judge improperly assessed fines to Jackson County instead of the City of Jackson as punishment to the City of Jackson for not increasing the pension provisions for former city employees. After the judge was cautioned about his behavior, he agreed to cease these practices. When the pension issue was not resolved to the judge's satisfaction, however, he again began diverting funds away from the City and to the County. He refused to disqualify himself pursuant to a motion filed by the City of Jackson. The City and County then entered into a settlement agreement and release through which the City agreed to accept payment of $28,000 from the County in exchange for any claims or damages it might otherwise have arising out of the judge's actions. Again, the judge received only a public censure for these actions.

Finally, in *Matter of Cooley,* 454 Mich 1215 (1997), the respondent judge conducted activities related to her radio and television program during established court hours in her chambers. The judge appropriated the services of court personnel to work on the programs during court hours and also used the court's postage system, phone service, voice mail system, fax machine, copy machine, and other court materials for these programs. She solicited funds for

her programs, receiving $5,125, which she failed to report to the State Court Administrative Office. For these activities, she received only a public censure.

Judge Servaas has already suffered as a result of this process, which has caused great disruption in his life ever since the Examiner's surprise visit in January. He has spent a significant amount of time and money defending the charges, and will continue to do so for the duration of this matter. Judge Servaas should not lose his judicial position or his ability to continue serving the community and the judicial system, as he has done so well for the past 35 years, as the result of a wrong address, two doodles, and a joke.

CONCLUSION

For the reasons stated above, the Master's findings on Count I must be rejected by the Commission, as they result from an incorrect interpretation of Michigan law. However, even if the Commission were to agree with the Master's interpretation of the constitutional and statutory provisions regarding residency, Judge Servaas's reasonable, although different, interpretation of those provisions does not constitute judicial misconduct and is not cause for discipline. This is especially true in light of his move back into the 1st Division of the 63rd District to resolve the question of residency.

The Master's findings on Count III must also be rejected by the Commission. The sweatshirt comment, while perhaps inappropriate in hindsight, was intended as a joke and not meant to be hurtful. Such a comment does not constitute judicial misconduct and is not cause for discipline. Further, the Master's findings that Judge Servaas created the "penis doodle" are unsupported by the evidence. And while Judge Servaas does not deny creating the "breast doodle," this incident does not rise to the level of judicial misconduct and is not cause for discipline.

Therefore, Respondent respectfully requests that Counts I and III be dismissed.

The Master found that the conduct complained of in Count II does not rise to the level of judicial misconduct; therefore, Respondent requests that this count also be dismissed.

To the extent the Commission finds that any of these actions constitute judicial misconduct, any sanction beyond a reprimand would be grossly disproportionate to the conduct and wholly unwarranted.

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