STATE OF MICHIGAN
BEFORE THE JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

Formal Complaint No. 84

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

Hon. Casper O. Grathwohl
Master

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BRIEF IN SUPPORT OF MASTER'S DECISION

I. INTRODUCTION

The Judicial Tenure Commission issued Formal Complaint No. 84 against the Respondent on February 14, 2008 and filed a petition for the appointment of a master in the Supreme Court. The Court issued an order on March 5, 2008 appointing as master the Hon. Casper O. Grathwohl, a retired Berrien County Trial Court judge. The master presided over an evidentiary hearing that began on Friday, March 28, 2008, continued on April 1, 2008 and April 2, 2008, and concluded on April 3, 2008. The master issued his written report on May 12, 2008.

II. STATEMENT OF FACTS

A. The Residency Issue

Steven R. Servaas was last elected to the 63-1 District Court in November 2002, for a term that began on January 1, 2003 and ends on January 1, 2009. T 98.[1] There are two election divisions of the 63rd District Court: the first division (located in the City of Rockford in Kent County) and the second division (located in Cascade Township). T 99-100. The courts were

[1] References are to the continuously-paginated transcript. Where warranted, the identity of the witness is also indicated.

frequently referred to by division number (*i.e.*, first division) or by location (*i.e.*, the Rockford court or the northern division). T 57; 100. The first division essentially consisted of the half of Kent County north of 4 Mile Road.[2] The second division essentially consisted of the eastern- and southernmost portions of the county.[3] Judge Sara Smolenski is the chief judge of the district. T 100.

Respondent purchased a parcel of property just under 12 acres in December 1998 at 201 Honey Creek in Ada Township, Kent County.[4] T 101; 105. He testified that he had begun living there on an everyday basis in August or September of 2005. T 104 He signed a Homeowner's Principal Residence Exemption Affidavit on January 13, 2006, indicating that this property had become his primary residence as of December 31, 2005. T 102; Exhibit 1. Respondent conceded that at least as of that date, the Honey Creek property was his main residence, the place he called "home." T 104. He remained there until February 22, 2008, when he moved to a rental property on Shaner Avenue within the territorial boundaries of the first division of the 63rd District Court. T 100. He then withdrew the homestead affidavit. (Exhibit 1).

In fact, however, the Respondent had been living at the Honey Creek address in the southern division for much longer than he was willing to admit. The 63rd District Court maintained a duty log, whereby the one judge or magistrate who was "on duty" would be available for any court business during off-hours. T 132-133 (Respondent); 238-240 (Gillson).

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[2] The first division consists of the cities of Cedar Springs and Rockford and the townships of Tyrone, Solon, Nelson, Spencer, Sparta, Algoma, Courtland, Oakfield, Alpine, Plainfield, Cannon and Grattan and has one elected judge (Respondent, Judge Steven Servaas). MCL 600.8130(4)(a).

[3] The second division consists of the cities of East Grand Rapids and Lowell and the townships of Grand Rapids, Ada, Vergennes, Cascade, Lowell, Byron, Gaines, Caledonia and Bowne and has one elected judge (Chief Judge Sara Smolenski). MCL 600.8130(4)(b).

[4] Ada Township, of course, is located within the territorial boundaries of the second division of the 63rd District Court. Moreover, as shown below, he was certainly living there already by January 2000.

Each judge or magistrate provided a phone number where he or she could be reached at 3 a.m., in case the police needed a search warrant or some other such thing. T 134 (Respondent).

Respondent provided the court administrator of the 63rd District Court, Dona Gillson, with the phone number(s) where he would be available in the middle of the night on his rotation. T 241 (Gillson). Ms Gillson compiled all these phone numbers into the duty log, and provided copies to the judges and magistrates, as well as to the various police agencies who might have need of a judge in the middle of the night. T 239. All phone number information was provided by the judges or magistrates themselves. T 239.

Respondent provided Ms Gillson with several numbers over the course of the years. On the first day that he testified at the hearing, he claimed not to recall them, but the very next day, he knew each and every one. T 115-118; 549-553. The duty log established that Respondent had been listing his phone number(s) at the 201 Honey Creek address in the southern division since at least January 2000, more than five years earlier than he was willing to admit under oath at the hearing. T 241-242 (Gillson); 549-550 (Respondent).

In addition to his residence/domicile in Ada Township, Respondent maintained a much smaller home within the election division on Belding Road. T 107. It was a condominium unit in a converted motel of five units. T 110. The unit has 847 sq. ft, and partial basement (260 sq. ft.) with an SEV of $58,300. T 110-111. He uses the Belding Road condominium as a "summer cottage." T 526.

In contrast, the Ada Township residence/domicile was approximately 1,744 sq. ft., with a full basement, on nearly 12 acres, and with 2,600 feet on a creek. T 105-106; 515-516. It has an SEV of $182,000, "but that's way low in [Respondent's] opinion." T 106. "This is gorgeous

land. I think it's very expensive land, but I don't know exactly." T 106. "You'd think you were in the Upper Peninsula in the summer." T 515.

It is no surprise, then, that Respondent chose to live in this home, twice the size of his Belding Road property, and it was on 12 acres of "gorgeous" property to boot. However, Respondent could not have lived at the Belding Road condominium even if he had wanted to, as he had rented it out in February 2007. T 144. Thus, Respondent had no "home" within the first election division of the 63rd District Court at all to claim as of that time.

B. The Sexually Inappropriate Matters

1. The breasts doodle

In one incident, Respondent drew a pair of women's breasts on a note and sent it to a female staff member. Respondent admitted doing so in his answer to the formal complaint, but then tried to wriggle out of that admission at the hearing. Answer to Formal Complaint, Paragraph 33.

Paragraph 33 of the formal complaint alleged that "[o]n other occasions, Respondent ha[d] given the female employees such notes with female breasts drawn on them." Formal Complaint, Paragraph 33. Although Respondent denied that allegation as "untrue," he then averred by way of

> "further answer. Respondent assumes that this allegation relates to incident a female [*sic*] appeared in court wearing inappropriate dress. The individual was large-breasted and wearing revealing clothing. When the individual walked into Court, one of the female court staff members sent the Respondent a note, commenting on the inappropriate dress of the individual. ***When Respondent sent the court file back to the staff member, he sent it back with a note, which had a drawing of breasts on them [sic]. The note was a private note, and was intended to be a joke.*** (emphasis supplied). Answer to Formal Complaint, Paragraph 33.

Despite this clear admission of having drawn and sent a note emblazoned with a drawing of a woman's breasts, Respondent then feigned ignorance of his own admission in the answer to the formal complaint:

> Q [by the Examiner] You admit, though, that you did make a doodle of breasts on a bench note, is that correct?
>
> A [Respondent] No. I haven't seen that. You know, what I said was – you know, I've been there 35 years, and if you show me, I can tell you. That's what I said.
>
> Q Do you deny ever making a doodle of breasts on a note that you –
>
> A No, I don't deny it. I didn't see them. I can't even comment on it.
>
> Q You don't deny that you never did? Is that what you're saying?
>
> A 'I don't know' is my answer.
>
> * * *
>
> Q Okay. So then my question is have you ever made a doodle of a woman's breasts on a note at court?
>
> A Not that I know of.
>
> T 155-156.

2. The penis doodle

Respondent denied drawing the "penis image" contained on Exhibit 6. In August 2007, Carrie Flowers had placed a yellow "sticky" note (Post-It note) on a file with the notation: "see second file" and took it into the courtroom for the Respondent. T 206; Exhibit 6. When she got the file back, her "sticky note" was still there, but with a crude image of a penis drawn on it. T 216 (Flowers). The other staffers who had contact with the file that day all denied drawing the penis. T 208 (Flowers); T 227 (Thelen, by stipulation); T 376 (Martorell). However, the master

concluded that in fact it was the Respondent who had drawn the penis. MR, 6. The propriety of this finding will be discussed further in the argument section.

3. The sweatshirt incident

On November 30, 2007, Rebecca Andrus, a clerk at the 63-2 District Court was working while she awaited the start of a retirement party for a colleague. T 25-26. Ms Andrus had been with the court for 19 years. T 25. She generally worked in a back room, but that was where the party was going to be held, so she was seated in the meantime at one of the four cubicles in the criminal division of the clerk's office, some distance away. T 26.

The four cubicles were like four quadrants on a graph, with one employee sitting in each quadrant.[5] In the "upper left" quadrant sat Chris Banhagel. In the "upper right" quadrant sat Ms Andrus. In the "lower left" quadrant sat Nancy Dodgson, and in the "lower right" quadrant sat Kelli Alflen. All four of these women were clerks at the second division of the 63rd district court. They were not at the party yet. T 174 (Banhagel).

Carrie Flowers, a clerk at the first division of the court, had already arrived, and she was standing between Ms Andrus and Ms Banhagel. T 27; T 204. Respondent then entered the clerk's office and stopped for a moment at these cubicles, talking first to Ms Flowers about whether the first division would ever implement a "casual Fridays" program as existed in the second division. Respondent said he would not authorize such a program, as all the employees at the first division already "dress ratty" (T 30 [Andrus]) or "dress like slobs." T 152 (Respondent; T 203 (Flowers). Ms Andrus, who until then had been working and not involved in the conversation between Respondent and Ms Flowers, looked up. T 30.

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[5] T 27 (Andrus); T 166 (Banhagel); T 171 (Dodgson); T 193-194 (Alflen); T 204 (Flowers)

Respondent then asked her what was on her shirt. T 31 (Andrus); T 153 (Respondent). Ms Andrus was wearing a "Michigan" sweatshirt. It was dark blue, with the word "Michigan" in the color "maize" in block letters. T 28-31; T 153. Rather than say, "Michigan," which was self-evident, she said, "Go Blue!" T 31. At that point Respondent said words to the effect that her chest was too small for the word "Michigan;" she needed a smaller school, like Alma.[6] Ms Andrus was stunned (T 31 [Andrus]; T 169 [Banhagel]), and she felt humiliated. T 32 (Andrus). Respondent then said words to the effect that he had better leave "before he got sued."[7]

III. RESPONDENT VACATED HIS OFFICE

A. A district judge who moves his domicile outside the territory from which he was elected has vacated his judicial office

It is a basic precept that judges ***must*** remain residents of the locality from they were elected. Failure to do so results in the loss of that judicial office. "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.

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[6] The five women all testified that Respondent made such a comment, as did Respondent. The exact wording differed: "That's an awfully small chest for that. * * * 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." T 31 (Andrus); "I guess if you had a bigger chest, it would fill out the 'Michigan,' but maybe it should be a smaller college like Alma." T 169 (Banhagel); "You either need a larger chest or a smaller college to go to." T 178-179 (Dodgson); "You need a smaller name college on your chest." T 195 (Alflen); "[M]aybe if her chest was larger, she could get away with the school that was on there. Maybe she should try Alma." T 205 (Flowers); "Beck, if you're going to wear a sweatshirt with that many letters, you need a bigger chest or you need a smaller school sweatshirt, like Albion – or I'm sorry – Alma." T 153 (Respondent)

[7] Again, the exact wording differed, but the gist was the same: "Well, I guess I better move on before I get in trouble or get sued." T 32 (Andrus); "I better get out of here or maybe I'll get sued." T 179 (Dodgson); "I better leave before I get sued." T 195 (Alflen); "I better get to the party before I get into trouble." T 205 (Flowers); See too T 153 (Respondent)

In Michigan, the primary rule of constitutional interpretation is the "rule of common understanding." *See e.g. Goldstone v Bloomfield Township Public Library*, 479 Mich 554-558-559 (2007); *County of Wayne v Hathcock*, 471 Mich 445 (2004). As Justice Colley described,

> "A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it."
>
> *Hathcock*, at 468.

A person can only have one residence or "domicile."[8] The definitions of "home" and "residence" contain the notion of

> "permanence, of a place to which one returns, a place where one intends to remain, a haven, a domicile. * * * One cannot be permanently located in more than 1 place; one cannot be domiciled in more than 1 place; one cannot intend to remain for an extended period of time in more than 1 place." *In re Scheyer's Estate*, 336 Mich 645, 651-652 (1953)

Residence is determined by fact and intention. There must be the fact of abode and the intention of remaining. *Reaume & Silloway v Tetzlaff*, 315 Mich 95, 99 (1946). Presence, abode, property ownership and other acts are often considered, yet *intent* is the key factor. *Id.* However, where the underlying facts are not in dispute, domicile is a question of law for the court. *Fowler v Auto Club Ins Ass'n*, 254 Mich App 362, 364 (2002). There is no factual dispute regarding Respondent's establishment and maintenance of a domicile outside his election division.

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[8] "Residence" and "domicile" are synonymous in Michigan. *Hartzler v Radeka*, 265 Mich 451, 452 (1933); *Leader v Leader*, 73 Mich App 276, 281 (1977).

B. Respondent moved his domicile outside the territory from which he was elected

1. As the judge of the 63-1 District Court, Respondent is required to maintain his one "residence" – his domicile – in the territory of the first division of the court

The 63rd District Court consists of two election divisions. MCL 600.8130(4). The first division consists of the cities of Cedar Springs and Rockford and the townships of Tyrone, Solon, Nelson, Spencer, Sparta, Algoma, Courtland, Oakfield, Alpine, Plainfield, Cannon and Grattan and has one elected judge (Respondent, Judge Steven Servaas). MCL 600.8130(4)(a). The second division consists of the cities of East Grand Rapids and Lowell and the townships of Grand Rapids, Ada, Vergennes, Cascade, Lowell, Byron, Gaines, Caledonia and Bowne and has one elected judge (Chief Judge Sara Smolenski). MCL 600.8130(4)(b).

District judges are elected in each judicial district and election division of a judicial district. MCL 168.467f(1). Thus, although the 63rd District Court is one court and one administrative unit[9], only the registered voters of the first division elect the judge of the first division, and only the registered voters of the second division elect the judge of the second division. The corollary to that principle is that the registered voters of the first division cannot elect the judge of the second division, nor can the registered voters of the second division elect the judge of the first division. Each electoral division is a separate and distinct electoral unit, despite both electoral units being part of a larger district court.

As the judge of the first division of the 63rd District Court, Respondent was required to maintain his "residence/domicile" within that first electoral division, *i.e.*, somewhere within the cities of Cedar Springs or Rockford or within Tyrone, Solon, Nelson, Spencer, Sparta, Algoma, Courtland, Oakfield, Alpine, Plainfield, Cannon or Grattan Townships. Correspondingly, he

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[9] "The provisions for election divisions of a judicial district have no effect on the administration of a judicial district." MCL 600.8102.

cannot maintain his "residence/domicile" *anywhere* else and still remain a judge of the 63-1 District Court. *See too* OAG, 2001, No. 7091 (October 16, 2001) (the judicial office of one election division is not the same as a judicial office in another election division of the same court; the electors in one election division cannot vote for a judge in a different election division.)

2. Respondent moved his residence/domicile outside the territory of the first electoral division of the 63rd District Court to the second division of that court

a. Respondent signed an affidavit attesting to the fact that he had moved his primary residence outside of the first division

It is undisputed that Respondent removed his residence/domicile from the area comprising the first electoral division of the 63rd District Court to the second division of that court. Respondent admitted that he had, as of August or September 2005. T 102-105. Moreover, he had executed a Homeowner's Principal Residence Exemption Affidavit on January 13, 2006, indicating that this property had become his primary residence, at least as of December 31, 2005. T 102; Exhibit 1. It is uncontroverted that Respondent moved his residence/domicile to the territory of the second division of the 63rd District Court.

b. Respondent informed the Court that he was living at the Honey Creek property in the second division

Moreover, Respondent in fact had moved his domicile/residence to the second division as far back as January 2000. By his own testimony he confirmed that the phone number he had submitted for his shift on the "duty roster" for after-hour availability was the phone number for 201 Honey Creek in Ada Township, his true residence/domicile. Respondent acknowledged that that phone number was his, that it was a land-line to the Honey Creek address, that he used that number for all of 2000, 2001, 2002, 2003, and through June 2004. T 549-550. Dona Gillson, the

court administrator who had prepared the duty log, confirmed Respondent's testimony and confirmed that Respondent had given her that Honey Creek phone number for the duty roster. T 241-242.

Respondent was taken off the duty log for July through December 2004 due to a medical situation. T 242. When he returned to duty, he listed a phone number for Belding Road, in the first division, for all of 2005. T 243; 550. However, Respondent had told Dona Gillson that he had arranged for any incoming calls to be "call-forwarded" to his residence/domicile at 201 Honey Creek in Ada Township, where he was obviously still residing. T 243 (Gillson.).

For the first half of 2006, Respondent changed his on-duty phone listing to his phone at 201 Honey Creek in Ada Township. T 244-245; 551-552. But something happened in April/May 2006 that caused Respondent to re-list it at the Belding address (albeit with call-forwarding again) for the second half of 2006.

Carl Gromek (the State Court Administrator) and Jim Hughes (the SCAO Regional Administrator) paid Respondent a visit in April or so of 2006. T 518; 589-590. One topic that came up "for about five seconds" was the issue of Respondent's residency. T 519; 523 (Respondent). Significantly, at the very next opportunity to do so (as the duty logs were prepared for three month blocks, T 240-241 [Gillson]), he changed his listing on the duty roster from Ada Township (in the second division) to Belding Road (in the first division). T 245-247 (Gillson).

Mrs. Gillson testified that the Respondent had told her he was changing the number listed on the duty roster to the Belding Road address due to that visit from Messrs. Gromek and Hughes. T 247. However, he added a little twist, having the phone calls from Belding Road call-forwarded to 201 Honey Creek in Ada Township. T 245 (Gillson). Nevertheless, or at least

when "the coast was clear" again, Respondent re-listed himself on the duty roster at the Ada Township address effective January 2007. The chart below sets out all the information:

PHONE	LOCATION	DATE	SOURCE	NOTES
"ends in 58"	201 Honey Creek	2000	T 241-242; 549-550	
"ends in 58"	201 Honey Creek	2001	T 241-242; 549-550	
"ends in 58"	201 Honey Creek	2002	T 241-242; 549-550	
"ends in 58"	201 Honey Creek	2003	T 241-242; 549-550	
"ends in 58"	201 Honey Creek	June 2004	T 241-242; 549-550	
"ends in 80"	Belding Road	2005	T 243; 550	*
682-2823	201 Honey Creek	Jan - Jun 2006	T 244-245; 551-552	
874-8730	Belding Road	Jul - Dec 2006	T 245-247; 552	**
682-2823	201 Honey Creek	Sept 2007	T 142; 247-8; 551-2	

* calls were then forwarded to 201 Honey Creek, T 243 Gillson)

** Officials from the State Court Administrative Office visited Respondent in April/May 2006, and made inquiry about his residence. Immediately thereafter, Respondent changed the phone number on the duty log to his Belding Road address, but had any calls to Belding Road call-forwarded to 201 Honey Creek, T 245 (Gillson).

Thus, it is clear that Respondent had been living at the Honey Creek home since at least 2000, not at his summer cottage on Belding Road. The need for him to mark down his nightly whereabouts for the duty log made it necessary for him to identify truthfully where he would be in case of an emergency. Since 2000, he has been at 201 Honey Creek, every night. There is no doubt that Respondent moved his residence/domicile to the 201 Honey Creek address in Ada Township.

Further, it is significant to note that even assuming that Respondent did not have matters call-forwarded to Honey Creek from Belding Road, he spent the overwhelming majority of his time at Honey Creek. Of the 87 months that Respondent was on after-hours duty from 2000 through September 2007 (he stopped taking call after September 2007, and had not restarted again by the time of the hearing in March 2008, T 248 [Gillson]), he acknowledges he was at Honey Creek for 69 of them, *i.e.*, 79% of the time!

c. Respondent was fraudulently registered as a registered elector of the first division when he had clearly moved his residence to the second division

District court judges are not only required by statute to be residents of the district from which they were elected and serve as judge, but also from any election *division* within that district. "[A] judge of the district court shall be a registered elector of the district ***and election division*** in which he . . . holds office." MCL 600.8201 (emphasis supplied). A "registered elector" is a person who has actually registered to vote. MCL 168.495; MCL 168.499; MCL 168.500a.

The Michigan Constitution defines "elector" as

> "[e]very citizen of the United States who has attained the age of 21 years[10], who has resided in this state six months, and who meets the requirements of local residence provided by law, shall be an elector and qualified to vote in any election except as otherwise provided in this constitution. Const 1963, art. 2, §1

However, just being an "elector" does not make every such person "qualified" or "registered" to vote. A "qualified elector" is defined as "any person who possesses the qualifications of an

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[10] U.S. Const., Amendment XXVI, § 1, provides: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." Accordingly, Michigan's 21-year-old qualification must now be read to include 18-year-old electors.

elector as prescribed in section 1 of article 2 of the state constitution and who has resided in the city or township 30 days." MCL 168.10.

The Michigan Constitution further provides for the legislature to define what constitutes "residence" for voting purposes. Const 1963, art. 2, §1. "Residence" is defined in the Michigan Election Law (MCL 168.1 *et seq*) as

> "that place at which a person habitually sleeps, keeps his or her personal effects and has a regular place of lodging. If a person has more than 1 residence, or if a wife has a residence separate from that of the husband, that place at which the person resides the greater part of the time shall be his or her official residence for the purposes of this act. This section shall not be construed to affect existing judicial interpretation of the term residence. MCL 168.11(1)

On January 13, 2006, Respondent signed an affidavit asserting that his residence at 201 Honey Creek Ave NE, Ada Township, Kent County, 49301, became his "principal residence" on December 31, 2005, and that he rescinded the principal residence exemption for property he previously claimed as his principal residence. The General Property Tax Act (MCL211.1a *et seq*) defines "principal residence" as: "[t]he 1 place where an owner of the property has his or her true, fixed, and permanent home to which, whenever absent, he or she intends to return and that shall continue as a principal residence until another principal residence is established." MCL 211.7dd. The definition of "principal residence" under the affidavit Respondent executed to establish his Ada Township property as his principal residence nearly replicates the definition of "residence" under the Michigan Election Law, the place he habitually sleeps, keeps his personal effects and has a regular place of lodging, and if he has more than one residence the place he resides the greater part of the time. MCL 168.11(1).

Respondent's domicile was at 201 Honey Creek Ave NE, Ada Township, Kent County, 49301. That was his primary residence or domicile. It was the address he held out to the world

as his residence. By his own admission and in his affidavit he has indicated that he resided in Ada Township. Thus, he was a "qualified elector" in Ada Township, the locality where he resided. His purported registration in Cannon Township was a nullity, and may involve several criminal and fraudulent acts.[11]

As the elected judge of the 63rd District Court, first division, Respondent was required to be and remain a "registered elector" within the parameters of that division. Respondent contends that he *was* a properly registered voter in Cannon Township, claiming as his "residence" the property he owns at 8631 Belding Road.

However, Respondent cannot continue to perpetuate the illusion that he maintained a "residence" in the first division, as that residence was someone else's. Respondent rented the Belding Road property out in February 2007. T 144. Respondent was a resident of the second division, plain and simple.

Respondent's true "residence" – the one defined by Michigan Election Law as the place he habitually sleeps, keeps his personal effects and has a regular place of lodging, and if he has more than one residence the place he resides the greater part of the time[12] – was in Ada Township, in the second election division of the 63rd District Court. Because a person can only have one "residence" under the Michigan Election Law, a person can only be a qualified elector in one place. Respondent was truly a "qualified elector" in Ada Township, not Cannon Township, and his purported status as a "registered elector" in Cannon Township was a nullity and/or fraud. Shockingly, Respondent even voted in the first division – while he was living in

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[11] Knowingly reporting a change of address to the secretary of state that is not his residence address may be a misdemeanor. MCL 257.315(4). Making a false statement regarding one's residence in an application to register to vote may be a misdemeanor. MCL 168.499(1).

[12] MCL 168.11(1)

the second division and, by his own admission, had been living there since late 2005! – yet thought nothing of it. T 126-127.

In order to be a judge of the first division of the 63rd district court, as he was elected to be, Respondent was required to **be *and* remain** a registered elector within his election district. Because he could not legally be a registered elector in the first division, and in fact was only a "qualified elector" in the second division (*i.e.*, he can register to vote there, but had not done so), Respondent was ***not*** a registered elector of the district and "election division in which he held office," contrary to the requirements of MCL 600.8201. As a result, Respondent has vacated his elected office. Const 1963 art. 6 §20.

C. Respondent has vacated his judicial office

"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. As set forth above, Respondent has clearly removed his domicile beyond the limits of the territory from which he was elected, *i.e.,* beyond the limits of the territory comprising the first division of the 63rd district court. By removing his domicile to the territorial limits of the *second* division of that court, Respondent has vacated his judicial office.

The "limits of the territory" of the first division of the 63rd district court (where Respondent is ostensibly a judge) are set forth by statute: the cities of Cedar Springs and Rockford and the townships of Tyrone, Solon, Nelson, Spencer, Sparta, Algoma, Courtland, Oakfield, Alpine, Plainfield, Cannon and Grattan. MCL 600.8130(4)(a). Respondent's admissions, his affidavit ([Exhibit 1] which clearly and forcefully establishes his intent to be domiciled outside the territorial limits of the first division of the 63rd district court), and his

listing of himself as being at the Honey Creek address every night since 2000 demonstrate that his domicile has been in Ada Township (within the "limits of the territory" of the second division of the 63rd district court) since December 2005. MCL 600.8130(4)(b). Accordingly, Respondent vacated his office at least as of December 31, 2005, and perhaps as early as January 2000. Const 1963, art. 6, §20. The office of judge of the district court of the 63rd District Court, first division has been vacant since December 31, 2005, and the master has so found. MR 8.

Having vacated his office, Respondent cannot re-acquire it simply by moving back into the proper election division. When he vacated the office, it was left vacant, subject to the Governor's appointment power. He does not become re-vested with the authority of a 63rd District Judge by virtue of moving back into the appropriate area. The office of district judge of the 63rd District Court, first division is vacant.

IV. RESPONDENT LIED AND MISREPRESENTED HIMSELF TO THE COMMISSION AND TO THE MASTER AT THE HEARING

Sadly, Respondent was less than candid at times, and was outright deceitful at others. As a result, the Commission should recommend that the Court assess costs against him, pursuant to MCR 9.205(B) ("In addition to any other sanction imposed, a judge may be ordered to pay the costs, fees, and expenses incurred by the commission in prosecuting the complaint only if the judge engaged in conduct involving fraud, deceit, or intentional misrepresentation, or if the judge made misleading statements to the commission, the commission's investigators, the master, or the Supreme Court.")

1. The breasts doodle

Respondent drew a pair of women's breasts on a note and sent it to a female staff member, and he admitted doing so in his answer to the formal complaint. Answer to Formal Complaint, Paragraph 33. At the hearing, however, he tried to wriggle out of that admission.

In answering the formal complaint, Respondent admitted that

> "one of the female court staff members sent the Respondent a note, commenting on the inappropriate dress of the individual. ***When Respondent sent the court file back to the staff member, he sent it back with a note, which had a drawing of breasts on them [sic]. The note was a private note, and was intended to be a joke.*** (emphasis supplied). Answer to Formal Complaint, Paragraph 33.

Respondent made a bald-faced attempt to contradict his own admission. It is clear that Respondent made misleading statements to the master in denying at the hearing that he had drawn the breasts doodle.

2. "I say that kind of stuff to you all the time"

Rockford court clerk Bobbi Thelen testified that, after the sweatshirt incident, Respondent said to her (in apparent amazement) that he said that kind of stuff to the Rockford staff all the time and no one ever complains about it. T 346. Respondent denied ever making any such comment. T 155. However, the master, who had the opportunity to see the witnesses testify and assess their respective credibility, found that "Judge Servaas was less than truthful when he denied saying anything like that on cross examination." MR 8.

3. The length of time Respondent had been living at 201 Honey Creek

Respondent acknowledged that he had been living at the 201 Honey Creek address since August or September 2005. He would have been hard-pressed not to so admit, as his own

affidavit to that effect (Exhibit 1, the Homestead Affidavit) made it clear that he had been. Nevertheless, the truth caught up with Respondent again, and exposed his deception.

The duty logs show that Respondent had, in fact, been living at 201 Honey Creek since at least the year 2000, more than five years earlier than Respondent admitted. This is not an oversight on Respondent's part. When confronted with his phone numbers over the preceding eight years, Respondent claimed not to recognize them. Yet the very next day, he identified them all, including the dates he used them. Having listed his home phone number at Honey Creek for those eight years, it is readily apparent that he feigned ignorance of those phone numbers so as not to have to admit to the fact that he had actually been living at Honey Creek since at least the year 2000. It is utterly reprehensible for anyone to be deceitful in testifying, but it is all the more so repugnant when that person is a judge. Respondent's perfidy cannot go unchallenged.

4. False statements regarding his application for a CCW permit and others

Exhibit 4 is a Concealed Pistol Application executed by Respondent on February 1, 2007. Respondent applied for this concealed weapons permit and listed his "residential address" as 8631 Belding (*i.e.*, the Belding Road property) even though he was clearly living at the Ada Township location. The CCW application says in part (and Respondent read this aloud at the hearing):

> **I have read** the information provided on carrying a concealed pistol and meet all the criteria for a Concealed Pistol License under **Public Act 372 of 1927**, as amended
>
> **I understand that this application is executed under oath and swear or affirm under penalty of law that the above answers are true and correct to the best of my knowledge**. I understand that intentionally making a false statement on the

application is a felony punishable by imprisonment for not more than 4 years or a fine of $2,500, or both. (Exhibit 4, emphasis supplied)

Public Act 372 of 1927, as amended, includes MCL 28.425b, which provides that the application shall contain all of the following: The applicant's legal name, date of birth, and the address of his ***primary*** residence. The statute uses the words "primary residence," not just "residential address," and Respondent averred that he had read the statute. Respondent's "primary address" – just like the one on the homestead affidavit – was the 201 Honey Creek residence, not the Belding Road address he actually listed.

The application – under oath – did not simply call for ***a*** residence; it called for ***the*** residence – the ***primary*** residence. Respondent's loose and breezy approach to the truth cannot go – and did not go – unnoticed.

V. Respondent Made Sexually Inappropriate Comments and Drawings

1. The breasts doodle

Respondent drew a pair of women's breasts on a note and sent it to a female staff member, and he admitted doing so. Answer to Formal Complaint, Paragraph 33. The master rejected his efforts to obfuscate that plain admission at the hearing, and the Commission should reject any such efforts now. He drew the breasts doodle "which was intended to be a joke," in his words, but which the master found to be "sick humor." MR 9.

2. The sweatshirt incident

Respondent's off-color, demeaning comment to Rebecca Andrus, a clerk at the 63-2 District Court, is contemptible. It is fair to say that women are very concerned about their self-image (although perhaps no more so than men are.) In any event, a woman's physical form

lends much to that self-image or awareness, and Respondent attacked that very essence by making degrading comments regarding Ms Andrus's bust size.

Respondent's comment to Ms Andrus, in front of at least four of her colleagues, was humiliating. Regardless of the exact words used, the intent of the "joke" was clear: to make a joke at Ms Andrus's expense regarding her too-small-for-Respondent's liking chest-size. It was a humiliating, shameful thing to do, and if the shoe were on the other foot, it is doubtful that Respondent would see the humor, but then again, most bullies never do. Perhaps Respondent even recognized that he had gone too far when he "joked" yet again that he had better leave "before he got sued." T 153 (Respondent).

3. The penis doodle

Respondent's credibility was seriously compromised. He had already been caught in a number of less-than-truthful to outright deceitful comments, including (1) his admission that he had been living at Honey Creek only since late 2005, when in fact he had been living there since at least 2000; (2) his "not remembering" his own phone numbers; (3) his efforts to avoid his clear admission in his answer that he had drawn the breast doodle; (4) his claim that Exhibit 1 was the first homestead exemption he had ever gotten, when in fact he had also previously obtained one at the Belding Road address, T 103, 126, 516 553-555; (5) he actually voted at a locale where he was clearly no longer a resident; (6) the false statements in the CCW application (Exhibit 4); (7) the master's own determination that Respondent had been "less than truthful" regarding his denial of the statement he had made that he "says that kind of stuff" to the Rockford staff all the time, MR 8; and (8) Respondent's "theory" that the law only required him

to live within his division at election time, and no other, T 516; 566-567. His credibility was seriously damaged.

The master found that Respondent had, in fact, drawn the penis doodle (Exhibit 6), MR 6, although Respondent denied doing so. T 155. In August 2007, Carrie Flowers had placed a yellow "sticky" note (Post-It note) on a file with the notation: "see second file" and took it into the courtroom for the Respondent. T 206; Exhibit 6. When she got the file back, her "sticky note" was still there, but with a crude image of a penis drawn on it. T 216 (Flowers). The other staffers who had contact with the file that day all denied drawing the penis. T 208 (Flowers); T 227 (Thelen, by stipulation); T 376 (Martorell). However, the master concluded that in fact it was the Respondent who drew the penis. MR, 6.

There is no video of the Respondent drawing that penis, but there are very strong grounds to believe, as did the master, that Respondent had drawn it. Although there is no eye-witness testimony to his having done so, there is sufficient circumstantial evidence to support the conclusion that he did. Carrie Flowers sent that sticky note in with the words "see second file." It did not have the penis drawing on it at that time, T 207, but it was there when it came back to her. T 208. She had not drawn it. T 208. The other staff denied doing drawing it, but clearly someone had. The one with the most compromised credibility was the Respondent, and he had already admitted drawing the breast doodle as "a joke." It was reasonable for the master to conclude that Respondent had made the penis doodle, and that this was another "private note meant to be a joke."

4. Sexual harassment

Lastly, Respondent's misconduct also constitutes sexual harassment against the female court staff, and especially Mrs. Andrus. *Radtke v Everett*, 442 Mich 368 (1993). Sexual harassment violates civil liberty, and it is demeaning and degrading. 442 Mich at 381. There are five necessary elements to establish a hostile work environment:

> (1) the employee belonged to a protected group;
>
> (2) the employee was subjected to communication or conduct on the basis of sex;
>
> (3) the employee was subjected to unwelcome sexual conduct or communication;
>
> (4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and
>
> 5) respondeat superior.

442 Mich at 382-383. Respondent's crude "jokes" unfortunately fit this bill.

Mrs. Andrus, as a woman, was a member of a protected class. Respondent's crude comments regarding her chest size were communicated on the basis of sex (*i.e.*, the same comment would not have been made of a male employee), the comments were absolutely unwelcome, they were offensive and intimidating, and Respondent was not her colleague (not that that justifies the comments anyway) but her superior. There can be no doubt that Respondent sexually harassed Mrs. Andrus, and even the other women who received his breasts "joke" and penis doodle. Even if those other women will not concede the harassment, it was harassment nonetheless. And even a single act may constitute discrimination. *Quinto v Cross & Peters*, 451 Mich 358, 371 (1996).

VI. The Commission Should Recommend that the Michigan Supreme Court Validate the Action Respondent has Already Accomplished: Removal From Office

1. The *Brown* factors

The criteria for assessing an appropriate sanction are set forth by the Supreme Court in *In re Brown*, 461 Mich 1291, 1292-1293; 624 NW2d 744 (1999). The Examiner submits the following considerations on each factor. In addition, because Respondent has been untruthful in this hearing, the Examiner provides an analysis under *In re Noecker*, 472 Mich 1 (2005).

a. misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct

Respondent's conduct was part of a long pattern of deceit, living in Ada Township, but availing himself of the illusion that he was properly residing in the northern division. This was clearly well-planned activity.

b. misconduct on the bench is usually more serious than the same misconduct off the bench

This conduct mostly involved off-the-bench conduct, although the drawing of the breasts and the penis are arguably on-the-bench conduct.

c. misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety

Because Respondent was no longer a judge, from at least late 2005, but really dating back to 2000, he has had a severe, negative impact on the administration of justice. There was no

justice, as there was no judge! Respondent may well have put at risk every action he purported to take under color of law.

d. misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does

Because Respondent was no longer a judge – and the seat was vacant – he was only masquerading as a judge. He has been perpetrating a fraud on the administration of justice since at least 2005, and really dating all the way back to 2000.

e. misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated

For the most part, Respondent's misconduct was premeditated and deliberate and therefore more serious than conduct that occurs spontaneously.

f. misconduct that undermines that 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

Respondent was living outside the territory from which he was elected, and he deliberately misrepresented how long he had been doing so. Such conduct is extremely corrosive to the integrity of the judicial system.

g. 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

This factor is not at issue here.

In addition to the *Brown* factors, the Commission should take into account the *Noecker* factors. Misrepresentations, lies, and deceitful testimony by a judge constitute a sufficient basis for removal from office. *See In re Noecker*, 472 Mich 1 (2005). Lies, and the motivation in telling them, seriously harm the integrity of the judiciary. *Id.*

> Some misconduct, such as lying under oath, goes to the very core of judicial duty and demonstrates the lack of character of such a person to be entrusted with judicial privilege.
>
> Where a respondent judge readily acknowledges his shortcomings and is completely honest and forthcoming during the course of the Judicial Tenure Commission investigation, I believe that the sanction correspondingly can be less severe. However, where a respondent is not repentant, but engages in deceitful behavior during the course of a Judicial Tenure Commission disciplinary investigation, the sanction must be measurably greater. Lying under oath, as the respondent has been adjudged to have done, makes him unfit for judicial office. Id., at 17-18 (Young, J., concurring)

See too In re Nettles-Nickerson, ___ Mich ___ (MSC Docket No. 133929, released June 13, 2008)

Respondent has been less than truthful throughout these proceedings. He deliberately falsified the fact that he had been living in the wrong election division for over eight years, and not "just" since last 2005 as he had testified. He was less than truthful when he tried to disavow his own admission in his answer to the formal complaint, trying to imply that he had *not* drawn the breast doodle when he had already admitted that he had. This conduct shows an utter disregard for the truth, which is anathema to any true judicial officer. He must not continue to serve as a judge.

2. Respondent has already vacated his office

By moving his domicile outside the territory from which he was elected (*i.e.*, from the territory comprising the first election division of the 63rd District Court to the territory comprising the second election division) Respondent vacated his judicial office. Const 1963, art. 6, §20. This is a self-effecting consequence, so Respondent is not now, and has not been since at least late 2005, a judge of the 63rd District Court. The master found as a matter of fact, and he concluded as a matter of law, that Respondent was no longer a judge, and that the seat he had previously served in has been vacant since late 2005 and "remains vacant today." MR 8. The Commission should adopt that finding and that conclusion as its own, and recommend that the Supreme Court do so as well, effectuating this reality into a judgment of the Court.

The consequence of that determination cannot go without comment. Respondent purported to file for re-election in the upcoming general election by filing an "affidavit of incumbency." T, 514-515.[13] However, Respondent was ***not*** an incumbent judge at the time he filed his affidavit of "incumbency." He has not been an incumbent since at least late 2005, and he remained a non-incumbent, as his seat was "vacant," passed the filing deadline. Respondent's "affidavit of incumbency," the document that attained his access to the ballot, is a nullity. It has no force or effect, and it has no meaning under the law. A non-incumbent, ordinary citizen *cannot* file an affidavit of incumbency. Accordingly, the Court should take notice that there is

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[13] An *incumbent* judge may obtain access to the ballot merely by filing an "affidavit of incumbency." MCL 168.467c(1) ("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 in lieu of nominating petitions not less than 134 days prior to the date of the primary election.")

no candidate for judge in the first division of the 63rd District Court, and he should be stricken from the ballot.

3. Respondent should be removed from office

Assuming for the sake of argument that Respondent still is an incumbent, he should be removed from office. His flagrant abuse of the residency requirements shows such contempt for the law that it undermines his fitness to serve as a judge. Moreover, he has finagled and connived his way to the ballot, in derogation of the statutorily-prescribed requirements.

Respondent's misrepresentations at the hearing and to the Commission – regarding how long he had, in fact, been living outside his election division – warrant his removal from office. Respondent was not truthful regarding his various phone numbers, as they established that he had, in fact, been living in the wrong division, and he "suddenly" remembered what they were the very next day of testimony. It is clear that he was attempting to propagate the same sham that he had been perpetuating for years: that he only need live in the division during election time. But he provides no statutory or other support for that bizarre proposition, he does not define what "election time" is (the month of November? August? the year of the election?), and he really did not even believe it himself, as he was ***not*** living in the division at the time of the last election in 2002. Respondent's "reliance" on this non-existent principle belies any thought that he is a legitimate jurist. He must be removed from office.

Timing is everything in life. If the Supreme Court does not remove him until after the new term starts on January 1, 2009, that removal will be valid for at least that full six-year term. If the Court removes him during this term – which ends on December 31, 2008 – the sanction of

removal will be wholly disproportionate and unfitting for the depth of his misconduct, as it would really only result in a suspension of a few months or weeks (at most).

Another alternative is for the Court to remove him from office less than 66 days before the general November election, and declare that he is disqualified from running in that election (due to his fraudulent affidavit of incumbency, for example.) If that happens, then there will be no one elected at the November election, and a vacancy will exist at noon on January 1, 2009, at which time the Governor can use the appointment power to fill the seat until the next general election in November 2010. See MCL 168.467f(2). The Commission should recommend removal after the start of the new term at noon on January 1, 2009, or, in the alternative, removal between November 4, 2008 and 65 days earlier, *i.e.*, August 31, 2008.

4. Sexual harassment

Respondent's "humor" was so inappropriate for a work setting, even for a social event at work. Moreover, the party at which he made the sweatshirt comment had not even started nor did the "joke" occur at the party. It is unthinkable that a judge would engage in such a one-sided, power-laden oppression of a female court staffer. Even if Respondent would not be removed "just" for this misconduct, the Commission must take special notice of it, utterly condemn it, and urge the Supreme Court to do likewise.

5. Respondent should be assessed costs

The court rules provide that "[i]n addition to any other sanction imposed, a judge may be ordered to pay the costs, fees, and expenses incurred by the commission in prosecuting the complaint only if he judge engaged in conduct involving fraud, deceit, or intentional

misrepresentation, or if the judge made misleading statements to the commission, the commission's investigators, the master, or the Supreme Court." MCR 9.205(B). Such costs are properly assessed in situations where a judge has lied at the hearing. *See In re Nettles-Nickerson*, ___ Mich ___ (MSC Docket No. 133929, released June 13, 2008).

In this matter, the Respondent lied about his primary residence for years, and he lied about it at the hearing, too. The Commission incurred $8,364.38 in direct costs and expenses in this matter (transcripts [$3,606.41]; witness fees [$168.00]; videos [$40.00]; the master's fee [$3,370.25], and the travel expenses of the examiner [$653.75] and associate examiner [$525.97]). The affidavit of Commission Administrative Assistant Camella Thompson, as well as the supporting documentation, are appended to this brief as Attachment A.

VII. CONCLUSION

Respondent has committed misconduct, by removing his domicile (contrary to statute), vacating his judicial office, committing a misdemeanor by voting under the guise of being a resident of Belding Road in August 2007, committing a felony in his false CCW affidavit in February 2007, testifying falsely in these proceedings regarding his actual residence, and engaging in sexually harassing behavior toward his female staff by making degrading comments on bust size and drawing doodles of a penis and of a woman's breasts "as a joke."

WHEREFORE, the Commission should recommend that the Respondent be **REMOVED** from office, and ordered to pay costs to the Commission in the amount of $8,364.38. In addition, the Commission should make such recommendations as warranted to prevent Respondent from taking advantage of the fact that he fraudulently obtained access to the

ballot by filing an affidavit of incumbency when, in fact, he had long ago vacated the position and was no longer an incumbent.

Respectfully submitted,

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_____
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