

JUDICIAL CONDUCT BOARD



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AMENDED CLOSURE REPORT OF THE VERMONT JUDICIAL CONDUCT BOARD

Re: Docket No.: 22.007

This Docket commenced when the Complainant filed a complaint with the Judicial Conduct Board on August 31, 2021. The Complaint alleges that Secretary of State James Condos violated various provisions of the Vermont Code of Judicial Conduct by refusing to recuse himself from the Administrative Election Complaint filed pursuant to 17 V.S.A. § 2458 by the Complainant in 2020 against Secretary Condos.

The Judicial Conduct Board conducted an initial inquiry to determine if the Board has jurisdiction over the Secretary of State. As the Complainant correctly observed, the Rules for Disciplinary Control of Judges (the “Rules”) define the Board’s jurisdiction as follows:

Any judge or any individual specially assigned pursuant to law to serve as a judge is subject to the disciplinary jurisdiction and control of the Supreme Court and the Board hereinafter established and defined. The Board has continuing jurisdiction over former judges regarding allegations that misconduct occurred during their judicial service if a complaint is made within three years of the discovery of the grounds for the complaint.

Rule 3 (“Jurisdiction”), § 3(1). In addition, the Rules apply “to any complaint charging a judge with” any of a list of potential violations. Id. § 2 (“Scope of the Rules”) (emphasis added). Therefore, the outcome turns on whether Secretary Condos is a “judge” or an “individual specially assigned 17 V.S.A. § 2458 pursuant to law to serve as a judge” when deciding an complaint filed under 17 V.S.A. § 2458.

To answer that question, the Board considered the definitions of the term “judge” in the Rules and the Vermont Code of Judicial Conduct (the “Code”). First, the Rules define a “judge” as follows:

“Judge” means **the chief justice of the state, an associate justice of the Supreme Court, a superior judge, a district judge, an assistant judge, a probate judge** or any other individual who is deemed a judge by Administrative Order No. 10, Code of Judicial Conduct, TERMINOLOGY (11).

Rule 1 (“Definitions”), § 1(2) (emphasis added). Secretary Condos does not fit any of the specific roles emphasized in bold type, so the outcome here depends on whether the Secretary qualifies as “any other individual who is deemed a judge by” the Code.

The Code, in turn, states that

“Judge” means anyone, whether or not a lawyer, who is an officer of the judicial system and who performs judicial functions, including **an assistant judge, a probate judge, and an officer such as a magistrate, commissioner, traffic hearing officer, master, or referee**. See Application, section A.

Code, “Terminology” section (emphasis added). As with the Rules’ definition, the Secretary of State does not fall within any of the specific roles highlighted in bold type.

Therefore, the jurisdictional question of whether the Secretary is “judge or any individual specially assigned pursuant to law to serve as a judge” (and thus comes under the Board’s jurisdiction under Rule 3, § 3(1)) boils down to whether the Secretary is “an officer of the judicial system [] who performs judicial functions.” If not, then the Secretary falls outside the Board’s jurisdiction under Rule 3.

The Secretary of State is not acting as an officer of the judicial system when deciding complaints submitted pursuant to 17 V.S.A. § 2458. Basic separation of powers principles require this conclusion. The Vermont Constitution vests the “judicial power of the State . . . in a unified judicial system which shall be composed of a Supreme Court, a Superior Court, and such other subordinate courts as the General Assembly may from time to time ordain and establish.” Vt. Const. Ch. II, § 4. It clarifies that “[t]he Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others.” Vt. Const. Ch. II, § 5. Further, the statutes governing the Secretary of State’s Office reside in Title 3 of the Vermont Statutes Annotated, which is entitled “Executive.” Indeed, Chapter One of Title 3 describes the powers and duties of the Governor. The first statutory provision in the Secretary of State’s chapter of Title 3 states that “[t]he Secretary of State shall be commissioned by the Governor and shall keep an office open for the transaction of business.” 3 V.S.A. § 101.

In sum, the Secretary of State is simply not part of Vermont’s “unified judicial system,” including when the office is deciding a complaint under 17 V.S.A. § 2458. Therefore, Secretary Condos is not an officer of the judicial system and falls outside the Board’s jurisdiction.

This conclusion is bolstered by comparison to the ABA’s Model Code. The ABA Code defines “judge” more broadly, recognizing the possibility that an executive branch officer could be subject to the Code when that officer acts in a judicial role (for example, a member of a state public utilities commission): “A judge, within the meaning of this Code, is **anyone who is authorized to perform judicial functions**, including an officer such as a justice of the peace, magistrate, court commissioner, special master, referee, or member of the administrative law judiciary.” ABA Model Code of Judicial

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Conduct, “Application” Section, § I(B) (2011 ed.) (emphasis added).¹ The emphasized language contrasts with the Vermont Code’s definition, which states that a “judge” must actually **be** “an officer of the judicial system.” In Vermont, it is not enough that the person be “authorized to perform judicial functions.”

Significantly, the Vermont Supreme Court and its Advisory Committee considered the ABA Model Code, using it as a guide in adopting the current version of the Vermont Code. As the Introductory Reporter’s Note to the current Vermont Code explains, “[t]he Vermont Judicial Conduct Board in October 2015 recommended that the Supreme Court adopt ABA Code 2007 and presented a draft of a Vermont Code to the Court.” In the end, the current Vermont Code “adopts the format and substantive provisions of ABA Code 2007, with necessary or appropriate Vermont variations.” Intro. Rptr’s Note. In other words, the Court and its Advisory Committee could have adopted the ABA’s broader definition of a “judge,” but instead used the more limited “officer of the judicial system” formulation.²

Conclusion

In light of the analysis above, the Board concludes that the Secretary of State is not an “officer of the judicial system.” Therefore, the Secretary does not fit the definition of a “judge” in the Vermont Code nor in the Vermont Rules for Disciplinary Control of Judges, and falls outside the scope of our jurisdiction, as defined by § 3(1) of the Rules.

Accordingly, the Complaint in Docket No. 22.007 is DISMISSED.

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By: 
Barbara Blackman, Chair

¹ This 2011 edition appears to be the operative version of the ABA Code. It is the version found on the [current ABA Model Code webpage](#).

² The Reporter’s Note quoted above references the “ABA Code 2007.” I verified that the 2007 version of the ABA Code contained the “anyone who is authorized to perform judicial functions” language. See Housekeeping Revisions to the 2007 Model Code of Judicial Conduct, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/judiciaethics/ABA_MCJC_Housekeeping_Revisions.pdf.