

STATE OF VERMONT

JUDICIAL CONDUCT BOARD

**IN RE: ASSISTANT JUDGE
WILLIAM BOARDMAN**

JCB DOCKET NO. 06.036

FINDINGS, DECISION AND ORDER

This matter came before the Vermont Judicial Conduct Board (hereafter JCB) on the complaint of Mr. Greg Soula of Woodstock, Vermont, concerning actions taken by Windsor County Assistant Judge William Boardman. After a Preliminary Inquiry was completed, probable cause was found and a Formal Complaint was filed on August 22, 2007. The matter came on for hearing on the merits on February 1 and March 14, 2008. (NOTE: The entire Board was appointed by the Chair to be the hearing panel in this matter.) Upon receipt of the final transcripts on March 27, 2008 the matter was taken under advisement by the Board.

The JCB was represented by Board Counsel Richard Goldsborough, Esq. The Respondent, Assistant Judge Boardman, initially appeared *pro se*, but later was represented by Attorney Eric R. Benson.

Findings of Fact

The following findings of fact have been established by clear and convincing evidence. See Vermont Rules of the Supreme Court for the Disciplinary Control of Judges (hereafter RDSC) 9.

A. Emerge Conflict Allegation

1. William Boardman is one of two elected assistant judges for Windsor County, Vermont. He was first elected in 1991 and was most recently re-elected in November of 2004. Assistant Judge David Singer is the second Windsor Assistant Judge, having been elected in November of 2006. He succeeded Assistant Judge Cooper, who served with the Respondent through January of 2007.
2. As part of their statutory duties, the assistant judges create and administer the County budget each year. 24 VSA §131,133. Presently and for the last few years, the only non-governmental entity to receive money from Windsor County is a group called Emerge.
3. Emerge is a non-profit corporation providing supervised parent-child contact exchanges and supervised visitation to parents in high conflict family court cases.
4. The Respondent was a founder of Emerge¹ and has, since 1997, been a member of the Board of Directors of Emerge. He served as the Vice-Chair of the Board for one year and at other times was its "informal" secretary. Respondent claimed at the hearing that the assistant judges negotiated with Emerge for a seat or seats on its board of directors in exchange for County funding. Emerge's ByLaws originally did not give a seat or seats on the Board to the assistant judges.

¹ The Respondent seems to have played a key role in establishing a supervised visitation center for Windsor County. In the spring of 1995 he consulted with the Central Vermont Supervised Visitation Center about how they were organized and received some information back from its then Director, Roberta Tracy. See Exhibit B. In May of that year he asked a local attorney, Susan Weider, to draft guidelines for the legal community to follow in using the proposed center. See Exhibit C. His Exhibit A is his 6/20/95 draft proposal for the organization of such a center for Windsor County. Minutes from Emerge dated 7/9/97 show his election to the Board, he is listed on its Board announcement, and is the only Board member whose fax and e-mail information appears on the list. See Exhibit 18.

However, Ramona Russell, the Executive Director of Emerge since September of 1996, testified that the assistant judge seat was later added.

5. Emerge's Bylaws provide that there is a seat on its Board for the assistant judges so long as it receives funding from the County. The Bylaws further specify that: "(1) the vote associated with that [Assistant Judge] seat may be exercised by one or both Assistant Judges, individually or severally..." (Emerge ByLaws, §1(b). Exhibit 23.)
6. Although the Respondent testified that his membership on the Board of Emerge was a part of his County duties, at other points in his testimony he downplayed his role, claiming he was only a "sounding board" for the organization and only attended about half the meetings. The evidence showed and the Board so finds that both Assistant Judges Cooper and Singer declined to be Emerge Board members. Judge Singer believed that doing so would create a conflict of interest.
7. Many, but not all, of the parents who use Emerge's services have been ordered to do so as part of their own Windsor County Family Court case. By law the assistant judges sit on family court cases and assist the presiding judge in deciding questions of fact.
8. Emerge serves Windsor County, Vermont and at least two towns in adjacent New Hampshire.
9. Emerge filed for and obtained 501(c)(3) status in 2007. It obtains funding from a variety of sources, including Windsor County, the U.S. Department of Justice, and the State of New Hampshire. It also charges fees for use on a sliding scale.

10. Since its inception Emerge has struggled financially. However, Windsor County has contributed money to Emerge since at least 1996², and in the last two fiscal years, granted Emerge \$12,000 in county funds. See Exhibit 19. Although the 2007-2008 Windsor County budget was not provided during the hearing, the evidence showed that Emerge received the same amount in the last fiscal year from the County. No other non-profit was granted any funding by Windsor County.
11. It was unclear whether Emerge is required by Windsor County to make a written request for funds each year. County Clerk Jamie Ammel testified persuasively, and the Board so finds, that Emerge did not submit a written request for funding every year, but that it was granted County money every year. In 2006 its appropriation was increased to \$12,000 from \$10,000. No written evidence of any request from Emerge was found for any year before 2005. Jane Ammel, the Windsor Superior Court clerk, knew of no other agencies that sought funding for the county that did not file a written request. There was no evidence adduced indicating that the County ever formally required Emerge to disclose how it used County funds in any year.
12. The Respondent testified that no such disclosure was required since he, by virtue of his position on Emerge's board, already knew how it was spending the County money it received.
13. Emerge now operates out of the former Windsor County Sheriff's office, a Windsor County building located on seven acres on Route 5 in the

² Since the Respondent was the only Windsor Assistant Judge to accept the slot and participate on Emerge's Board during the relevant time period, he was effectively the only Assistant Judge exercising voting power on its Board.

Town of Hartford. At some point after the creation of Emerge, the County and Sheriff began planning to relocate the Sheriff's office to a County building in Woodstock.

14. Before the building was vacated the County listed it for sale with local real estate broker Douglas Symmes. Mr. Symmes has over thirty years experience in the Upper Valley area of Vermont and New Hampshire. He secured an Exclusive Right (contract) to market the property from Assistant Judges Cooper and the Respondent on or about May 22, 2001. At that time the assistant judges offered the property for sale at \$159,000, setting the price with the assistance of Mr. Symmes. See Exhibit 1. At that time the property had an assessed valuation by the Town in excess of \$250,000.
15. Subsequently the assistant judges, on the recommendation of Mr. Symmes, decided to raise the asking price to \$189,000. The reason stated by the broker for the increase was to give the County some negotiating room due to an uncertain wastewater capacity issue, which, if discovered by an offeror, would enable the County to appear to reduce the price while still realizing the original goal of \$159,000. A marketing flyer was distributed (see Exhibit 2), but no immediate offers were received.
16. Eventually the realtor showed the property or distributed promotional materials on it some forty-two times, which resulted in three offers. Two of the offers were at or above the asking price, but no deal was consummated. In December, 2001, the County's agreement with Mr. Symmes had expired, and he wrote the Assistant Judges suggesting a reduction in the price from \$189,000 to \$149,000. The

Respondent did not sign this extension but another one was negotiated on or about February 20, 2002. See Exhibits 1A and 1B. However, within a few months thereafter, the third offer came, this one from Emerge, which signed a purchase and sales agreement with the County on April 10, 2002. This offer was accepted by the assistant judges, including the Respondent, on April 15, 2002. See Exhibit 3.

17. On April 15, 2002, the Respondent was still a member of the Board of Directors of Emerge. He testified that whenever the subject of the financial aspects of this transaction came up at Emerge Board meetings he would excuse himself from those discussions. Nevertheless, the acceptance of the offer by the County and by Emerge placed him, factually, on both sides of this transaction, as seller and buyer.
18. Closing on the transaction was to occur within ten days of the Sheriff vacating the property, but no sooner than August 1, 2002. As a contract contingency, Emerge had until June 15, 2002 to secure financing. It was unable to secure financing until years later when an anonymous donor provided a personal guarantee to the bank.
19. At some point after the fall of 2002 the Sheriff vacated the building and Emerge moved in and commenced operations. The Sheriff had not been able to relocate to Woodstock by August 1, 2002, as the County building there was not ready in time.
20. Emerge has used the County building continuously since that time to the present. It operated out of the building for about five years with an oral agreement until it

signed another purchase and sales agreement with the County (represented by the Respondent and Assistant Judge Singer) on or about July 15, 2007. See Exhibit 15.

21. During or about the fall of 2003, and at some point after it moved into the County building on Route 5, Emerge and the County began to discuss terms for its continued occupancy of the building. Emerge had been unable to obtain financing and had not otherwise been able to perform the original contract. The County, however, did not treat that failure as a default and the building was not put back on the market. Instead, the parties began to negotiate and produced a draft "Letter of Understanding" which was never signed by either Emerge or the County. See Exhibit 4. This unsigned document became the general operating agreement between the parties.
22. From the inception of the proposal to sell the building to Emerge, the Respondent was the "go-to" person with the best knowledge of the condition of the building and the financial aspects of the transaction. Joseph Verdine was the President of Emerge for three years, and its Vice-President for three of his years as a member. He has been on its Board since 1998. Mr. Verdine testified, and the Board so finds, that throughout his time on the Board, the Respondent was the person to whom others looked for details about this transaction. When, in August of 2006, the Town of Hartford inquired of the County Clerk, Ms. Ammel, about buying the Sheriff's building, she referred them (through Town Manager Hunter Rieseberg) to the Respondent. See Exhibit 21.

23. The Respondent was also involved in assisting Emerge in its efforts to obtain financing for the purchase of the County building. Exhibit 5 is a series of e-mails between the Respondent and Terry Martin, the loan officer at Mascoma Savings Bank from whom Emerge was seeking financing. On January 24, 2007, the Respondent told Mr. Martin that he "just nudged" Mona Russell, the Executive Director of Emerge, over the issue of getting a signed Board Resolution for the financing. On December 18, 2006 Mr. Martin thanked the Respondent for his "help". Mr. Martin had phone conversations with the Respondent concerning financing, and he noted that it was unusual to be dealing with one individual who was on both sides of the transaction (i.e., buyer/borrower and seller). The Board finds that the Respondent was involved in assisting Emerge to obtain financing for its purchase of the County property.³

24. Emerge proved to be an unreliable tenant. It was often late on its rent for months at a time and was, on at least one occasion, bailed out by the infusion of the annual grant from Windsor County. Despite Emerge's chronic delinquency, no eviction or collection proceedings were ever instituted against it by the County.

25. Barbara Frizzell has been the Windsor County Treasurer since 1981. In that position she handles the County budget, acts as its bookkeeper, keeps County financial records, and writes checks to meet County obligations.

³ Exhibit 17 is a preliminary commitment letter from Mascoma Bank to Emerge dated December 13, 2006. By that time, Emerge was able, finally, to obtain financing because two guarantors came forward. Unfortunately for Emerge, one of the original guarantors died and the other withdrew, jeopardizing the transaction which had made financing contingent on the personal guarantees. However, Emerge and the County did not actually sign a new purchase and sales agreement until July 15, 2007 when another guarantor was found. The loan was not based on the collateral's value but rather on the personal guarantee tendered by the anonymous benefactor.

26. In that position she kept constant track of Emerge's payment of its rent and other obligations to the County. She testified, and the Board so finds, that Emerge was chronically late with its rent payments to the County.
27. Since Emerge never had an enforceable rental agreement with the County it was a month to month tenant throughout its tenancy. According to County records kept by Ms. Frizzell, Emerge occupied the County building in that status from October of 2003 until October of 2007. During that time Emerge failed to pay its monthly rent due (\$910.70) some 39 times out of those 48 months. See Exhibit 6(A). In many months it paid double or triple to catch up for the previous months in which no payments were made. On occasion, only the infusion of money from the County enabled Emerge to catch up on the back rent. See Exhibit 8. By the time of the closing Emerge still owed the County \$12,750.20 in back rent.
28. Ms. Frizzell testified, and the Board so finds, that Emerge never paid the County the back rent owed. She brought the rental delinquency to the attention of the assistant judges, including the Respondent, on several occasions. She was told not to worry about it, and that it would be taken care of at the closing. On one such occasion, the Respondent told Ms. Frizzell that he would call Ms. Russell himself concerning the back rent owed. In fact, the 06-07 Windsor County budget showed no actual rental payments by Emerge against \$10,920 due. See Exhibit 19.
29. Emerge also had an oral agreement with the County to pay some of the electric bill for the Route 5 property, including the radio tower located thereon.⁴

⁴ The County property in Hartford was burdened by a radio tower easement that occupied a substantial portion of the undeveloped 7 acres. The tower owner/operator drew his electricity for the tower from the

Apparently the Respondent negotiated an arrangement with the tower operator, referred to in County records as "VOX", for it and Emerge to share the electric bill for the property because the two users shared the same meter. Emerge was often delinquent in paying its share of the electric bill. By the time of the closing, Emerge still owed the County \$10,703.84 in unpaid electrical charges.

30. Ms. Frizzell testified, and the Board so finds, that Emerge never paid the County the back electric charges it owed.

31. Emerge and the County signed a second purchase and sales agreement for the transaction between June 28, and July 15, 2007. Respondent and Assistant Judge Singer signed on behalf of the seller, Windsor County.

32. The Town of Hartford owns 65 acres surrounding the County property on Route

5. On August 25, 2006 it expressed an interest in buying the subject property from the County. See Exhibit 21, Letter from Hartford Town Manager Hunter Rieseberg to the Respondent and Assistant Judge Cooper. On March 28th Hartford wrote the County a letter and on the 29th Mr. Rieseberg e-mailed the Respondent and repeated the Town's interest in acquiring the property. The Town proposed a cash sale and asked to hear from the County in the "near future." Between August of 2006 and March of 2007 the County had no binding purchase and sales agreement with Emerge.

33. On April 2, 2007 Mr. Rieseberg again e-mailed the Respondent, indicating the Town was prepared to begin negotiations with the County "immediately" for the

County building, but the output was not on a separate meter, requiring that the County estimate the usage by the tower versus its tenant, Emerge. At some point after Emerge became a tenant, VOX evidently sold its interest in the tower to Nassau Broadcasting, which negotiated a fixed monthly payment to the County for use of the site at \$256 per month.

purchase of the property. Mr. Rieseberg correctly pointed out that the County had no binding contract with Emerge and that Emerge had “not followed through” with the purchase. Mr. Rieseberg reminded Respondent of his comment, during a public hearing, that the County intended to put the property on the market on July 1, 2007. Mr. Rieseberg was responding, in part, to an April 1, 2007 e-mail he received from the Respondent indicating that the County had “a long-standing prior commitment to Emerge[.]”

34. The County never responded to the Town’s March 28th letter and proceeded with its arrangements with Emerge.

35. The closing took place on October 22, 2007. Emerge actually paid \$93,000 for the property by virtue of several credits granted it by the County. Further credits it received reduced the amount actually received by the County to \$71,755.90.

See Exhibit 14, HUD 1 Settlement Statement.

36. Emerge was charged \$719.84 for past-due electric bills. However, the actual amount owed for electricity by Emerge was \$10,703.84.

37. Instead of paying off its back rent to the County, Emerge was given a positive credit for rent paid totaling \$1,874.10.

38. Ms. Frizzell provided Assistant Judge Singer the correct figures for the past due electric bills and past due rent.

39. Assistant Judge Singer assumed office in February of 2007. He was aware of the informal arrangement to sell to Emerge, on whose Board he declined membership. He was concerned that the Respondent was on both sides of the proposed transaction and discussed that with the Respondent. Assistant Judge

Boardman assured Mr. Singer that he, Boardman, had recused himself from all Board discussions of the financial aspects of the purchase of the County property by Emerge. Assistant Judge Singer signed the purchase and sales agreement with Emerge, as well as the HUD 1 settlement statement, believing that all of the credits being granted to Emerge were based on figures supplied by Treasurer Frizzell. He was not aware of the magnitude of the unpaid rent and electric bills owed to the County by Emerge. Assistant Judge Singer also believed, erroneously, that the County was giving money to the Diversion program which, it appears, eased his concerns about the treatment that Emerge was receiving from the County. Judge Singer perceived that the Respondent wanted to sell the property to Emerge to the exclusion of any others.⁵

B. Allegation of Sign Removal and Lack of Retraction

40. The Respondent was involved in a three-way primary race for re-election in the fall of 2006.
41. In October of 2006 he approached the Fat Hat Factory, a business in Quechee, and asked to place one of his campaign signs there. Permission was granted and the sign was placed on the front lawn of the business, along with several other candidates' signs, on or about October 18th.
42. On or about October 19th the sign disappeared. The Respondent assumed it had been stolen and on or about October 21st went to the Fat Hat business and grilled a clerk about its disappearance. That same day he reported the "theft" to police.
- On October 24th he had a tense confrontation with the business owner, Joan

⁵ The Respondent testified that Assistant Judge Singer was not a "reliable source" for information about the Emerge transaction. The Board found Assistant Judge Singer's testimony to be credible.

Eckerd, about the disappearance of his sign. On or about October 21st he also wrote a letter to the editor to the Vermont Standard suggesting that the sign had been stolen. See Exhibit 12. This was published on November 2, 2006, only days before the election. See Exhibit 11.

43. In his letter he described the disappearance as a theft and implied it was done as a political dirty trick. In fact, he knew by October 26th that the business owner had taken the sign down as she disapproved of his candidacy. On that date the Valley News published a report from reporter John P. Gregg quoting Ms. Joan Ecker indicating that she had taken the sign down because she didn't want it on her property. See Exhibit D.

44. Despite having this knowledge, the Respondent did not seek to withdraw the letter to the editor. During his testimony in these hearings he suggested that the Vermont Standard had caused the problem by publishing the letter despite knowing that he did not intend it to be published. The Respondent claimed that he had captioned the letter as a "media advisory" and not as a letter to the editor. On that basis, he argued that the Vermont Standard should have known not to publish it.⁶ However, even the email version of the letter supplied by Respondent carries no heading "Media Advisory." See Exhibit 12. The Board does not accept the Respondent's claim that this letter, however titled, was not intended for public consumption.

⁶ During his testimony, the Respondent chided the paper for not recognizing that a "media advisory" was not intended for publication. Although the editor stated that he would not print a document entitled as such, the Board does not find credible Respondent's testimony that the document was so titled. Moreover, given the pattern of the paper printing whatever Respondent submitted, Respondent would have known that even a "media advisory" might be printed. Regardless of that likelihood, he had a responsibility to correct the record he had created.

45. Kevin Forest is the Editor of the Vermont Standard. He has been with the paper since 1979.
46. He testified, and the Board so finds, that since his election the Respondent has been a prolific and frequent letter writer to the Editor, to include a regular column entitled "Courtroom Notes."⁷ Mr. Forest always published all of the Respondent's submissions (sometimes with editing).
47. Before November 2nd, Mr. Forest received an e-mail from the Respondent asking whether his letter had been published. Mr. Forest assumed that the Respondent was referring to the "Who Stole the Sign" letter, and published it along with a self-laudatory letter the Respondent had also recently submitted on or about November 2nd. Exhibit 11A shows the two letters published on that date.
48. The Respondent contacted Mr. Forest a few days later and accused him of running the "wrong" letter in the paper on November 2nd. In fact, this was several days after the Valley News had already run its piece revealing that the Respondent's sign had not, in fact, been stolen.
49. Mr. Forest testified that the Vermont Standard would have printed an after-the-fact retraction if Respondent had so requested. It is undisputed that he never did so.

Relevant Provisions

Board Counsel has charged the Respondent with violations of Canons 1, 2(A), 2(B), 3(C)(1), 3 (E)(1), 4 (A), 4 (C)(3) and 5(B)(2) of the Vermont Code of Judicial

⁷ Indeed, the Respondent himself, in a June 13, 2007 e-mail to Board Counsel, admitted that he sent the "advisory" out widely. See Exhibit 12.

Conduct, as well as violating Rule 2(6)⁸ of the Rules of the Vermont Supreme Court for Disciplinary Control of Judges. These provide, in pertinent part*, as follows:

CANON 1

A Judge Shall Uphold the Integrity and Independence of the Judiciary.

A. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

CANON 2

A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities.

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

CANON 3

A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently.

C. Administrative Responsibilities.

(1) A judge shall diligently discharge the judge's administrative responsibilities

⁸ Rule 2(6) appears to provide an independent and substantive basis on which to refer allegations of judicial misconduct. Thus, even if it were not to find that the Respondent's conduct of this sale or his simultaneous membership on the buyer's Board of Directors was related to his judicial duties, it could still conclude that his conduct in this matter, and the matter involving his campaign sign, was a violation of the rules governing the conduct of judges. However, given its other findings the Board sees no need to make a finding under Rule 2(6).

*Asterisks in the original, denoting defined terms, are omitted here.

without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

E. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding, or is to serve as factfinder in a case in which the judge has conferred ex parte with the parties in an unsuccessful effort to mediate or settle the matter pursuant to §3B(7)(d);

(c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding;

(i) is a party to the proceeding, or an officer, director or trustee of a party;

(iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

CANON 4

A Judge Shall so Conduct the Judge's Extra-Judicial Activities as to Minimize the Risk of Conflict With Judicial Obligations.

A. Extra-Judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge;

(2) demean the judicial office; or

(3) interfere with the proper performance of judicial duties.

C. Governmental, Civic or Charitable Activities.

(3) A judge may serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice or of an educational, religious, charitable, fraternal or civic organization not conducted for profit, subject to the following limitations and the other requirements of this Code.

(a) A judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely that the organization

(i) will be engaged in proceedings that would ordinarily come before the judge.

CANON 5

A Judge or Judicial Candidate Shall Refrain From Inappropriate Political Activity.

B. Political Conduct of Candidates for Appointment to or Confirmation or Retention in Public Office. A candidate for appointment to, or confirmation or retention in, state judicial office, or for appointment to any other public office,

(2) if a candidate for initial appointment to state judicial office, shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary, and shall encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate.

C. Political Conduct of Candidates for Election as Judge of Probate or Assistant Judge.

(1) Except as provided in this §C, a candidate for election or reelection as judge of probate or assistant judge shall comply with all applicable provisions of §5A(1) and 5B.

Rule 2(6) of the Rules of the Supreme Court for the Disciplinary Control of Judges provides:

These Rules shall be applicable to any complaint charging a judge with:

(6) wilful misconduct or conduct prejudicial to the administration of justice although not related to judicial duties nor constituting conduct in office which nevertheless:

(a) brings or tends to bring the office into disrepute or disrespect.

Analysis and Opinion

These charges arise out of two separate and generally unrelated sets of accusations: (1) that the Respondent acted improperly and created the appearance of impropriety by serving on the Board of Emerge while it was buying a piece of property from the County he serves as assistant judge, and (2) that the Respondent acted improperly by knowingly creating a controversy alleging a “political dirty trick” during his campaign (theft of a campaign sign) when, in fact, he knew or should have known that the sign was not stolen and that no such “political dirty trick” had occurred.

The Board heard two days of extensive testimony on the issues presented and received a series of legal motions in advance of the merits hearing. In reviewing evidence supporting a Formal Complaint the JCB must make its findings of fact by the standard of clear and convincing evidence. RDCJ 9 (1). See also In re Hill, 152 Vt. 548, 562 (1989). “Clear and convincing evidence is a very demanding standard, requiring somewhat less than evidence beyond a reasonable doubt, but more than a preponderance.” In re E.T., 2004 VT. 111, ¶ 12. In order to make a finding by clear and convincing evidence, the trier of fact must find the fact’s existence to be highly probable.” In re N.H., 168 Vt. 508, 512 (1998). In this case, the JCB has found all of the above-referenced facts by the standard of clear and convincing evidence.

In both of the allegations charged, this Board concludes that Board Counsel has proven by clear and convincing evidence that the Respondent committed violations of the Vermont Code of Judicial Conduct in his participation in and handling of the sale of County property to Emerge, and in his handling of the campaign sign disappearance.

Assistant judges, though unique to Vermont, are judicial officers under the Vermont Constitution and statutes. See Vermont Constitution, Chapter II, §50 [Assistant Judges elections]. They have an unusual blend of judicial and executive duties, including sitting as triers of fact in family cases along with the presiding judge, and creating and administering the County budget. See, 4 VSA §131 and 133. They are clearly and unambiguously under the control of the Supreme Court, Vermont Constitution, Chapter I, §31, and are therefore subject to the Vermont Code of Judicial Conduct in all of their duties. Although the Respondent initially argued that his administrative duties, including budgeting and the decisions concerning Emerge, were beyond the jurisdiction of the JCB, we reject that proposition as devoid of any legal support. Assistant judges, like all Vermont judges, are subject to the Code of Judicial Conduct in all aspects of their duties.

1. The Emerge Transaction

The Respondent's simultaneous positions as Assistant Judge and a member of the Board of Directors of Emerge, and his handling of the transaction involving sale of the former Sheriff's office to Emerge during the period from 2002 to 2007 violated several provisions of the Vermont Code of Judicial Conduct.

Assistant Judge Boardman was a founder and one of the original members of the Emerge Board of Directors. From 2002 to 2007 he actively promoted the sale of the former Sheriff's office to Emerge, first entering into a purchase and sales agreement in his capacity as an Assistant Judge in April of 2002. As a matter of law this put him on both sides of the transaction, thereby creating an appearance of impropriety in the minds of a reasonable observer. As noted by Mr. Martin, the Mascoma Bank loan officer

assisting Emerge, it was unusual, to say the least, to be dealing with an individual whose overlapping board memberships and responsibilities placed him on both the seller's and buyer/borrower's sides.

Thereafter the Respondent assisted Emerge, on whose Board he sat, with obtaining and arranging financing. He turned aside and spurned an inquiry from the Town of Hartford regarding purchasing the property on a cash basis, and focused, to the exclusion of all other buyers, on selling the property to Emerge. When Emerge was unable to obtain financing in a timely fashion, the Respondent allowed it to remain in the building as a month-to-month tenant without any written agreement. Despite the fact that Emerge was a poor tenant, often behind on its rental and electricity payments, no action to collect or evict was ever brought. Even during the year in which Emerge paid no rent, August, 2006 to October, 2007, Respondent took no action on the Town of Hartford's interest in making a competing offer to buy, nor any legal action against Emerge. When Emerge finally found a guarantor willing to co-sign its entire mortgage, a closing went forward based on an April, 2007 purchase and sales agreement, again signed by the Respondent as seller. With that act the Respondent re-affirmed and amplified the appearance of impropriety created by his overlapping fiduciary responsibilities: to the County, which was selling the building, and to Emerge, on whose Board he sat.

Even at closing the Respondent created an appearance of impropriety in his dealings with Emerge. Although Emerge owed the County some \$23,454.04 in back rent and electricity at the time of closing in October, 2007, the Respondent agreed to, and signed, a closing statement granting Emerge a large credit for the rents actually paid, and only charged it a fraction of what was actually owed for unpaid electric bills. All of these

actions, considered together, created an appearance of impropriety. A reasonable observer looking at the handling of this matter by the Respondent would conclude, as did the Board in this case, that the Respondent violated his fiduciary duty to the County by selling the County property to the very organization on whose Board he sat, at a favorable price, eschewing at least one other cash offer which would have brought a higher return to the County for the sale and ignoring much of the accrued debt of the tenant (Emerge).

Respondent violated Canon 1 and 2(A) of the Code by creating an appearance of impropriety in his handling of the Emerge sale. Although he argues that he recused himself from those portions of Emerge board meetings during which the purchase was discussed, the evidence received during the hearing shows that even if true, the act of leaving the room during such discussions was insufficient to relieve the appearance of impropriety in this case.

Canon 2(A) requires that a judge act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Despite the obvious nature of the problem created when he was on both sides of this real estate sale, and in disregard of his fellow Assistant Judge, David Singer's, warnings of discomfort with his dual roles, the Respondent nevertheless pressed on and consummated the sale to Emerge. The Respondent knew that this discomfort was shared by many in the community, but blithely wrote this off as the sentiment of political foes. This created a reasonable doubt in the eyes of the public in the integrity of the process, exacerbated by the fact that the County ended up receiving far less in proceeds from the sale (not to mention lost rent and unpaid electrical bills) than it could have had in an arm's length transaction. The failure of the Respondent to conduct the sale in a completely transparent fashion, and his failure to

pursue the potential cash offer from the Town of Hartford, evidenced a self-serving commitment to Emerge to the detriment of his obligation to the citizens of Windsor County.

For the same reasons, the JCB concludes that the Respondent also violated Canon 3(C)(1) and 3(E). In disposing of the County property, the Respondent was clearly discharging an administrative function. Canon 3(C)(1) requires that such functions be performed impartially and fairly, without bias or prejudice. Canon 3(E)(1) requires that a judge recuse him or herself in “a proceeding in which the judge’s impartiality might reasonably be questioned.” In this case, not only did the Respondent not deal with the County property in an impartial fashion, he failed to recuse himself from the transaction from the outset, an action clearly required by his dual and – in this case – conflicting fiduciary duties.⁹

The County had an interest in selling the former Sheriff’s office for the greatest return and at the minimal expense.¹⁰ It had a concomitant duty to conduct the transaction in a transparent fashion, seeing to it that it concluded in a manner most favorable to the County. Further, the Respondent had a duty to safeguard County property, and to deal fairly and openly with citizens inquiring about its disposition. Here, the evidence showed clearly and convincingly that the Respondent was determined to use his office as Assistant Judge to ensure that Emerge was able to buy and use the former Sheriff’s

⁹ While Canon 3(E) provides no definition for what constitutes a “proceeding,” its list of examples is not exclusive. At least one Vermont Supreme Court case considering an earlier version of this provision appears to have construed the term to include the administrative aspect of the judicial role. In re Hill, 152 Vt. 548, 575 (1989) (affirming violation of this Canon due to judge’s actions, inter alia, “in matters related to...participation in the decision to suspend [an Assistant Judge] without pay.”). We conclude that “proceeding” includes administrative as well as judicial aspects of a judge’s responsibilities.

¹⁰ Arguendo, the County could decide to grant a discount or even gift the property, but the Board does not reach those issues because Respondent insists that this was an arms length transaction in the best financial interests of the County.

office. He entered into an original purchase and sales agreement with Emerge without stepping off from its Board, and then allowed Emerge to remain in the property for years after the original purchase and sales agreement expired, after they repeatedly failed to pay the rent or electricity bills, and without any written agreement. Had it become necessary to evict Emerge for failure to pay rent, for example, the Respondent would have found himself in the unenviable and indefensible position of being the Plaintiff in the eviction of his own organization. Further, even when Emerge entered into the second purchase and sales agreement, Respondent assisted it in obtaining financing, and entered into an agreement in his capacity as Assistant Judge to sell the property at a reduced price and forgive over twenty thousand dollars of unpaid rent and utility charges.

The Respondent should have seen this conflict of interest and recused himself from all matters involving this sale. The best practice here would have been to resign from the Emerge Board, thereby preserving his ability to discharge in complete good faith his fiduciary responsibility to the County. Instead, he remained, insisting even through the hearings that there was no conflict, that his temporary absences from portions of the Emerge board meetings sufficed, and that the entire issue is politically motivated by his former political opponents.¹¹

In a similar vein, the JCB concludes that the Respondent's extra judicial membership on the Emerge board also violated Canon 4(A)(1) and (3). These Canons require a judge to conduct his extra judicial duties in a way that does not cast doubt on

¹¹ During the hearing the Respondent argued that if one Assistant Judge is unable to act in a particular matter, and has to recuse him/herself, then the County is paralyzed and unable to take action on that matter. The JCB was unable to find any authority for that contention and does not accept it. If the Respondent had recused himself from the Assistant Judge role the other Assistant Judge could have completed the transaction. However, this conclusion by the JCB is not integral to its finding that the Respondent created an appearance of impropriety by simultaneously participating in the transaction as buyer and seller.

the ability to be impartial (1), and so that the extra activities do not interfere with the proper performance of his judicial duties (3).

In this case, the Respondent's membership on the Emerge Board while he was simultaneously allowing Emerge to remain the only contender to buy the County property he was selling on behalf of the County interfered with his obligation to properly perform the administrative aspects of his duties: management of the county property. He essentially stonewalled the Town of Hartford in its efforts to make an offer on the property, allowed Emerge to remain in possession years after its first contract had expired, allowed Emerge to go months at a time without paying the rent or utilities, and then participated in a favorable deal permitting Emerge to buy the property below cost and with substantial unearned credits. A reasonable observer would find, as does this Board, that the Respondent's actions, taken over a several year period, interfered with his administrative duties as a judge. Respondent allowed his partiality for Emerge to interfere with the performance of his duty as an Assistant Judge. As an Assistant Judge he owed the people of the County a duty to get the County the best return on the property. By favoring Emerge to the exclusion (as Assistant Judge Singer put it) of all others, the Respondent violated Canon 4(A)(3). The prestige and authority of the judge cannot be used to "bestow favors." In re Hill, supra, at 571. However well-intentioned, in this matter, the Respondent used his authority and position as Assistant Judge to favor Emerge, the organization on whose Board he simultaneously served.

The Board also finds that Respondent's conduct violated Canon 4(C)(3). While it is true that this Canon allows judges to serve as directors and officers for non-profit organizations, Respondent's activities on behalf of Emerge went beyond what is

permitted by the Canon. Canon 4(C)(3) is qualified by the concept, contained in subsection (i), that a judge may not serve in such capacities when it is likely that the organization will be “engaged in proceedings that would ordinarily come before the judge.”

Here the word “proceedings” must be given its normal, common-sense, meaning, in order to understand the nature of the Respondent’s violation. Of course, Emerge was not a non-profit under the law until 2007, when Mascoma Bank made it clear that it needed 501(C)(3) status in order to obtain financing from the bank. Even assuming that Emerge was at all relevant times a non-profit, the Respondent knew at all relevant times that it was involved in a proceeding before the judge (i.e. the transaction, occupancy and sale that the Respondent was continuously promoting since at least 2002). The Respondent should have recognized, at least as soon as the notion of Emerge purchasing from the County began to move towards concrete actions, that he could no longer be a member of its board and simultaneously fulfill his ethical and fiduciary duties to both entities.

In summary, with respect to the situation created by the sale to Emerge, the JCB concludes that the Respondent not only breached the Canons specified, but showed poor judgment in failing to recognize the obvious and multiple ethical problems his overlapping fiduciary responsibilities created. This was a series of violations readily avoided, as well as patently obvious. That they went on for several years, despite public criticism and the private misgivings of the other assistant judge, and despite two successive assistant judges declining membership on the Emerge board, only serves to underscore the depth of the deficit in judgment shown by the Respondent.

A crucial element of the appearance of impropriety standard is the consideration of whether the conduct was readily avoidable, in other words, whether there were reasonable precautions the Judge could have taken to avoid creating the appearance of impropriety.

Cynthia Gray, Avoiding the Appearance of Impropriety: With Great Power Comes Great Responsibility, *Judicature*, Volume 89, No. 1, p. 37 (July-August 2005).

2. The Campaign Transaction

Counsel also alleged that the Respondent violated Canon 5(B)(2) and 5 (C)(1) in that he, while a candidate for judicial office, failed to act in a manner “consistent with the integrity and independence of the judiciary....”¹² Specifically, this allegation arises out of the Respondent’s reaction to the disappearance of one of his campaign signs.

The Respondent placed a sign at a local business about two and a half weeks before the general election. Within a day, that sign disappeared, and the Respondent went to the business and angrily confronted a low-level employee about what he evidently viewed as a theft and politically motivated dirty trick. A few days later one local paper, the Valley News, ran a story based on its investigation into the sign matter. This investigation showed - and the October 26th article revealed - that the sign was not stolen by Respondent’s opponents at all. Instead, it had been removed by the business owner, Ms. Ecker, who disapproved of the Respondent’s candidacy. Notwithstanding this public revelation that the sign was not stolen as part of a political dirty trick, the Respondent failed to retract an earlier letter to the editor which he had sent a second local paper, the Vermont Standard. As a result he allowed the paper to publish a letter to the

¹² Canon 5(C)(1) incorporates the requirements of Canon 5(B) into campaigns for candidates for election or reelection as Assistant Judge.

Editor in which he intimated that his opponents had, in fact, stolen the sign as part of a “political dirty trick.....directed at me personally...” See Exhibit 11A.

Later the Respondent tried to accuse the Vermont Standard of making a mistake in publishing his letter, because he claimed he had titled it a “media advisory.” In fact, though, the Respondent was a regular and prolific contributor of letters to the editor, including a second self-laudatory one he sent them about the same time as the media “advisory.” Both were published on the same date, November 2nd. The JCB finds that the Respondent knew or should have known that both of his letters to the Editor would be published, because the Vermont Standard regularly published everything he sent them. In addition, he knew prior to the publication of the letter that in reality the sign had not been stolen but rather was removed by the property owner. Respondent never sent a retraction or correction, leaving the body politic with the impression that his missing campaign sign was stolen by one of his political opponents.

The JCB concludes that the Respondent’s actions in this matter were a violation of Canon 5 in that he failed to maintain the dignity appropriate to judicial office and failed to act in a manner consistent with the integrity of judicial office. It also appears that he may have violated this Canon because instead of investigating the disappearance of his sign, he stormed into the retail office at which it was located and yelled at the clerk on duty. However, these facts were not the basis for the complaint in this case and we therefore make no finding of misconduct on that basis. He sent a letter to the editor within days of the sign’s disappearance, but learned at about that same time (but not later than the 26th of October) through the Valley News article that his sign in fact was not stolen but had been removed by Ms. Ecker. Nevertheless, he allowed the accusatory

letter to be published and even after the election, sent no correction or retraction. These actions were a downward departure from the dignity with which the Respondent and others similarly situated should conduct themselves during a campaign, and the failure to correct the incorrect public accusation is inconsistent with the integrity expected from judicial officers. The JCB concludes that the Respondent violated Canon 5.

Sanctions

The JCB has found the Respondent to be in violation of Canons 1, 2, 3, 4 and 5. Under Rule 6(2) the Board has the responsibility to determine what, if any, disciplinary actions should be taken. In doing so the Board must assess the gravity of the violations proven, the need to promote appropriate judicial conduct, identify misconduct which might recur, and deter future misconduct. The Board must also consider this Respondent's prior history of misconduct. See JCB Docket No. 99.014.

In the instant matter, the JCB believes that a public reprimand would be insufficient to adequately respond to the seriousness of the offenses proven. Simply put, a reprimand alone, given the willful and prolonged nature of this misconduct, the clarity of the conflicts presented, the simplicity of the remedy, and the Respondent's history of one prior violation and public reprimand, would not be adequate to address these new violations nor to restore public confidence in the integrity, impartiality and propriety of the judiciary.


Particularly troubling to this Board is the nature of the Respondent's previous public reprimand wherein he was disciplined for, among other things, utilizing the official stationery of the Windsor Superior Court, identifying him as an assistant judge, for his own personal benefit. In that instance, and those represented by the violations

found here, the judge appears oblivious to the fact that the trappings of his office are a product of public trust. While he seems thoroughly familiar with the authority and entitlements inherent in his judicial position, he either does not understand or is simply unconcerned with the obligations of that public trust. While we have neither the authority nor the ability to imbue in this Respondent the sense of humility and obligation that we seek in our public officials, we can certainly require that he educate himself regarding the minimum standards of judicial comportment due the citizens of this state and required by the Code of Judicial Conduct.

Accordingly, the JCB hereby specifies the following sanctions:

1. The Respondent shall be suspended from the performance of all Assistant Judge duties, whether adjudicative, administrative or otherwise, for a period of six months and until he has resigned from the Board of Emerge and from any other organization doing business with, or seeking or obtaining funding from, Windsor County.
2. The Respondent shall complete a judicial ethics course at his own expense and with the prior approval of the JCB. Upon proof of satisfactory completion of said course, and the Respondent having provided proof to the Board of completion, and upon his completion of the requirements of Paragraph One, above, the Respondent may request the termination of his suspension.
3. The Respondent must immediately recuse himself from any and all County funding decisions for any organization on whose Board or governing body he has served during the preceding five (5) years.

This Order is entered by the Vermont Judicial Conduct Board this 13th day of
May, 2008.



Robert P. Keiner, Esq., Chair
On Behalf of All Members of the Judicial Conduct Board