STATE OF MINNESOTA

IN SUPREME COURT

A14-1871

Inquiry into the Conduct of the
Honorable Alan F. Pendleton

BRIEF AND ADDENDUM OF THE MINNESOTA BOARD ON JUDICIAL STANDARDS

OPPENHEIMER WOLFF & DONNELLY LLP

William J. Egan, #166029
Aaron Mills Scott, #33943X
Laura E. Stecker, #396971
Campbell Mithun Tower, Suite 2000
222 South Ninth Street
Minneapolis, MN 55402-3338
Telephone: (612) 607-7000
wegan@oppenheimer.com
ascott@oppenheimer.com
lstecker@oppenheimer.com

ATTORNEYS FOR RESPONDENT BOARD ON JUDICIAL STANDARDS

KELLEY, WOLTER, & SCOTT, P.A.

Douglas A. Kelley, #54525
Steven E. Wolter, #170707
Centre Village Offices, Suite 2530
431 South Seventh Street
Minneapolis, MN 55415
(612) 371-9090
dkelley@kelleywolter.com
swelter@kelleywolter.com

ATTORNEYS FOR APPELLANT JUDGE ALAN PENDLETON

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LEGAL ISSUES

I. Is the Hearing Panel's (the "Panel") finding of fact that Judge Pendleton intentionally disregarded his constitutional obligation to remain a resident of the Tenth Judicial District from January 15, 2014 through June 2, 2014 clearly erroneous?

The Panel found clear and convincing evidence that:

1. Judge Pendleton voluntarily chose to reside with his second wife in Minnetonka for an indefinite period of time until he and his first wife decided where one of his sons would go to school;

2. Judge Pendleton made no attempts to find housing in the Tenth Judicial District during the period January 15 through June 2, 2014 and intended to abandon his residency within the district during that period of time; and

3. Judge Pendleton intentionally disregarded his constitutional obligation to remain a resident of his judicial district during his continuance in office.

(Add. 15, Panel Findings of Fact ("FF") ¶ 42.)

This issue was raised in the Board's Formal Complaint, presented to the Panel for determination, and preserved for appeal by Judge Pendleton's notice of appeal. Rule 11(d), Rules of the Board on Judicial Standards ("Board Rules").

Most Apposite Cases:

In re Karasov, 805 N.W.2d 255 (Minn. 2011)

Piepho v. Bruns, 652 N.W.2d 40 (Minn. 2002)

Apposite Constitutional Provisions:

Minn. Const. art. VI, § 4

Apposite Rules:

Rules 1.1, 1.2, and 2.1, Minn. Code of Judicial Conduct

II. Is the Panel's finding of fact that Judge Pendleton knowingly made a false statement with the intent to deceive in his May 22, 2014 affidavit of candidacy clearly erroneous?

The Panel found clear and convincing evidence that Judge Pendleton knowingly made a false statement concerning his address in his May 22, 2014 affidavit of candidacy

and that his "testimony that he lacked any intent to deceive [was] incredible." (Add. 16, FF ¶ 44.)

This issue was raised in the Board's Formal Complaint, presented to the Panel for determination, and preserved for appeal by Judge Pendleton's notice of appeal. Board Rule 11(d).

Most Apposite Cases

In re Karasov, 805 N.W.2d 255 (Minn. 2011)

Apposite Rules

Rules 1.1, 1.2, and 4.1(A)(9), Minn. Code of Judicial Conduct

III. Did the Board violate Judge Pendleton's due process rights where the alleged procedural and evidentiary errors have no factual basis, do not implicate due process, and did not prejudice him?

The Panel took evidence on the asserted violations. The Panel did not address the merits of the due process arguments. The issues were preserved for appeal by Judge Pendleton's notice of appeal. Board Rule 11(d).

Most Apposite Cases

In re Karasov, 805 N.W.2d 255 (Minn. 2011)

In re Gillard, 271 N.W.2d 785 (Minn. 1978)

Apposite Constitutional Provisions

U.S. Const. amend. XIV

IV. What discipline is appropriate for Judge Pendleton's intentional violation of the residency requirement in the Minnesota Constitution and his filing, with the intent to deceive, of an affidavit of candidacy containing a knowingly false statement of his residence address?

The Panel recommended:

1. That Judge Pendleton be censured for his violations of the Minnesota Constitution and the Code of Judicial Conduct;

2. That Judge Pendleton be suspended without pay from his position as judge of district court for at least six months (with the individual Panel members proposing suspensions in a range from six to sixteen months); and

3. That the court impose additional sanctions, including but not limited to conditions on the performance of judicial duties and/or civil penalties, that it deems appropriate.

(Add. 17-18, Recommendations ¶¶ 1-3.)

This issue was raised in the Board's Formal Complaint and presented to the Hearing Panel for recommended determination. The Panel's recommendation is before the Court pursuant to Board Rule 14(e).

Most Apposite Cases

In re Karasov, 805 N.W.2d 255 (Minn. 2011)

Apposite Rules

Board Rules 11(b) and 14(e)

STATEMENT OF THE CASE

This judicial discipline case was initiated by a Formal Complaint filed by the Minnesota Board on Judicial Standards (the "Board") pursuant to Board Rule 8(a). The Complaint alleged (1) that Judge Alan Pendleton intentionally disregarded his constitutional obligation to remain a resident of his judicial district during his continuance in office in violation of Article VI, section 4 of the Minnesota Constitution and Rules 1.1, 1.2, and 2.1 of the Minnesota Code of Judicial Conduct (the "Code") and (2) that he made a knowingly false statement of his residence address in an affidavit of candidacy in violation of Rules 1.1, 1.2, and 4.1(A)(9) of the Code. The case was heard by a Panel comprised of Retired Judge Edward Toussaint (presider), Dianne Ward (attorney), and Patrick Sexton (public member).

The Panel found that Judge Pendleton intentionally abandoned his residency in the Tenth Judicial District for a four-and-one-half month period while living outside the district. The Panel also found that Judge Pendleton knowingly misrepresented his residence address on his affidavit of candidacy and that his testimony that he had no intent to deceive in so doing was "incredible." The Panel concluded that these actions violated Article VI, section 4 of the Minnesota Constitution and Rules 1.1, 1.2, 2.1, and 4.1(A)(9) of the Code.

Judge Pendleton claimed that the Board violated his due process rights. The Panel took evidence on the due process claims but did not address their merits.

The Panel recommended that Judge Pendleton be censured and suspended for "a period of at least six months," with individual Panel members proposing suspensions ranging from six to sixteen months.

STATEMENT OF FACTS

Judge Pendleton's Statement of Facts does not cite the Panel's findings and includes assertions he submitted in proposed findings that the Panel rejected. However, the Board believes that the following facts, except those concerning Judge Pendleton's intent and credibility, are undisputed.[1]

Residency Facts

Judge Pendleton has at all relevant times been aware of his obligation under the Minnesota Constitution to reside in the Tenth Judicial District. (Add. 2, FF ¶ 3, Tr. 65.) In 2013, he decided to sell his condominium in the city of Anoka, primarily for financial reasons. (Add. 6, FF ¶¶ 13-14; Tr. 46-49.) The sale closed on November 27, 2013. (Add. 6, FF ¶ 14; Tr. 46-49.) From that date until August 1, 2014, he did not have a place to reside in the Tenth Judicial District and resided instead with his second wife, Kim Pendleton, at her residence in Minnetonka. (Add. 6, FF ¶ 15; Tr. 95; Ex. 20.) Judge Pendleton looked for an apartment beginning November 27, 2013, but his search was

[1] Judge Pendleton claims that the Panel clearly erred in finding that he intended to abandon his residence in the Tenth Judicial District in early 2014 and that he intended to deceive in the affidavit of candidacy. (Add. 15-16, FF ¶¶ 42, 44; App. Br. 19-29, 30-32.) He also assigns as error the Panel's failure to make certain additional findings relating to his defenses. (App. Br. 21-22, 27-28.) He does not assign error to any other Panel findings. Because he failed to provide the Addendum required by Minn. R. Civ. App. P. 130.02(a), the Panel's Findings, Conclusions and Recommendations are included in the Board's Addendum (cited herein as "Add.").

suspended on January 15, 2014 after he learned that his middle son (of three) had been caught with drugs and drug paraphernalia at Anoka High School. (Add. 7, FF ¶¶ 16-18; Tr. 47-48, 57-59, 63, 91-92; Ex. 30.) Thereafter, he and his first wife, Sarah, discussed moving their son to Andover High School, also in Anoka County in the Tenth District, which would have required one of them to relocate to that school district. (Add. 8, FF ¶ 19; Tr. 63-64; Ex. 30.) He deferred his apartment search pending that decision and made no attempt to find housing in the Tenth Judicial District from January 15 through June 2, 2014. (Add. 15-16, FF ¶¶ 42; Tr. 63-64.) The Panel found that during this time he "intended to abandon his residency within the district while addressing his familial issues." (Add. 15, FF ¶ 42.)

Judge Pendleton admitted that he made a "choice" not to search for new housing in his district and did not explore any short-term housing options during this time period. (Add. 8, FF ¶ 21; Tr. 63-65.) He and Sarah did not have a deadline for deciding whether to transfer their son to Andover, although he expected they would decide near the end of the school year. (Add. 8, FF ¶ 22; Tr. 127-32.) He had the option to secure housing in the Andover school district in case they decided to transfer his son, but he chose not to. (Add. 8, FF ¶ 21; Tr. 64.)

On June 2, 2014, while Judge Pendleton was residing in the Minnetonka home, an incident occurred involving his stepdaughter and his youngest son, who was visiting. (Add. 9, FF ¶ 23.) The police were called, leading to a Hennepin County Deputy Attorney's notification to the Board that Judge Pendleton reportedly was residing outside his judicial district. (Tr. 70; Ex. 19.) Immediately after this incident, Judge Pendleton

renewed his search for housing in his district. He found an apartment in the city of Ramsey within three days. (Add. 9, FF ¶ 24; Tr. 31, 98-101.) On August 1, he signed a lease and moved back to his district. (*Id.*)

Judge Pendleton's Communications with the Board and Fellow Judges Before 2014.

In support of his contention that he always intended to comply with the Minnesota Constitution and the Code, Judge Pendleton offered extensive evidence of his communications with David Paull, the Board's Executive Secretary until January 3, 2014. (Add. 4, FF ¶ 7; Ex. 6.) From 1999 to 2010, he made numerous inquiries to Paull regarding ethical issues. (Add. 20-21, Exs. 3, 7; Tr. 38, 53-59, 66; Exs. 1-2, 4-5.) In August 2005, he advised Paull of his impending divorce and his intent to marry or live with Kim, who resided in Minnetonka. Judge Pendleton knew that he must maintain a residence in his district. (Add. 4, FF ¶ 7; Add. 20, Ex. 3; Tr. 57-58.) Paull told him, "I have known judges with a similar problem and that they have always maintained a residence, either owned or rented, in the county of election." (*Id.*)

In November 2010, Judge Pendleton again contacted Paull about his residence arrangement in light of the residency case recently filed by the Board against Judge Patricia Karasov. (Add. 21, Ex. 7; Add. 5, FF ¶ 11; Tr. 81-82) Paull responded that Judge Pendleton's circumstance was different from Karasov's because Karasov had rented out her Hennepin County residence whereas Judge Pendleton, as they had discussed many times, stayed with Kim in Minnetonka on weekends and at his townhouse in Blaine during the week. (*Id.*)

Also in November 2010, Judge Pendleton emailed his fellow Anoka County judges, the district court administrator, and the Anoka County court administrator to address what he characterized as "a persistent rumor that I do not reside in the district." (Add. 6, FF ¶ 12; Add. 22, Ex. 8; Tr. 82-83.) The email stated that for the past two years, he and his wife had maintained separate residences and that, according to Paull, he was "in full compliance with all residency requirements." (*Id.*)

Judge Pendleton's Concealment of His Residence in Minnetonka

"Judge Pendleton kept very private the fact that he did not have a home in the 10th Judicial District between November 27, 2013, and August 1, 2014." (Add. 9, FF ¶ 25; Tr. 66-67.) Despite his numerous previous discussions with Paull regarding ethical issues, including at least two regarding the judicial residency requirement, he did not seek advice from Paull, Paull's successor Tom Vasaly, or anyone else between November 2013 and August 2014. (*Id.*) Nor did he tell any fellow judge that he was staying full time in Minnetonka with Kim. (*Id.*) He testified that the only people at the courthouse who knew about his living arrangements were his court reporter, his law clerk, and the guardian ad litem (GAL) manager. (*Id.*) The GAL manager, however, denied knowing that Judge Pendleton was living in Minnetonka. (*Id.*)

Michael Moriarity, the Tenth Judicial District court administrator, maintains a confidential directory of judges' addresses and telephone numbers, and his office sends emails three or four times per year requesting updated information for the list. (Add. 10, FF ¶ 26; Tr. 169.) In 2012, when Judge Pendleton moved into the Anoka condominium, he promptly notified Moriarity of his new address. (Add. 10, FF ¶ 27; Ex. 33.) He did

not notify Moriarity of his address change when he was living in Minnetonka despite receiving requests for updated information on December 31, 2013, March 31, 2014, and July 14, 2014. (Add. 10, FF ¶ 28; Exs. 40-42.) On August 7, 2014, less than one week after moving into his new apartment in Ramsey, he sent an email to Moriarity notifying him of his new address. (Add. 11, FF ¶ 29; Exs. 44-45.) On October 1, 2014, Judge Pendleton received an email attaching the directory and requesting updates; he immediately reported that his address had not been updated. (*Id.*)

Affidavit of Candidacy Facts

On May 22, 2014, while living full time in Minnetonka with Kim, Judge Pendleton filed an affidavit of candidacy indicating his intent to run for reelection to judicial office in November 2014. (Add. 11, FF ¶ 30; Add. 19, Ex. 13.) The affidavit includes a space for a residential address, the completion of which is optional for judges.[2] (*Id.*) He wrote "2200 2nd Ave. N. #205, Anoka MN 55303" in the field for Residence Address—the address of the Anoka condominium at which he had not resided since November 2013. (*Id.*; Tr. 73.) He testified, "I knew that that was not an accurate statement . . . ." (Add. 12, FF ¶ 32; Tr. 74.)

The Panel's Findings

The Panel found by clear and convincing evidence that Judge Pendleton was not a resident of his judicial district from January 15 to June 2, 2014 and that "Judge Pendleton intentionally disregarded his constitutional obligation to remain a resident of his judicial district during his continuance in office." (Add. 16, FF ¶ 42.) The Panel rejected Judge

[2] *See* Minn. Stat. § 204B.06, subd. 1b(d) (2014).

Pendleton's testimony that he intended to remain a resident of his district when he was living in Minnetonka and that his stay in Minnetonka was temporary pending the decision on which high school his middle son would attend. (*Id.*; Tr. 95-97, 100; Ex. 16.) The Panel accepted Judge Pendleton's testimony regarding his search for an apartment in his district from November 27, 2013 to January 15, 2014 and from June 3 to July 31, 2014, and concluded that there was insufficient evidence of a residency violation during these periods. (Add. 7, 9, 16, FF ¶¶ 17, 24, 43.)[3]

As to the May 22, 2014 affidavit of candidacy, the Panel found by clear and convincing evidence that Judge Pendleton knowingly made a false statement in the affidavit. (Add. 16, FF ¶ 44.) The Panel rejected Judge Pendleton's proposed finding that he had made a spontaneous, split second decision to fill in the address of the Anoka condominium in the affidavit. (Pendleton Proposed FF ¶ 33.) The Panel found that Judge Pendleton's testimony that he lacked any intent to deceive was incredible when viewed in the context of the whole record. (Add. 16, FF ¶ 44.)

SUMMARY OF ARGUMENT

The Panel found that Judge Pendleton intentionally disregarded his constitutional obligation to remain a resident of his judicial district. Specifically, the Panel found that

[3] With regard to the latter period of time, the Board believes that once a judge becomes a resident of another district, the judge cannot regain residency in the judge's original district based merely on intent and pursuit of housing in the original district. *See* Minn. Stat. § 200.031(i) (2014) ("[T]he mere intention to acquire a new residence, is not sufficient to acquire a new residence, unless the individual moves to that location. . . ."). However, the Board also believes that it is not necessary for the Court to resolve this issue in the present case because the Panel's recommended discipline is appropriate regardless of where Judge Pendleton was a resident during the period June 3 to July 31, 2014.

he abandoned his residency in the Tenth Judicial District during the four-and-one-half-month period in which he made no attempts to find housing in his district while living in Minnetonka. The Panel also found that Judge Pendleton knowingly misrepresented his residence address on his affidavit of candidacy and that his testimony that he had no intent to deceive was incredible.

Judge Pendleton argues that the Panel erred because it did not believe his assertions of subjective intent, going so far as to accuse the Panel of being "disingenuous." (App. Br. 29, n.4.) The Panel was not obligated to believe him. On witness credibility, the Court defers to the finder of fact. *In re Miera*, 426 N.W.2d 850, 854 (Minn. 1988) ("[W]e are sensitive to the fact the panel had the opportunity to view the witnesses as they testified and is therefore in a superior position to assess credibility."). As the Court articulated in an attorney discipline matter, "We . . . give great deference to the referee's findings and will not reverse those findings unless they are clearly erroneous, especially when the referee's findings rest on disputed testimony or in part on credibility, demeanor, and sincerity." *In re Lyons*, 780 N.W.2d 629, 635 (Minn. 2010). The Panel's findings concerning Judge Pendleton's intent to abandon his residency, intent to deceive, and lack of credibility are fully supported by the evidence.

Judge Pendleton's allegations that the Board violated his procedural due process rights are without merit. There was nothing improper about the Board's actions, his concerns do not implicate due process, and the alleged violations did not impair the fairness of the Panel hearing.

The Panel recommended that Judge Pendleton be suspended for at least six months, with the individual Panel members proposing suspensions in a range from six to sixteen months. The Board believes this six to sixteen month range is appropriate, with the qualification that the suspension should be at least eight months.

Four years ago, the Court stated, when imposing a six month suspension on Judge Karasov, "By this sanction, we convey our lack of tolerance for a judge's failure to comply with her constitutional obligations and for a judge's failure to act in a candid and honest manner when responding to the Board." *In re Karasov*, 805 N.W.2d 255, 277 (Minn. 2011). Judge Pendleton's misconduct is more serious than Judge Karasov's. Both of their actions were intentional, but Judge Pendleton's residency violation was a flagrant violation of the Court's directive in *Karasov*. In addition, Judge Pendleton intended to deceive the public concerning his actual residency by intentionally falsifying his address in his affidavit of candidacy, conduct that is more serious than Judge Karasov's failure to respond to the Board in a candid manner. Therefore, Judge Pendleton should receive greater discipline than Judge Karasov.

STANDARDS OF REVIEW

The Panel's findings of fact are subject to the clearly erroneous standard of review. *Karasov*, 805 N.W.2d at 263; Board Rule 14(e). To conclude that findings are clearly erroneous, the Court must be "left with the definite and firm conviction that a mistake has been made," *Lyons*, 780 N.W.2d at 635 (quoting *Gjovik v. Strope*, 401 N.W.2d 664, 667 (Minn. 1987)), and that the Panel's findings of fact, including its factual findings on ultimate issues in this case (Add. 15-16, FF ¶¶ 42-44), are not supported by

clear and convincing evidence. Board Rule 10(b)(2). Clear and convincing evidence requires that "the truth of the facts asserted [be] 'highly probable.'" *Karasov*, 805 N.W.2d at 263.

As to allegations of due process violations, the burden of proof is on the judge. *Id.*

The Court independently assesses whether the established facts constitute Code violations. *Id.*; Board Rule 14(e). The Court "afford[s] no particular deference" to the recommended sanction of the Panel or the Board and independently reviews the record to determine the discipline, if any, to impose. *Karasov*, 805 N.W.2d at 272 (quoting *In re Blakely*, 772 N.W.2d 516, 523 (Minn. 2009)).

ARGUMENT

I. THE HEARING PANEL'S FINDING THAT JUDGE PENDLETON WAS NOT A RESIDENT OF THE TENTH JUDICIAL DISTRICT FROM JANUARY 15 THROUGH JUNE 2, 2014 IS FULLY SUPPORTED BY THE EVIDENCE AND IS NOT CLEARLY ERRONEOUS.

The Panel found clear and convincing evidence that Judge Pendleton was not a resident of his judicial district from January 15, 2014 through June 2, 2014, and that he voluntarily resided with his second wife in Minnetonka for an indefinite period of time until he and his first wife decided where his middle son would go to school. (Add. 15-16, FF ¶ 42; Tr. 47-48, 57-59, 63, 91-92, 95; Exs. 20, 30.) The Panel found that "Judge Pendleton intentionally disregarded his constitutional obligation to remain a resident of his judicial district during his continuance in office." (*Id.*)

The Panel's finding is fully supported by the evidence. Judge Pendleton voluntarily sold his condominium, leaving himself with nowhere to live in the Tenth

Judicial District. (Tr. 95; Ex. 20.) For a four-and-one-half-month period, he failed to make any effort to find a place to reside within his district. (Tr. 63-64.) After hearing the testimony, assessing witness credibility, and evaluating the evidence, the Panel correctly determined that Judge Pendleton abandoned his residence within the Tenth Judicial District, violating the Minnesota Constitution and Code of Judicial Conduct.

A. The Minnesota Constitution Requires Judges To Reside Within Their Judicial Districts Throughout Their Terms In Office.

The Minnesota Constitution provides, "Each judge of the district court in any district shall be a resident of that district at the time of his selection and during his continuance in office." Minn. Const. art. VI, § 4. A judge's compliance with the Minnesota Constitution is of utmost importance. The public at large and parties appearing in court could legitimately question whether a judge will faithfully apply Minnesota's constitutional provisions if that judge does not conform his or her own conduct to the constitutional requirements for judges. *Karasov*, 805 N.W.2d at 276 (citing *In re Ginsberg*, 690 N.W.2d 539, 549 (Minn. 2004)).

B. The Panel's Findings That Judge Pendleton Lacked Both Physical Presence And Intent To Reside In The Tenth Judicial District From January 15 To June 2, 2014 Are Not Clearly Erroneous.

The evaluation of whether a judge is in compliance with the residency requirement presents "largely questions of fact." *Karasov*, 805 N.W.2d at 265 (quoting *Studer v. Kiffmeyer*, 712 N.W.2d 552, 558 (Minn. 2006)). In applying the facts to the constitutional requirement, "the foremost considerations with respect to residency in the election context are physical presence and intent." *Id.* (quoting *Piepho v. Bruns*, 652

N.W.2d 40, 44-45 (Minn. 2002)). "The two factors 'inform' each other and 'neither factor is determinative.'" *Id.* (quoting *Piepho*, 652 N.W.2d at 44).

1. It is undisputed that Judge Pendleton failed to meet the "physical presence" factor for a period of more than four-and-one-half months.

The *Karasov* court framed its factual inquiry on physical presence as whether the judge has "a place to live" within the judicial district during the relevant period, where the judge in fact lives, and whether and when the judge had a property interest, or at least a formal agreement to establish a property interest, at "a physical location in the district at which to establish residency." 805 N.W.2d at 266. The Panel found:

> Beginning on the November 27, 2013, closing date, and until he moved into an apartment on August 1, 2014, Judge Pendleton did not have a place to live in the 10th Judicial District. He stayed with his wife at her residence in the City of Minnetonka in Hennepin County, outside the 10th Judicial District, from November 27, 2013, until July 31, 2014.

(Add. 6, FF ¶ 15.) The Panel found that Judge Pendleton looked for an apartment between November 27, 2013 and January 15, 2014 and that he renewed his search for housing in his district after the June 2, 2014 domestic incident involving his youngest son. (Add. 7, 9, FF ¶¶ 16-18, 24; Tr. 31, 47-48, 57-59, 63, 91-92; 98, 101.)

It is undisputed that since Judge Pendleton held neither an actual nor a potential place to live in the Tenth Judicial District from January 15 through June 2, 2014, he failed to meet the "physical presence" component of the Court's test for judicial residence. *Karasov*, 805 N.W.2d at 264; App. Br. 18 ("The crux of the instant dispute in this case turns on Judge Pendleton's intent.").

2. The Panel did not clearly err in finding that Judge Pendleton intended to abandon his residence in the Tenth Judicial District from January 15 to June 2, 2014.

The Panel found:

> Judge Pendleton suspended his housing search completely between January 15, 2014, and June 2, 2014. Judge Pendleton asserts that he intended to remain a resident of the 10th Judicial District during this time, but has presented no evidence corroborating that intent. Rather, the evidence supports the inference that he intended to abandon his residency within the district while addressing his familial issues. Judge Pendleton voluntarily decided to live with his second wife in Minnetonka for an indefinite period of time until he and his first wife figured out where his son would go to school.

(Add. 15, FF ¶ 42.)

In making these findings regarding Judge Pendleton's intent, the Panel considered, among other things, the reason he ceased to have a place to live within his district (Add. 6, FF ¶ 14; Tr. 46-49), his failure to take any steps to locate a new residence for four-and-one-half months (Add. 7-9, FF ¶¶ 17-24; Tr. 63-65, 98-101, 127-32; Ex. 30), and the information he conveyed to others, or omitted, about where he was living (Add. 9-12, FF ¶¶ 25-32; Add. 19, Ex. 13; Tr. 63-67, 73-74, 109; Exs. 33, 40-42, 44-45). The Panel assessed Judge Pendleton's demeanor and credibility in considering his assertion that he has considered himself a Tenth Judicial District resident continuously since 1995. (Add. 3, FF ¶ 4; Tr. 118-20.)

This Court defers to the finder of fact when it comes to witness credibility. *In re Miera*, 426 N.W.2d at 854. The Panel's finding that Judge Pendleton intended to abandon his residence within his district is fully supported by the evidence and Minnesota law.

In determining residence, "intent" refers to intent to live at and remain at a location. *Karasov*, 805 N.W.2d at 264. Intent is determined by more than simply what a judge claims; the Court looks to a judge's "conduct during the time in question to determine . . . intent." *Id.*, at 266 n.7; *see also In re Hanssens*, 821 A.2d 1247, 1252-53 (Pa. Commw. Ct. 2003) ("Intent is the actual state of facts, not what one declares them to be. Thus, a declaration of intent as to domicile that is self-serving and not followed by acts that are in accord with the declaration will not be regarded as conclusive."); *Mobley v. Armstrong*, 978 S.W.2d 307, 310 (Ky. 1998) ("Such an intention is a mere floating one, and is not decisive of the question.").

a. Judge Pendleton voluntarily chose to live outside the Tenth Judicial District for over four-and-one-half months.

The Panel found that Judge Pendleton "voluntarily decided to live with his second wife in Minnetonka" after selling his condominium in Anoka. (Add. 6, 15-16, FF ¶¶ 14, 42.) He listed the condominium for sale in early October 2013 and closed on its sale on November 27, 2013. (Add. 6, FF ¶ 14; Tr. 46-49.) From the date the sale closed until August 1, 2014 when he moved into an apartment, Judge Pendleton did not have a place to live in his district. (Add. 6, FF ¶ 15; Tr. 95.) Judge Pendleton does not contest these findings.

Judge Pendleton erroneously claims that he "unexpectedly found himself without a home in his judicial district for a period of time while he worked to address pressing family problems of extreme magnitude." (App. Br. 19.) On the contrary, Judge Pendleton voluntarily sold his condominium primarily for financial reasons. (Add. 6, FF

¶¶ 13-14; Tr. 46-49.) His middle son's incident at school occurred seven weeks later. (Add. 7, FF ¶ 18; Tr. 63-64; Ex. 30.)

Judge Pendleton claims that "an extremely serious family emergency" excuses his inactivity in looking for alternate housing. (App. Br. 24-25.) There is no evidence that this claimed four-and-one-half month emergency kept him from work or other activities, and continuing to live in Minnetonka was of no benefit to his middle son, who lived with his mother in Anoka County. It is undisputed that "[a]lthough he initially made efforts to retain new housing [within the Tenth Judicial District], Judge Pendleton suspended his housing search completely between January 15, 2014 and June 2, 2014." (Add. 15, FF ¶ 42; Tr. 63.)

Judge Pendleton remained in Minnetonka for his own convenience, not to address a family emergency. (Tr. 64.) He conceded that securing housing in Andover (within the Tenth Judicial District) would have been an option, but he testified "that he did not think that was a good option because he would be inconveniently located if they decided not to have his son transfer schools." (Add. 8, FF ¶ 21; Tr. 64.) However, Rule 2.1 of the Code expressly states, "The duties of judicial office, as prescribed by law, shall take precedence over all of a judge's personal and extrajudicial activities."

The indefinite nature of Judge Pendleton's stay in Minnetonka was inconsistent with maintaining residency in his district. *See Karasov*, 805 N.W.2d at 264 (citing Minn. Stat. § 200.031). The Panel found that he "voluntarily decided to live with his second wife in Minnetonka for an indefinite period of time until he and his first wife figured out where his son would go to school." (Add. 15-16, FF ¶ 42.) That finding is fully

supported by Judge Pendleton's testimony that he and his first wife did not have a deadline for making a decision whether to transfer their son to a different school. (Add. 8, FF ¶ 22; Tr. 127.)

Judge Pendleton cites *People v. Owers*, 29 Colo. 535, 69 P. 515 (1902), in arguing that indefinite departures from judicial districts are permissible. (App. Br. 23.) In *Owers*, a judge had severe health problems making it necessary for him to live at a lower elevation than his judicial district. *Id.* at 519. Unlike the judge in *Owers*, "Judge Pendleton admits he made a 'choice' not to search for new housing in the 10th Judicial District" (Add. 8, FF ¶ 21; Tr. 64), a decision based not on necessity but personal convenience.

Judge Pendleton's decision to reside outside his district was similar to that of Judge Karasov. In that case, the Court observed:

> This is not a case where a judge, because of an emergency or other unforeseen circumstance, unexpectedly finds herself without a home in her judicial district. To the contrary, Judge Karasov deliberately chose to live outside her judicial district for an extended period of time.

Id. Like Judge Karasov, Judge Pendleton had "ample time to secure new housing" while living outside his judicial district and failed to take "reasonable steps to find another place to live in [his] district" despite his professed intention to return. *Karasov*, 805 N.W.2d at 266-67. Under *Karasov*, Judge Pendleton's voluntary choice to live out of his district for an indefinite period of time while making no attempt to locate a residence in his district fully supports the Panel's finding that he intended to abandon his residency there. (Add. 6, 15-16, FF ¶¶ 14-15, 42; Tr. 46-49, 95.)

Judge Pendleton's voluntary decision to live outside his district may be compared with the plight of legislators who, due to redistricting, find themselves involuntarily living outside their districts. Such legislators are required to promptly move into the new boundaries of their district, notwithstanding the inconvenience to them and their families. *See Karasov*, 805 N.W.2d at 265 n.5. Judges must be held to the same standard.

b. Judge Pendleton's concealment of his residency in Minnetonka shows that he knew he was not in compliance with the residency requirement.

In *Karasov*, this Court considered what Judge Karasov told others about her housing arrangements during the relevant time period. *Karasov*, 805 N.W.2d at 267. The Panel found that Judge Pendleton "kept very private the fact that he did not have a home in the 10th Judicial District between November 27, 2013 and August 1, 2014." (Add. 9, FF ¶ 25.) He refrained from sharing that information with Paull or his fellow judges. (*Id.*; Tr. 66-67.) He did not notify the Tenth District court administrator of his new address after moving out of his Anoka condominium or respond to multiple requests for updated directory contact information. (Add. 9-10, FF ¶¶ 25-29; Tr. 170-75.) The Panel found: "Judge Pendleton's failure to disclose his living situation during this time period [January 15 through June 2, 2014]—particularly in light of his previous disclosures to both his colleagues and to Paull—belies Judge Pendleton's assertion that he intended to remain a resident of the 10th Judicial District." (Add. 15-16, FF ¶ 42.)

Judge Pendleton asserts that he did not ask Paull or anyone else for advice about his living situation after he moved to Minnetonka based on his understanding of *Karasov*. (Tr. 60-61.) The Panel was right to reject this assertion. First, no one who was sincerely

interested in complying with the residency requirement would seek advisory opinions on absences of two days a week but fail to inquire about an absence of seven days a week, for an indefinite but lengthy period. Second, no reading of *Karasov* permits the interpretation that residency is determined by subjective intent alone. *Karasov* clearly held that residence was determined by *both* intent and physical presence. Judge Pendleton concedes that under Karasov, intent is not "singularly determinative of residency" (App. Br. 17) and accepts that "[a]ctions are generally assigned greater weight than words. . . ." (App. Br. 19). The opinion also stressed the importance of a judge's duty to comply with the residence requirement in the Constitution. *Karasov*, 805 N.W.2d at 268 ("By not residing in her judicial district during this period, Judge Karasov created the appearance of impropriety and did not act in a manner that promotes public confidence in the integrity of the judiciary because she acted in a manner suggesting that constitutional requirements do not apply to her.) Judge Pendleton was fully aware of *Karasov* but chose to ignore it. (Tr. 60.)

Judge Pendleton harshly accuses the Panel of being "further disingenuous" because, he asserts, his failure to ask for advice applies equally to the two periods for which the Panel found no violation. (App. Br. 29, n.4.) Thus, he attempts to use the Panel's scrupulous fairness to him as a basis for attacking the Panel's decision. Judge Pendleton's accusation is without merit. When he first moved to Minnetonka, Judge Pendleton's failure to ask for advice was not determinative because he was looking for alternative housing and his departure from his district was still only short-term. As to the

last two months of his Minnetonka stay, there would have been no need for him to ask for advice after he had already located an apartment in his district.

Judge Pendleton argues that he was merely "maintaining his personal privacy." (App. Br. 28-29.) However, he did not hesitate to disclose his address when he was living in his district. When he moved into his Anoka condominium in 2012, he promptly notified Tenth District Court Administration. (Add. 10, FF ¶ 27; Tr. 162; Ex. 33.) In August 2014, less than a week after moving into his Ramsey apartment, he promptly notified district court administration of his new address. (Add. 10, FF ¶ 29; Tr. 175-76; Ex. 43.) He only elected to "maintain his personal privacy" during the eight months he lived in Minnetonka, failing to respond to repeated requests for updated contact information from district court administration. (Add. 10, FF ¶ 28; Exs. 40, 42; Tr. 170-74.)

Judge Pendleton's pattern of behavior is clear; he ignored requests for his address while living outside his district, but provided prompt updates when he lived in the district. After weighing the facts and Judge Pendleton's credibility, the Panel correctly determined that he intended to abandon his residency in the Tenth Judicial District during January 15 through June 2, 2014. (Add. 15-16, FF ¶ 42.)

c. Judge Pendleton's attempts to find a residence in his district at the beginning and end of his stay in Minnetonka do not show that he was a resident of his district during the middle period of his stay there.

Judge Pendleton argues that his decision to move his possessions into a storage unit in November 2013 and his attempts to find an apartment in December 2013 and June

2014 prove that he intended to remain a resident of his district throughout his stay in Minnetonka. (App. Br. 21-22, 26-28.) Judge Pendleton's intent at the beginning and end of his stay in Minnetonka says nothing about his intent during the four-and-one-half months he did not attempt to find an apartment.

Judge Pendleton criticizes the Panel for not making findings regarding his decision to move possessions into a storage unit while living in Minnetonka. His decision, however, shows only that he had nowhere else to put them after selling his condominium. The fact that he moved the possessions to the Hopkins Storage Mart (Tr. 87; Ex. 12.), only a short distance from the Minnetonka home where he was residing, provides no clear evidence regarding his intent. The notation on a November 27, 2013 invoice by an unidentified moving company employee, "Customer will call soon to move back to Anoka," shows only what Judge Pendleton told the employee. (App. Br. 21-22; Ex. 12.) Judge Pendleton did not in fact "call soon" to move back to Anoka. The Panel found that his intent when he first moved out of his apartment was not his intent seven weeks later. (Add. 16, FF ¶ 43.)

Judge Pendleton chides the Panel for its alleged "casual disregard of [his] rental of an in-district apartment" (App. Br. 27), but the Panel did not disregard his rental of the apartment. (Add. 9, FF ¶ 24.) The Panel fully considered that fact and concluded that the residency violation ended as soon as Judge Pendleton resumed his search for a place to live in his district. (Add. 16, FF ¶ 43.) However, the "fact that Judge Pendleton subsequently renewed his intent to reside in the district [did] not persuade the panel that

he intended to maintain a resident throughout" the time he resided in Minnetonka. (Add. 16, FF ¶ 42.)

The Panel found that Judge Pendleton failed to maintain the status of "resident" of the Tenth Judicial District "during his continuance in office." (*Id.*) That finding is based on clear and convincing evidence, involves credibility determinations, and is not clearly erroneous. Like Judge Karasov, Judge Pendleton clearly violated the Code of Judicial Conduct and the Minnesota Constitution.

II. THE PANEL'S FINDING THAT JUDGE PENDLETON KNOWINGLY MADE A FALSE STATEMENT WITH INTENT TO DECEIVE IN HIS MAY 22, 2014 AFFIDAVIT OF CANDIDACY IS FULLY SUPPORTED BY THE EVIDENCE AND WAS NOT CLEARLY ERRONEOUS.

Judge Pendleton admits that he made a knowingly inaccurate statement in his May 22, 2014 affidavit of candidacy, but denies that he was attempting to deceive or mislead anyone. (App. Br. 30-31; Tr. 74, 146.) He testified that when he filled in the false address, he considered his wife's Minnetonka home, where he had been living the previous six months, as "not unlike being in a hotel." (Tr. 146.)

The Panel found that the statement was knowingly false and that Judge Pendleton's implausible testimony that he lacked an intent to deceive was incredible. (Add. 16, FF ¶ 44.) Particular deference is paid to findings based on witness credibility, demeanor, and sincerity. *In re Miera*, 426 N.W.2d at 854; *Lyons*, 780 N.W.2d at 635. Judge Pendleton has failed to show that this finding is clearly erroneous. *Karasov*, 805 N.W.2d at 263.

At the time Judge Pendleton wrote "2200 2nd Ave N # 205, Anoka, MN" as his "Residence Address" on the affidavit, it had not been his address for six months. (Add. 16, FF ¶ 43; Add. 19, Ex. 13; Tr. 73.) He admitted, "I knew that that was not an accurate statement." (Tr. 74.) He admits that this action was a violation of Rules 1.1 and 1.2 of the Code, but denies that it was "a knowingly false" statement in violation Rule 4.1(A)(9) which prohibits a judge from knowingly making false or misleading campaign statements. (App. Br. 30.)

Judge Pendleton's defense that he did not violate Rule 4.1(A)(9) is a nonstarter because he has admitted conduct that violates the rule. He admits, as he must, that he listed an inaccurate address on the affidavit of candidacy and that he knew that the address was inaccurate when he completed the form. (Tr. 74, 106.) That is all that is required to constitute a violation of Rule 4.1(A)(9). Further, intent to deceive "may be maintained by proof of a false statement, made as of the party's own knowledge, if the thing stated is not merely a matter of opinion, estimate, or judgment, but is susceptible of actual knowledge. In such a case it is not necessary to make proof of an actual intent to deceive." *In re Czarnik*, 759 N.W.2d 217, 222 (Minn. 2009) (quoting *Saupe v. St. Paul Trust Co.*, 170 Minn. 366, 369, 212 N.W. 892, 893 (1927)). Judge Pendleton's motive and intent are relevant to assessing the seriousness of his misconduct. For the reasons discussed below, the Panel found that Judge Pendleton's claim that he was not attempting to deceive or mislead anyone was incredible. (Add. 16, FF ¶ 44.)

A. Judge Pendleton Made The False Statement To Deceive The Public Concerning The Location Of His Residence.

What Judge Pendleton characterized as a "spontaneous, split-second decision" made without the intent to deceive anyone was, in fact, part of a long-running pattern in which he concealed the fact that he was residing outside the Tenth Judicial District. (Tr. 74.) He presented "no evidence that [he] made any attempt to correct the inaccurate affidavit of candidacy." (Add. 12, FF ¶ 32; Ex. 14.) He did not disclose his living situation from January 15, 2014 to June 2, 2014 in contrast with his previous disclosures to both his colleagues and to Paull. (Add. 15-16, FF ¶ 42.) He concealed his address from district court administration. (*See* Add. 8, FF ¶¶ 20-22.)

If he indeed had no intent to deceive when he filed his affidavit of candidacy, he would not have used an outdated residence address. Instead, he could have left the residence address section blank or listed his Minnetonka address with a notation claiming to be a resident of the Tenth Judicial District. (Tr. 133.) Alternatively, he could have moved back to his district before the close of the filing period and listed his new address. He did none of those things. Instead, he wrote in a false residence address.

Judge Pendleton's implausible explanation and his pattern of conduct, both before and after he filed the affidavit, demonstrate his deceptive intent. Moreover, his admission that he knew the statement of his residence address was false at the time he made it is of itself proof of an intent to deceive.

1. Judge Pendleton never corrected the false statement in his affidavit of candidacy.

Judge Pendleton presented "no evidence that [he] made any attempt to correct the inaccurate affidavit of candidacy." (Add. 12, FF ¶ 32; Ex. 14.) He does not challenge this finding. His failure to take any steps to correct a knowingly false statement that was allegedly "spontaneous" demonstrates that the false statement was, in fact, made to conceal his true residential address.

2. Judge Pendleton's long-term pattern of conduct demonstrates intent to conceal his true residence address.

Judge Pendleton asserts that "[h]e often discussed his personal situation with the Board's Executive Secretary and received assurances that his living arrangements complied with ethical requirements respecting judicial residency." (Response to the Formal Complaint ¶ 1; *see also id.* ¶ 6; Add. 19-22, Exs. 13, 3, 7, 8; Tr. 17; Exs. 1-2, 4-6, 10.) He supports this contention by tracing a pattern of his discussions with Paull. (Add. 7, FF ¶ 7; Add. 19-22, Exs. 13, 3, 7, 8; Tr. 53-56; Exs. 1-2, 4-6.) He and Paull had been "friends for many years." (Tr. 43; Ex. 6.) He and Paull discussed his living arrangements with Kim "multiple times." (Add. 21, Ex. 7; Tr. 58.) In 2005, he contacted Paull seeking advice on residency in relation to his anticipated marriage or cohabitation with Kim in Minnetonka. (Add. 4, FF ¶ 7; Add. 20, Ex. 3; Tr. 54.) In 2010, he called Paull and asked for clarification on the *Karasov* matter, which had recently become public. (Add. 5, FF ¶ 11; Tr. 57-58.)

This evidence, offered by Judge Pendleton to show a pattern of scrupulous compliance, actually demonstrates his intent to conceal. One exercising scrupulous

compliance would not conceal one's his living arrangements from January 15, 2014 to June 2, 2014, particularly in light of his previous disclosures to both his colleagues and to Paull. (Add. 15-16, FF ¶ 42.) As the Panel found, his silence belies his assertion now that he intended to remain a resident of his district. (*Id.*)

3. Judge Pendleton concealed his address from district court administration.

Judge Pendleton's failure to update his court directory shows that his listing his former address on the affidavit of candidacy was intentional. During the eight months he resided in Minnetonka, Judge Pendleton did not respond to repeated requests from the district court administrator to update his address. (*See* Add. 8, FF ¶¶ 20-22.) During this period, the district court directory continued to list his former Anoka condominium address. This was the same address Judge Pendleton listed on the affidavit of candidacy. (Add. 10, FF ¶¶ 26-28; Ex. 43.) It was only after he moved to his new apartment in Ramsey that he updated his address. (Tr. 175-76; Ex. 43.)

4. Judge Pendleton's argument that he falsified his residence address because of stress from family issues is not supported by the evidence.

Judge Pendleton's brief claims that when he filed the affidavit of candidacy, he was "distracted, extremely distressed and intensely focused on resolving serious and ongoing familial issues involving his 16 year-old son." (App. Br. 31.) At the hearing, he did not attribute his false statement to stress from family issues but rather to being in a hurry, a fact reiterated in his briefs and proposed findings to the Panel. (Tr. 72-74, 145-

46; App. Br. 11-12; Pendleton Post-Hearing Reply Mem. 13; Pendleton Proposed Findings ¶¶ 33, 34.) The Panel declined to make these findings.

When Judge Pendleton filled out the affidavit of candidacy, his residency outside the district would have been foremost in his mind. He had contacted Paull twice about the *Karasov* case and had been confronted directly by Judge Karasov herself as to his residency. (Tr. 81-82.) To quell rumors about his residency, he had written to his colleagues defending his living arrangements. (Add. 22, Ex. 8; Tr. 82-83.) When he filled out the affidavit, he had been secretly living outside his district for months in direct disregard of *Karasov*. Judge Pendleton's testimony that he made a "spontaneous, split-second decision" to list his former address on the form was found to be "incredible" for good reason. (Tr. 74, 146.)

5. Judge Pendleton's admission that he knew the statement of his residence address was false at the time he made it is of itself proof of an intent to deceive.

This Court has rejected the argument that a person may make a knowingly false statement, as Judge Pendleton admits he did, without intent to deceive. In *In re Czarnik*, 759 N.W.2d 217, 222 (Minn. 2009), the Court rejected a lawyer's argument that "any false representations were not made with an intent to deceive." The Court explained:

> [I]ntent to deceive . . . may be maintained by proof of a false statement, made as of the party's own knowledge, if the thing stated is not merely a matter of opinion, estimate, or judgment, but is susceptible of actual knowledge. In such a case it is not necessary to make proof of an actual intent to deceive.

Id. (quoting *Saupe v. St. Paul Trust Co.*, 177 Minn. 366, 369, 212 N.W. 892, 893 (1927)).

Czarnik was found to have "made false statements with knowledge of their falsity," the Court held "nothing beyond these findings [was required] to demonstrate that Czarnik acted with intent to deceive." *Id.*

The same analysis applies here. Judge Pendleton's intent to deceive may be inferred from his making a knowingly false statement on an official filing.

B. Judge Pendleton's Conduct Violated Rules 1.1, 1.2, and 4.1(A)(9) of The Code of Judicial Conduct.

The Panel concluded that Judge Pendleton's Conduct violated Rules 1.1, 1.2, and 4.1(A)(9) of the Code. (Add. 17, Recommendations ¶ 1.) Based on the admitted facts and after reviewing the Panel's findings for clear error, the standard of review that this Court applies is an "independent assessment of whether the Board has proven that a judge violated a provision of the Code of Judicial Conduct." *Karasov*, 805 N.W.2d at 263.

Judge Pendleton admits that he violated Rules 1.1, which requires a judge to "comply with the law, including the Code of Judicial Conduct." He also admits that by listing a false residence address on an affidavit of candidacy, he violated the appearance of impropriety standard of Rule 1.2. (App. Br. 30.) Rule 1.2 provides, "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."

Judge Pendleton's Rule 1.2 violation extends beyond the mere creation of the appearance of impropriety. His knowingly false statement also violated the rule's

required duty of integrity. "'Integrity' means probity, fairness, honesty, uprightness, and soundness of character." Minn. Code of Jud. Cond., Terminology.

Judge Pendleton also violated Rule 4.1 of the Code which provides, in relevant part:

> (A) Except as permitted by law, or by Rules 4.2, 4.3, and 4.4, a judge or a judicial candidate shall not:
>
> * * *
>
> (9) knowingly, or with reckless disregard for the truth, make any false or misleading statement. . . .

See also Rule 4.1(A)(9), cmt. 7 ("Judicial candidates must be scrupulously fair and accurate in all statements made by them.").

Judges are required to be honest and truthful. "Honesty is a minimum qualification expected of every judge." *Karasov*, 805 N.W.2d at 276 (quotation omitted); *see also In re Perez*, 843 N.W.2d 562, 568 (2014) ("The public at large, and in particular, those appearing before the tax court could have reason to question whether a judge who fails to comply with Minnesota law and makes a substantial number of false statements will respect and follow the law."). Judge Pendleton's conduct clearly violates Rules 1.1, 1.2, and 4.1(A)(9) of the Code and warrants serious discipline.

III. THE BOARD DID NOT VIOLATE DUE PROCESS.

A. Overview

Judge Pendleton's due process arguments are devoid of factual or legal support. First, as explained below, the Board did not violate its own rules.

Second, his legal arguments are unsupported by any cases supporting his claims that the procedural irregularities he alleges constitute due process violations. He cites no

judicial discipline case in which a due process violation was found.[4] Although most of the purported due process violations occurred before hearing, he does not cite a single case finding a pre-hearing due process violation. In short, there is no precedent for his due process claims.

Third, Judge Pendleton has made no showing that the Board or Panel denied him the "opportunity to be heard at a meaningful time and in a meaningful manner," *State v. Krause*, 817 N.W.2d 136, 145 (Minn. 2011) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)), or that he was in any way prejudiced by the alleged procedural irregularities. A merely "technical violation [that] appears to have been harmless" does not violate due process. *In re McDonough*, 296 N.W.2d 648, 688 (Minn. 1979).

Fourth, Judge Pendleton does not contend that the alleged violations require suppression of any evidence, dismissal of any charges, or mitigation of the discipline to be imposed. Instead, he asks that the Board be "harshly rebuked" in order to protect any "future judge that becomes the subject of an ethics investigation." (App. Br. 52.) He claims—with no factual basis in the record or otherwise—that due to fear of "humiliation" there are "many judges" who do not challenge the Board's disciplinary recommendations to this Court and thereby "overlook a multitude of Board misconduct." (*Id.*) His complaints are simply a rhetorical device to divert the Court's attention from his own misconduct. The fact is that a recommendation by the Board or a Panel for

[4] Four of the Minnesota judicial discipline cases he cites rejected due process arguments. *In re Gillard*, 271 N.W.2d 785, 812 (Minn. 1978); *In re McDonough*, 296 N.W.2d 648, 689 (Minn. 1979); *In re Kirby*, 354 N.W.2d 410, 415 (Minn. 1984); *Karasov*, 805 N.W.2d at 271-75. The fifth cited Minnesota case did not involve procedural due process. *In re Agerter*, 353 N.W.2d 908 (Minn. 1984).

suspension or removal must come before the Court whether the judge appeals or not, Board Rule 11(b)(3), 14(a), and if a judge believes his or her due process rights were violated, the judge has the opportunity to raise the issue.[5] His allegations are meritless.

B. Judge Pendleton's Objections To Aspects Of The Board's Investigation Do Not Implicate Due Process.

Judge Pendleton claims that the Board deprived him of procedural due process during its investigation. He alleges that the Board: (1) hid its investigation of Judge Pendleton's affidavit of candidacy until he testified before the Board in August 2014; (2) failed to identify the source of the initial report against him or reveal that the Board had become the complainant, in violation of Board Rule 6(d)(2)(iv); (3) gave him insufficient notice of its request that he appear before the Board in violation of Board Rule 6(d)(6); and (4) made an improper inquiry into his sex life, in violation of the principles established in *In re Agerter*, 353 N.W.2d 908, 914-15 (Minn. 1984). (App. Br. 34-42.) These purported due process claims are without merit.

The Board takes its obligation to follow its rules very seriously. However, even if Judge Pendleton could demonstrate the Board failed to follow its rules, which it did not, Minnesota law is clear: "[v]ariations from or violations of the Rules of the Board on Judicial Standards during the investigation or hearing process . . . do not, in and of themselves, constitute a due process violation." *Karasov*, 805 N.W.2d at 271. In the

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[5] Under former rules, appeal of a private warning could result in a public proceeding. Former Board Rule 6(g) (eff. Jan. 1, 1996). In 2009, private warnings were abolished and replaced with private admonitions. Board Rule 6(f)(6) (eff. Aug. 1, 2009). Under current rules, a judge does not risk publicity in appealing an admonition because the appeal is heard privately by the Board. *Id.*

only case in which the Court found that the Board violated a rule, the Court held, "Despite our concern about the insufficient notice Judge Kirby received, we do not find the Board's actions in ignoring its own rules so violative of due process as to raise the concern that fundamental fairness may not have attached." *Kirby*, 354 N.W.2d at 416.

Judge Pendleton cites Florida law in asserting, "Due process demands that disciplinary Boards comply with their procedural rules." (App. Br. 33) (citing *In re Graziano*, 696 So.2d 744, 750 (Fla. 1997)). This assertion is contrary to Minnesota law. This assertion also alters Florida law, as it omits "substantial" from the degree of compliance that Florida requires. *In re Graziano*, 696 So.2d at 750.

An alleged rule violation that occurs during the investigation stage is unlikely to result in prejudice to due process rights because the judge will be given full due process after the Formal Complaint is filed. "Full due process requirements . . . do not attach to a general fact-finding investigation conducted by an agency." *Humenansky v. Minnesota Board of Examiners*, 525 N.W.2d 559, 565 (Minn. Ct. App. 1994) (citing *Hannah v. Larche*, 363 U.S. 420, 442 (1960)).

1. Neither the Board Rules nor due process was violated when Judge Pendleton was asked questions about the affidavit of candidacy.

Judge Pendleton's primary due process argument is that the Board failed to timely inform him that it was investigating what he ultimately revealed to be a false statement of his address on the affidavit of candidacy. (App. Br. 36.) This claim fails because the Board complied with its rules and, in any event, due process does not require advance

notice of questions asked of a judge during an investigation. *Karasov*, 805 N.W.2d at 274.

Board Rule 6(d)(2)(i) requires:

> Within ten (10) business days after an investigation has been authorized by the board, the executive secretary shall give the following notice to the judge whose conduct is being investigated:
>
> > (i) a specific statement of the allegations and possible violations of the Code of Judicial Conduct being investigated, including notice that the investigation can be expanded if appropriate. . . .

In compliance with this rule, the Board notified Judge Pendleton on July 15, 2014 that it had received information that he "may have been living at 16440 Gladys Lane, Minnetonka, Minnesota for significant periods of time over the last several years" and that "[i]f the reported information is true, there may have been a violation of Rules 1.1 and 1.2 of the Code of Judicial Conduct, Article VI, Section 4 of the Minnesota Constitution, and the holding in *In re Karasov*, 805 N.W.2d 255 (Minn. 2011)." (Add. 12, FF ¶ 33; Ex. 20.) The notice also stated, "The Board's investigation can be expanded if appropriate." (Ex. 20.)

At the time of the July 15, 2014 letter, the Board had no reason to know that Judge Pendleton held no interest in the address listed in the affidavit of candidacy. (Tr. 210, 226.) Judge Pendleton's July 24, 2014 response stated that he had sold the Anoka condominium in November 2013. (Ex. 21; *see* Add. 12, FF ¶ 33.) It was then that the Board became aware that the condominium address on Judge Pendleton's affidavit of

candidacy was apparently inconsistent with his sale of the condominium six months earlier. (Tr. 232.)

The affidavit was only one of several areas of inquiry in the residency investigation. (Tr. 210, 226.) Prior to Judge Pendleton's Board appearance, the Board's Executive Secretary correctly informed him that the questions would be focused on residency. (Tr. 227.) At his Board appearance, Judge Pendleton did not have a plausible explanation for listing the condominium as his residence on the affidavit and he admitted that he knew the address was false when he signed the affidavit. (Tr. 232.) It was only after Judge Pendleton's appearance that the Board decided to make the false statement in the affidavit the subject of a separate charge. (Tr. 211.)

The Board Rules do not require the Board to issue a new Rule 6(d)(2)(i) notice for every new subtopic of interest that arises as an investigation progresses. To the contrary, the Rule contemplates that the investigation will go where the facts lead and requires only that the Board provide an initial "notice that the investigation can be expanded if appropriate." Board Rule (6)(d)(2)(i). The Board complied with this requirement.

Even if the Court were to conclude that the Board failed to comply with its rules, due process was not violated. Judge Karasov made the same claim and, relying on numerous authorities, the Court categorically rejected it: "In the end, we conclude that due process does not require notice of a judicial discipline investigation." *Karasov*, 805 N.W.2d at 274.

Significantly, Judge Pendleton makes no reference to this holding in his brief. He instead relies exclusively on *In re Ruffalo*, 390 U.S. 544 (1968), a case that is inapposite

because it concerns lack of notice at the hearing stage, not the investigative stage. In *Ruffalo*, an attorney was disbarred in the Sixth Circuit Court of Appeals based upon a single charge that was added *after* all evidence was submitted, including the testimony of the attorney and his main witness. 390 U.S. at 549. Ruffalo moved to strike the additional charge, but the tribunal denied the motion. *Id.* The Supreme Court held that this deprived the attorney of his right to notice and a fair opportunity to be heard on that charge. *Id.* at 550.

In contrast, Judge Pendleton was notified well in advance of the hearing of the charges against him by the Board's Formal Complaint, in compliance with both Board Rule 8(a)(1) and due process. *See Federal Grievance Comm. v. Williams*, 743 F.3d 28, 30-31 (2d Cir. 2014) (holding that notice required by *Ruffalo* refers to notice prior to evidentiary hearing, not notice prior to investigation). This Court, recognizing the same distinction in an attorney discipline case, observed: "Stansbury misconstrues *Ruffalo*. There, the charge *upon which the lawyer was disbarred* was added after the disciplinary hearing commenced and the lawyer did not have an adequate opportunity to respond." *In re Stansbury*, 561 N.W.2d 507, 512 (Minn. 1997) (emphasis in original). Because the Court has said that its own due process standards "are fully consistent with the requirements of *Ruffalo*," Judge Pendleton's disregard of the Court's opinions is misplaced. *In re Gillard*, 271 N.W.2d 785, 808 (Minn. 1978).

Judge Pendleton complains that at his Board appearance, he was asked questions for which he was unprepared and "the result was sworn testimony containing incriminatory admissions regarding unsuspected misconduct." (App. Br. 39.) He does

not claim, however, that he would have answered any question differently if he had known in advance that he would be asked about the affidavit, nor does he claim that his testimony before the Board affected the fairness of the Panel hearing. Judge Pendleton had the opportunity to be heard at a formal hearing, prepare his defense against the false statement charge while represented by counsel, and present evidence in his defense. He made no motion to suppress evidence. In fact, he jointly offered the transcript of his testimony before the Board. (Tr. 8.) The Panel findings regarding the affidavit cite the panel hearing transcript, not the Board investigation transcript. (Add. 12, FF ¶ 32.) Judge Pendleton's claim that he had a due process right to advance notice of questions at his Board appearance must be rejected.

2. The Board's inquiry as to when Judge Pendleton's relationship with his wife began did not violate due process.

The time Judge Pendleton began his relationship with Kim was relevant to the Board's investigation because Kim did not live in the Tenth Judicial District. In August 2005, Judge Pendleton told David Paull that he "has reunited with a high school friend" (Kim) and that they "will probably marry or live together." (Add. 20, Ex. 3; Tr. 54-55.) In 2014, the Board received a report that Judge Pendleton had "been living at 16440 Gladys Lane, Minnetonka, MN 55345 for significant periods of time over the last several years." (Ex. 19; Tr. 232.) That property was owned by Kim. (Tr. 73-74.) The Board reasonably sought to frame when Judge Pendleton may first have begun staying at a residence outside the district. (Tr. 212-16.)

At the beginning of Judge Pendleton's Board appearance, Tom Vasaly apologized in advance for the nature of some of the questioning: "This issue is a residency issue, which, by its nature, involves us inquiring into personal matters. . . . matters that could be—could create some discomfort for you, so we apologize for that and appreciate your cooperation." (Ex. 27 at 2-3.) Judge Pendleton responded, "That sounds very similar to what I have told jurors, potential jurors a hundred times in the past. But I understand." (*Id.* at 3.)

Later, the following exchange occurred:

> Q: And when did you begin your relationship with your current wife?
>
> A: Well, I've known her since we were teenagers. So I guess I'm not sure what you're asking.
>
> Q: When did you begin an intimate relationship with your present wife?

(*Id.* at 29.) The latter question could have been worded more precisely, but it was unplanned; it arose in response to the judge's request for clarification. (*Id.*) Judge Pendleton did not object to the question. There were no further questions on this subject. At the end of Judge Pendleton's appearance before the Board, Vasaly stated, "[W]e really appreciate your cooperation and responding to questions that sometimes necessarily had to be very personal and concern private matters." (*Id.* at 51.)

Judge Pendleton argues that the question concerning his relationship was an improper invasion of his private affairs in violation of *In re Agerter*, 353 N.W.2d 908, 914-15 (Minn. 1984). *Agerter* specifically offered a counsel of prudence: "Perhaps the more prudent course here would have been for the judge to have cooperated with the

Board's investigation, or at least to have appeared at the confidential Board hearing and there explained his position." *Id.* at 915. If the Board's question to Judge Pendleton had been improper, the remedy was for him to object when it was asked and, at the Panel hearing, to object to the admission of the question and answer into evidence. Judge Pendleton can hardly claim a due process violation when he volunteered in 2005 that he might live with Kim, did not object to the question, and stipulated to the admission of the question and answer into the record.

The Board violated neither due process nor *Agerter* in its inquiry.

3. Judge Pendleton's other objections to the investigation are without merit.

Judge Pendleton claims that the Board violated due process because it did not initially identify the source of the report in violation of Board Rule 6(d)(2)(iv). (App. Br. 34.) That rule, however, permits the Board to withhold the identity of a complainant for good cause, and Rule 6(a)(2) permits the Board to initiate an investigation on its own motion. Judge Pendleton never asked for the source of the Board's information. (Tr. 236.) The Board had good cause because the source of the Board's information, a deputy Hennepin County Attorney, passed on information he had received and asked not to be the complainant. (Ex. 19; Tr. 233-35.) Regardless, the Board identified the source in October 2014 prior to filing the Formal Complaint. (Tr. 236.)

Judge Pendleton also complains that the Board provided 15 days' notice of its request that he appear before the Board, less than 20 days' notice provided under Board Rule 6(d)(6). (App. Br. 34.) A shortened period is permitted under the Board's rules.

When the Board initiated its investigation (Ex. 19), Judge Pendleton was a judicial candidate. Board Rule 6(e) provides, "The board may expedite its investigation into a complaint against a judge who is a candidate for judicial office if the complaint was filed after the statutory filing period for judicial office has opened." Judge Pendleton made no objection to the fifteen day notice before or at the time of his appearance. The Board complied with its rules.

C. Judge Pendleton's Objections To Aspects Of The Hearing Do Not Raise Due Process Concerns.

1. The Board did not violate due process by its late disclosure of a relevant document that was not offered into evidence.

Judge Pendleton claims as a due process violation the Board's untimely production of a document that was not offered into evidence. He testified in his August 2014 appearance that he owned a townhouse in Ramsey from 2006 until he bought his Blaine townhouse at the end of 2008. (Ex. 27 at 30-31.) Relying on that testimony, the Board did not investigate his residence during that time period.

In October 2014, as part of the Board's investigation, Board counsel obtained a copy of a bankruptcy petition filed by Judge Pendleton in 2009. Not realizing that the 45-page petition contained information that contradicted his testimony before the Board, namely that he actually lived in Albertville and Hopkins in 2007 and 2008, Board counsel did not produce a copy of the petition. On the eve of trial, Board counsel realized that the petition contained information inconsistent with Judge Pendleton's Board testimony and produced the document to Judge Pendleton's counsel. The Board acknowledges that the document should have been reviewed and produced earlier.

Upon inquiry as to whether the Board intended to use the document at the hearing, the Board advised that the document would only be used "if necessary for impeachment purposes." (Pendleton Post-Hearing Reply Mem. Ex. A) The bankruptcy petition was never offered into evidence because Judge Pendleton testified consistently with the information in the petition.

Further, Judge Pendleton knew about his own bankruptcy petition regardless of when the Board produced a copy of it. He cannot object that his knowledge that the Board had the petition forced him to testify truthfully about his past residences. If error, the late production of the petition error was harmless.

2. The Board did not violate due process by making inquiry into Judge Pendleton's living arrangements in 2007 and 2008.

Judge Pendleton's August 14, 2014 sworn testimony included the following:

A: I made arrangements to buy a townhouse . . . in Ramsey . . . so I purchased that . . . it would have been probably mid to late 2006.

Q: And did you own the townhouse until you bought the Blaine townhouse in 2008?

A: Yes. . . . I lived in that Ramsey townhouse for about two years.

(Ex. 27 at 28.)

At the Panel hearing, Judge Pendleton was asked about past addresses, including where he was living in 2008. He objected to the questions as irrelevant under Minn. R. Evid. 404(b). The presiding judge overruled the objection, and Judge Pendleton testified, contrary to his testimony to the Board, that he lived at the Ramsey townhouse only until May 2007. He then moved to a house that he owned in Albertville where he lived for

nine months and then to his wife Kim's house in Hopkins for six or seven months until he moved to Blaine. (*Compare* Tr. 37-38, 41-42 *with* Ex. 27 at 28.) Judge Pendleton now claims that the questions violated due process. (App. Br. 47.) This claim is incorrect.

First, the evidence of Judge Pendleton living in Hopkins 2008 was offered to corroborate evidence that he abandoned his district for personal reasons in 2014, intentionally disregarding his constitutional obligation. Minn. R. Evid. 404(b). Evidence of a prior act may be admissible to show "proof of motive, opportunity, intent preparation, plan, knowledge, identity, or absence of mistake or accident." Minn. R. Evid. 404(b). The evidence offered under Rule 404(b) must have some similarity, either in time, location, or modus operandi, to the allegation at hand. *State v. Wermerskirchen*, 497 N.W.2d 235, 240 (Minn. 1993); *State v. Belssner*, 463 N.W.2d 903, 909 (Minn. Ct. App. 1990). "[T]he closer the relationship, the greater is the relevance or probative value of the evidence and the lesser is the likelihood that the evidence will be used for an improper purpose." *Wermerskirchen*, 497 N.W.2d at 240.

Judge Pendleton's living in Hopkins shows an intent to reside outside his district with his second wife when motivated by personal circumstances. This evidence supports the Panel's finding that in 2014 "he intended to abandon his residency within the district while addressing his familial issues." (Add. 15-16, FF ¶ 42.) Accordingly, the evidence is relevant and admissible.

Second, his conduct shows a common intent and plan not to disclose his stays outside his district. Judge Pendleton asked Paull for advice on residency in 2005, before he moved outside his district, and in 2010, after he returned to his district, yet he did not

ask Paull for advice concerning his stay in Hopkins. (Add. 20-21, Exs. 3, 7.) In November 2010, Judge Pendleton emailed his fellow Anoka County judges stating that for the past two years, he and his wife had maintained separate residences and that, according to Paull, he was "in full compliance with all residency requirements." (Add. 22, Ex. 8.) The specific reference to a two year period shows that this was a calculated statement. The two year period commenced in November 2008, two months after he returned from Hopkins to his district. The evidence of the Hopkins stay also refutes his claim that the evidence would show "a [past] pattern of consulting with the Board and trying to be careful about his judgeship." (Tr. 17.)

Third, the evidence of Judge Pendleton living in Hopkins was admissible for impeachment. His Panel testimony, given after he learned that the Board had his bankruptcy petition, was contrary to his sworn testimony to the Board. (Ex. 27 at 28.) Minn. R. Evid. 608(b).

Fourth, Judge Pendleton objects to the lack of advance notice of the questions concerning his living in Hopkins. Advance notice is required only in criminal prosecutions. Minn. R. Evid. 403(b). "The due process guarantees of a criminal proceeding are not applicable; judicial removal is neither civil nor criminal in nature, but sui generis, designed to protect the citizenry by insuring the integrity of the judicial system." *Gillard*, 271 N.W.2d at 812. Judge Pendleton argues that the questions were inconsistent with Board Counsel's promise that the information in the bankruptcy petition would be used only for possible impeachment. Board Counsel made no such statement. Board Counsel sent Judge Pendleton's counsel an email before the hearing stating that

the petition would only be used "if necessary for potential impeachment purposes. (Pendleton Post-Hearing Reply Mem. Ex. A.) It was implicit in the email that Board Counsel would ask Judge Pendleton about his stay in Hopkins.

Fifth, the admission of "evidence rests within the broad discretion of the trial court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion." *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997) (quoting *Uselman v. Uselman*, 464 N.W.2d 130, 138 (Minn. 1990)). In the absence of some indication that the trial court exercised its discretion arbitrarily, capriciously, or contrary to legal usage, the appellate court is bound by the result. *Kroning*, 567 N.W.2d at 46; *Plunkett v. Lampert*, 231 Minn. 484, 492, 43 N.W.2d 489, 494 (1950). The presiding judge did not abuse his discretion in admitting this testimony.

Finally, at the Panel hearing, Judge Pendleton objected to the evidence of his living in Hopkins based on relevance. (T. 38, 49.) He did not object based on due process.

3. The Board did not violate due process or its rules by offering evidence of Judge Pendleton's non-disclosure of his change in address from December 2013 through July 2014 to the District Court Administrator.

Judge Pendleton now claims that the admission of evidence concerning the Tenth District judicial directory was a due process violation. Judge Pendleton's claims of unfair "surprise and ambush" (App. Br. 42) are contradicted by the fact that the Board timely and properly put him on advance notice of its intent to obtain and introduce this evidence

and ultimately followed the very procedure that Judge Pendleton had earlier argued was the proper way to proceed. The Board followed its rules and complied with due process in obtaining and offering this evidence.

On November 26, 2014, the Board sought from the presiding judge an order directing the Tenth District Court Administration to produce records reflecting Judge Pendleton's residence address. (*See* Board's Request for Authorization to Conduct Discovery at 14-15.) Judge Pendleton objected to the request, arguing, "Insofar as the Board deems the information now necessary, the proper procedure would have been to request a *hearing subpoena* from the presider of the panel for attendance, testimony, and document production" from District Court Administration. (Pendleton Response to Board Request to Conduct Rule 9 Discovery at 14) (emphasis added). The presiding judge denied the Board's requested order.

On December 9, 2014, the Board added Moriarity as a person with knowledge of relevant facts, namely the district's practice of asking judges to keep their addresses of record current. Moriarity was on the Board's witness list and the subject matter of his testimony was disclosed: "Judge Pendleton did not notify the Tenth Judicial District Administration of his Address change between November 27, 2013 and August 1, 2014." (Board's Amended Witness List.) The presiding judge invited the parties to submit short pre-hearing letters regarding any procedural or evidentiary issue that the parties anticipated. (Scheduling Order and Order on Discovery Motions, ¶ 5.) Judge Pendleton made no objection to the proposed testimony from Moriarity. (Pendleton Pre-Hearing Letter dated January 15, 2015.)

Prior to the hearing, using the process endorsed by Judge Pendleton in his discovery opposition papers in November, the Board subpoenaed Moriarity and the records relating to the communications that the Board had advised Judge Pendleton would be the subject matter of Moriarity's testimony. The exhibits were produced to the Board two days before the hearing and were immediately provided to Judge Pendleton. (Exs. 33-35; Tr. 158.)

There was no violation of Board rules or due process in the manner in which the evidence was obtained and presented. Even if the evidence had been admitted in error, Judge Pendleton has conceded that the error was harmless. (Pendleton Post-Hearing Reply Mem. 9). "Surprise," "ambush" and "harmless error" are—somehow—all Judge Pendleton's characterizations of the same evidence. Again, he attempts to make a due process violation out of nothing.

4. The Board did not violate due process by advancing arguments that Judge Pendleton's Code and constitutional violations were intentional.

Judge Pendleton mischaracterizes arguments as "charges" in his claim that the Board violated due process by making "a multitude of charges" not contained in the Formal Complaint. (App. Br. 50.) Judge Pendleton conceded the physical presence element of the residency charge and the false statement element of the false statement charge, leaving for adjudication the issue of intent as to each. The Board's arguments and evidence to which Judge Pendleton now objects as "new charges" were all in furtherance of the Board's proof of intent and the Board's challenges to the credibility of Judge Pendleton's defenses. The Board did not charge him with new offenses after the

hearing and the Panel made no such findings. The Panel's conclusions that Judge Pendleton violated the constitution and the Code were limited to his intent respecting his residence from January 15 to June 2, 2014, and to Judge Pendleton's intent on May 22, 2014 respecting the affidavit. The arguments made were simply arguments demonstrative of the judge's intent and were based on evidence adduced at the hearing.

IV. JUDGE PENDLETON'S MISCONDUCT WARRANTS A SUSPENSION OF AT LEAST EIGHT MONTHS AND A CENSURE FROM THIS COURT.

This Court does not defer to the Panel's or Board's recommendation as to sanction and independently reviews the record to determine the discipline, if any, to impose. *Karasov*, 805 N.W.2d at 275 (suspending judge for six months rather than three months as recommended by Panel); *In re Blakely*, 772 N.W.2d at 523 (suspending judge for six months as recommended by Panel). The Panel recommended:

> 1. That Judge Pendleton be censured for his violations of the Minnesota Constitution and the Code of Judicial Conduct;
>
> 2. That Judge Pendleton be suspended without pay from his position as judge of district court for a period of at least 6 months (with the individual Panel members proposing suspensions in a range from 6 to 16 months); and
>
> 3. That the court impose additional sanctions, including but not limited to conditions on the performance of judicial duties and/or civil penalties, that it deems appropriate.

(Add. 17-18, Recommendations ¶¶ 1-3.)

The conduct of Judge Pendleton warrants serious discipline. He voluntarily moved out of the Tenth Judicial District and resided in Minnetonka for a period of more than eight months and let more than four and one half of those months pass without making any attempt to find a new residence in his district. During that period, he filed an

affidavit of candidacy containing a knowingly false statement of the location of his residence that was intended to conceal his residency in Minnetonka. His conduct violated the Minnesota Constitution and the Code of Judicial Conduct. Contrary to his claim of accepting responsibility for his conduct, Judge Pendleton has admitted only facts that cannot be disputed and has attempted to deflect responsibility by attacking the Board, raising meritless assertions of due process violations.

Rule 2.1 of the Code specifically provides that, "The duties of judicial office, as prescribed by law, shall take precedence over all of a judge's personal and extrajudicial activities." This Court has reiterated that principle: "The public interest is and must be the paramount consideration; and the primary duty of the court must be protection of the public. . . . The enlistment of a natural human sympathy for respondent's unrelated misfortune cannot be permitted to deter us from performance of this duty." *In re Hanson*, 258 Minn. 231, 233, 103 N.W.2d 863, 864 (1960). Judge Pendleton chose to remain in his wife's home to avoid possible inconvenience. He did not want to risk having to move again if he moved into a residence that was not near the school ultimately chosen for his son. The Minnesota Constitution does not provide judges with discretion regarding when they reside in their districts. The inconvenience of possibly moving again is not a permissible reason to violate the Minnesota Constitution or the Code of Judicial Conduct.

Judge Pendleton did not offer any substantial evidence or claim of mitigation, good character, remorse or even recognition of misconduct. The words "mitigate" and "mitigation" do not appear in Judge Pendleton's brief to this Court, panel briefs or proposed findings. The Board requested that the presiding judge authorize interrogatories

to Judge Pendleton regarding mitigation. (*See* Board's Request for Authorization to Conduct Discovery at 9-10.) Judge Pendleton successfully opposed the Board's request. Brief evidence of personal circumstances does not approach the mitigation standards of judicial discipline proceedings. *Ginsberg*, 690 N.W.2d at 550.

Judge Pendleton called no character witnesses, and the word "character" does not appear in the transcript or in Judge Pendleton's proposed findings. Judge Pendleton presented no evidence of remorse, certainly not in the relevant sense of "genuine regret and moral anguish." *In re Severson*, 860 N.W.2d 658, 670 (Minn. 2015). Judge Pendleton claimed that he had always taken responsibility for the false statement in the affidavit, but he regards "responsibility" as merely the unavoidable admission that he made a false statement, which he qualifies and minimizes by calling it a "spur of the moment," "spontaneous, split-second decision." (Tr. 74, 120, 145-46; Pendleton Proposed FF ¶ 34.) He admits only to the appearance of impropriety. (Tr. 120, 145; Pendleton Proposed FF ¶ 36.)

After weighing the evidence and evaluating the demeanor of the witnesses, the Panel concluded that a censure and a suspension without pay for at least six months was an appropriate sanction, with the individual Panel members proposing suspension within a six to sixteen month range. The Board believes this six to sixteen month range is appropriate, and suggests that the suspension should be at least eight months because it is more serious than the *Karasov* case. The Board does not believe that additional sanctions, such as conditions on the performance of judicial duties and/or civil penalties, are appropriate.

CONCLUSION

For all of the foregoing reasons, the Board respectfully requests that this Court accept and adopt the Panel's findings of fact and conclusions of law without qualification, censure Judge Alan Pendleton for violating the Code and the State Constitution, and suspend Judge Pendleton without pay for at least eight months.

Respectfully submitted,

Date: July 27, 2015

OPPENHEIMER WOLFF & DONNELLY LLP

By_____
William J. Egan (#166029)
Aaron Scott (#033943X)
Laura E. Stecker (#0396971)
2000 Campbell Mithun Tower
222 South Ninth Street
Minneapolis, Minnesota 55402-1609
Telephone: (612) 607-7000
E-Mail: *WEgan@oppenheimer.com*
AScott@oppenheimer.com
LStecker@oppenheimer.com

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 1 and 3 for a brief produced with a proportional font. The length of this brief is 13,982 words. This brief was prepared using Microsoft Word 2010 SP1, Times New Roman font face size 13.

Dated: July 27, 2015.

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William J. Egan

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