

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

In the Matter of the Proceeding
Pursuant to § 44, subdivision 4,
of the Judiciary Law in Relation to

E. TIMOTHY MERCER,

REFEREE'S REPORT

a Justice of the Athens
Town Court, Greene County

APPEARANCES:

Robert H. Tembeckjian, Esq. (S. Peter Pedrotty, Esq. and Shruti Joshi, Esq., Of
Counsel) for the Commission

Hon. E. Timothy Mercer, *pro se*

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

David M. Garber, Referee

I. Introduction

1. Respondent is a part-time Justice of the Athens Town Court, Greene County (“Court”). Respondent has served as Justice of the Court since January 1, 2020. His term of office expires on December 31, 2023. Respondent is not an attorney.

2. The Unified Court System’s Office of Justice Court Support (“OJCS”) makes funds available to town and village courts in the form of grants administered through the Justice Court Assistance Program (“JCAP”). *See Matter of Knapp, Jr.*, NY Comm’n Jud Conduct (April 28, 2021) at 2.

3. JCAP grant funds “may be used for any purpose having as its end enhancement of the justice court’s ability to provide suitable and sufficient services to their respective communities. These purposes may include, but shall not be limited to, automation of court operations; improvement or expansion of court facilities; provision of appropriate means for the recording of proceedings; provision of lawbooks, treatises and related materials; and provision of training for justices and other nonjudicial staff.” N.Y. Jud Law, § 849-h(2); *see* Rules of the Chief Administrative Judge, 22 NYCRR § 138.2.

4. Town and village courts use JCAP grant funds for items such as security equipment, furniture, office equipment and court facility improvements.

5. The chief administrator of the courts makes the determination whether to award a JCAP grant (*see* Judiciary Law § 849(i)(1)) after reviewing an application which must include “[t]he amount of funding sought” and “[a] detailed description of the purpose or purposes to which the funding will be applied. Judiciary Law § 849-i(2)(a), (b).

6. JCAP funds may be used only for the items specifically authorized in a grant to a court. *See Matter of Knapp, supra* at 2.

7. JCAP grant funds “shall not be used to compensate justices and nonjudicial court staff. . . .” Judiciary Law § 849-h(2); 22 NYCRR § 138.2.

8. JCAP funds are sent to towns and villages rather than to their Justice Courts and are held by them for disbursement.

9. Towns and villages must account to JCAP for expenditures of JCAP funds in written Reconciliation Reports. *See Matter of Knapp, supra* at 2; *see also* 22 NYCRR § 138.6(a).

10. Each year OJCS invites town and village courts to apply for a JCAP grant.

11. The Court has an established practice for applying for a grant: After OJCS notifies the Court that the JCAP application process for that year's grant cycle is open, the judges and their clerks meet to discuss the Court's needs. When they have agreed upon the items to be included in the application, the Senior Court Clerk prepares a letter to the Athens Town Board ("Board") requesting it to adopt a resolution authorizing the Court to apply for a grant. While awaiting Board action the Senior Court Clerk researches the cost of each item to be included in the application. Once the Board adopts its authorizing resolution the Senior Court Clerk prepares the Court's application which comprises two parts: OJCS's on-line application form and a separately faxed packet of supporting materials, including the application's signature page which has been executed by the Court's Justices and the Town Supervisor.

12. This proceeding involves Respondent's participation, in his capacity as town justice, in the Court's 2020-2021 application for a JCAP grant; his directive, as town justice, to the Court's Senior Clerk to include in the Court's JCAP application a security camera system which the Board did not authorize; Respondent's decision, as town justice, after the Court was awarded a JCAP grant for the security camera system, to retain his own contracting company (Mercer Associates) -- in reality himself -- to furnish and install the JCAP grant-funded

security camera system in the Court; his charging the Town of Athens (“Town”) for the cost of a more expensive security camera system rather than the lower priced system he actually furnished and installed, while intending to retain the “savings” as personal profit; and his use of his judicial office to obtain payment for his work from the Town.¹

II. Procedural History

A. The Commission’s Formal Written Complaint

13. On or about October 18, 2022 the New York State Commission on Judicial Conduct (“Commission”) served Respondent with its Notice of Formal Written Complaint and its Formal Written Complaint (“FWC”) containing one charge.

14. The FWC alleged that Respondent violated various ethical standards set forth in the Rules Governing Judicial Conduct, 22 NYCRR, Part 100 (“Rules”²) in that:

¹ Respondent is the sole owner of Mercer Associates which does not have any employees. All of Mercer Associates’ profits flow directly and exclusively to Respondent. Accordingly, this Report does not differentiate between Respondent and Mercer Associates and it attributes the acts or conduct of Mercer Associates to Respondent. For example, instead of stating “Respondent, acting through Mercer Associates, installed the security camera”, this Report states “Respondent installed the security camera system. . . .”

² Specifically, the FWC alleges that Respondent breached the ethical standards contained in the following sections of the Rules: 100.1 (“A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that

(a) Respondent, in his capacity as town justice, directed the Court's Senior Court Clerk, Marcia Puorro ("Court Clerk Puorro), to add a security camera system to the Court's 2020-21 JCAP application ("Application") although the Board authorized the Court to apply for a JCAP grant for five specific items -- two air conditioners, window blinds, a shredder, a desk chair and reimbursement for certain Covid expenses incurred by the Court (collectively, the "Specific Items") -- but not for a security camera system.

(b) Respondent, after the Court received a JCAP grant for a security camera system, used his position as town justice to retain his own company (Mercer Associates) to furnish and install the security camera system --

the integrity and independence of the judiciary will be preserved."); 100.2 (title) ("A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities."); 100.2(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."); 100.2(C) ("A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others. . . ."); 100.3(A) ("The judicial duties of a judge take precedence over all the judge's other activities."); 100.3(B)(1) ("A judge shall be faithful to the law and maintain professional competence in it."); 100.3(C)(1) ("A judge shall . . . maintain professional competence in judicial administration. . . ."); 100.4(A)(1) ("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) detract from the dignity of judicial office; or (3) interfere with the proper performance of judicial duties and are not incompatible with judicial office."); 100.4(D)(1)(a) ("A judge shall not engage in financial and business dealings that: (a) may reasonably be perceived to exploit the judge's judicial position. . . .").

which also violated General Municipal Law (“GML”) § 801³ and Town Code of Ethics § 19(C) and (G) prohibiting conflicts of interest by Town officers and employees, as well as GML § 803 because he failed to disclose his interest in his contract with the Town to the Board.

(c) Respondent purchased and installed a different and \$760 less expensive (\$1,569.99) model of security camera system rather than the specific and more expensive (\$2,329.99) model included in the Application while charging the Town for the higher priced model.

(d) Respondent, in his capacity as town justice, signed a Town voucher approving payment of his own company’s (Mercer Associates) invoice for furnishing and installing the security camera system in the Court.

(e) Respondent invoked his office as town justice when he used his judicial e-mail account in an effort to obtain payment for his work.

(f) Respondent, although acknowledging to his supervising justice that his conduct created an appearance of impropriety, insisted upon payment for his work and he added a finance charge for the Town’s nonpayment of his invoice.

³ In their September 5, 2023 Post-Hearing Memorandum of Law Commission counsel withdrew the FWC’s allegation that Respondent violated GML §801. See Commission Counsel’s Post-Hearing Memorandum of Law at 36 n 11; *see also* Report, Section VI(D)(2) *infra* at 44-45.

15. Additionally, paragraph 31 of the FWC alleged that Respondent violated the Rules' ethical standards by failing to cooperate with Town officials when he refused to accept and sign for of a copy of the Town's Employee Handbook, Code of Ethics and Procurement Policies and Procedures distributed to all Town officers and employees at the direction of the Town Supervisor until after he had testified during his investigative appearance before the Commission on February 7, 2022 when the Commission raised the issue with him.

B. Respondent's Letter Answer

16. On or about December 7, 2022 Respondent served his unverified answer in the form of a letter titled, "Response To The Commission On Judicial Conduct's Written Complaint With Additional Evidence And Argument In Support Of Justice E. Timothy Mercer" ("Letter Answer"⁴).

⁴ Respondent did not verify his Letter Answer as required by § 7000.6(b) of the Commission's Operating Procedures and Rules ("Operating Procedures"). His omission, however, is not fatal since the Commission did not raise it with him. See CPLR Rule 3022 ("Where a pleading is served without a sufficient verification . . . the adverse party . . . may treat it as nullity, provided he gives notice with due diligence to the attorney of the adverse party that he elects so to do"); *c.f. Matter of Rogers*, Comm'n Jud Conduct (April 9, 1980) at 1-2 (Following respondent's failure to verify his answer as requested by Commission counsel the Commission moved for summary determination under Operating Procedures § 7000.6(c)), *mod. on other grounds*, 51 NY2d 224 (1980). Further, Respondent's Letter Answer is questionable as to form. See Operating Procedures § 7000.6(b)(setting forth the pleading requirements for an answer). However, liberally construing the Letter Answer, see CPLR § 3026 ("Pleadings shall be liberally construed."), it minimally satisfies § 7000.6(b)'s pleading requirements. In any event, the Letter Answer's technical pleading deficiencies, if any, are of no import because the Commission has not claimed that it has been prejudiced by them. See CPLR § 3026 (Pleading "[d]efects shall be ignored if a substantial right of a party is not prejudiced.")

17. In his Letter Answer Respondent admitted many of the FWC’s factual allegations, tacitly acknowledged that in furnishing and installing the camera security system he committed judicial misconduct and conceded that he “failed to avoid the appearance of impropriety with [his] actions. . .[and] “exercise[ed] poor judgment.” Letter Answer at 1.

18. In his Letter Answer Respondent “request[ed] that the Commission show leniency in whatever further action it deem[ed] appropriate” (Letter Answer at 9), and he offered the following explanations in mitigation of certain aspects of the FWC:

(a) Court Clerk Puorro erred in failing to include a security camera system in her letter requesting the Board to adopt a resolution authorizing the Court’s JCAP Application.

(b) “As a new judge [Respondent] relied on the experienced court staff to perform their duties diligently and competently.” Letter Answer at 2.

(c) Respondent’s “actions were meant to safeguard and protect [his] staff from elicit [sic] sexual harassment and innuendo directed at them by the Town of Athen’s Bookkeeper, Mr. Pierro.” Letter Answer at 1.

(d) When the Town’s Covid protocols barred outside contractors from the Court’s premises Respondent believed that he, as a general contractor,

could more “quickly and at a lower cost” furnish and install the security camera system than could an “outside contractor” which he acknowledged “was a mistake in reasoning, a failure to maintain the high standards of judicial conduct, and against the guidelines laid out by JCAP regarding the proper usage of [JCAP] funds.” Letter Answer at 2.

(e) Town officials and employees were well aware that Respondent would furnish and install the security camera system.

(f) Respondent furnished and installed a different model of security camera system than the model specified in the Application because it was unavailable due to supply chain problems caused by the Covid pandemic.

(g) Respondent charged the Town for the (\$2,329.99) cost of the model of security camera system specified in the Application rather than the \$760 less expensive (\$1,569.99) model that he actually furnished and installed because he considered his work as a “package deal,” and “not [on] a materials and labor” basis. Letter Answer at 7.

(h) Respondent, in furnishing and installing the security camera system, believed that he complied with “acceptable procurement practices established by the Town of Athens.” Letter Answer at 6.

(i) Respondent's use of his judicial e-mail account in seeking payment of his invoice for furnishing and installing the security camera system was an "honest mistake." Letter Answer at 4.

(j) Respondent's imposition of a finance charge on his unpaid invoice was "auto-generated" by his accounting software and was unintentional. Letter Answer at 4-5.

19. Responding to that part of FWC paragraph 31 alleging that Respondent failed to cooperate with Town officials when he refused to accept and sign for a copy of the Town's Employee Handbook and Code of Ethics, Respondent affirmatively alleged that Handbook and the Code of Ethics did not apply to him as a member of the judicial branch of Town government.

20. Responding to that part of FWC paragraph 31 alleging that Respondent failed to cooperate with Town officials when he refused to accept and sign for a copy of the Town's Procurement Policies and Procedures, Respondent affirmatively alleged that his furnishing and installing the camera security system did not fall within its scope of coverage.

C. The Hearing

21. The Commission's February 24, 2023 Order in this proceeding designated David M. Garber, Esq. as referee ("Referee") to hear and report with respect to this proceeding.

22. On May 16 – 17, 2023, the Referee conducted a hearing in this proceeding at the Commission's offices in Albany, New York.

23. At the outset of the hearing Respondent acknowledged that in pre-hearing conferences the Referee had informed him that he had the right to be represented by an attorney in this proceeding, confirmed that that he desired to represent himself and stated that he was appearing *pro se*.

24. On September 5, 2023 Commission counsel submitted their Post-Hearing Memorandum of Law and their Proposed Findings of Fact and Conclusions of Law. On September 5, 2023 Respondent submitted his Post-Hearing Memorandum of Law.

III. Proposed Findings Of Fact With Respect To Respondent's Conduct Relating To The Application And The Security Camera System

A. The Town Court's JCAP Application

25. A "few weeks" prior to the September 21, 2020 date when the Court requested Board authorization for its Application, Respondent, his co-judge, Hon.

Constance Pazin, Court Clerk Puorro and then-Court clerk, Vincenzina Carl, met several times to discuss the items to be included in the Court's 2020-21 JCAP Application.⁵

26. They agreed to request a JCAP grant for the Specific Items, i.e., two air conditioners, window blinds, a shredder, a desk chair and reimbursement for certain Covid expenses. They did not discuss the need for a security camera system in the Court.

27. On September 21, 2020 Court Clerk Puorro wrote a letter to the Board and then-Supervisor Robert F. Butler, Jr. ("Supervisor Butler") -- with a copy to Respondent and Judge Pazin -- requesting that the Board adopt a resolution authorizing the Court to apply for a JCAP grant for the Specific Items ("September 21 Letter").

28. Court Clerk Puorro showed the September 21 Letter to Respondent for his review and approval before transmitting it to the Board.

29. Court Clerk Puorro "CC'd" Respondent and Judge Pazin on her September 21 Letter to the Board.

⁵ The Hearing record does not disclose the dates of the meetings.

30. Respondent did not say anything to Court Clerk Puorro that the September 21 Letter omitted a request for Board authorization for a security camera system.

31. On September 21, 2020 Respondent and Judge Pazin signed the signature page to the Application before the Board authorized it and before Court Clerk Puorro prepared the Application.

32. When Judge Pazin signed the signature page she understood that the Court was applying for a JCAP grant for the Specific Items and not for a security camera system.

33. Immediately below the signature line where Respondent and Judge Pazin signed their names was a certification to be signed by Supervisor Butler which provided as follows:

(1) any funds (and any good or services) awarded pursuant to this application shall be used in accordance with Chapter 280 of the Laws of 1999 and with all rules and regulations governing the [JCAP]; (2) any goods and/or services purchased with any [JCAP] funds shall be obtained with acceptable procurement practices established by the governing municipality including, but not limited to, competitive bidding and procurement practices and procedures; (3) no funds awarded pursuant to this application shall be used to compensate justices or non-judicial staff. . . .

Commission Ex. 4.

34. On October 5, 2020 the Board adopted Resolution #2020-34 (“Resolution”) authorizing the Court to apply for a JCAP grant for the Specific Items. The Board’s Resolution did not authorize the Court to apply for a JCAP grant for a security camera system.

35. On October 6, 2020 Town Clerk Linda M. Stacey provided Court Clerk Puorro with a copy of her letter of the same date addressed to the Office of Court Administration which embodied the text of the Resolution authorizing the Court to apply for a JCAP grant only for the Specific Items.

36. Court Clerk Puorro gave a copy of the Town Clerk’s October 6 letter to Respondent who did not say anything to her that the Resolution omitted authorizing the Court to apply for a JCAP grant for a security camera system.

37. After the Board adopted the Resolution Respondent -- in his capacity as town justice -- directed Court Clerk Puorro to add a security camera system in the Application.

38. In directing Court Clerk Puorro to add a security camera system in the Application without discussing his addition with Judge Pazin and with Court staff Respondent deviated from the Court’s established grant application practices.

39. When Court Clerk Puorro expressed her concern to Respondent that Judge Pazin was unaware of his addition of a security camera system in the

Application and that the Board had not authorized it, Respondent replied, “[d]on’t worry about it. See if we get [the security camera system].” Hearing Transcript (“Hearing Tr.”) at 29.

40. Court Clerk Puorro requested Respondent to provide her with an estimate of the cost of furnishing and installing a security camera system to include in the Application “[b]ecause [she] [didn’t] even know what to look for in [a] security system.” Hearing Tr. at 29.

41. On or about October 6, 2020 Respondent provided Court Clerk Puorro with a copy of a webpage from the website of CCTV Security Pros for a CSP-4POEMX8-S (“X8-S”) model of security camera system costing \$2,329.99, together with Respondent’s own \$1,000 cost estimate for installing it, to include with the Application in support of his request for JCAP funding for a security camera system.

42. On October 7, 2020 Supervisor Butler signed the certification on the Application’s signature page without reviewing the completed Application and without knowing that it included a request for JCAP funding for a security camera system.⁶

⁶ Clerk Puorro testified that she provided Supervisor Butler with the Application’s signature page previously signed by Respondent and Judge Pazin, together with her draft of the page of OCJS’s on-line JCAP application form which listed the Specific Items and which did not include a

43. On October 7, 2020 Clerk Puorro submitted the Application to OJCS.

44. The Application comprised two parts: (1) OJCS's six-page on-line application form which, among other things, listed the Specific Items and the security camera system; and (2) a packet of materials that Court Clerk Puorro separately faxed to OJCS that included, among other things, a copy of the Town Clerk's October 6 letter embodying the text of the Resolution, a copy of CCTV Security Pros' webpage for a security camera system with Respondent's handwritten notation designating it as the X8-S model system costing \$2,329.99 and with Court Clerk Puorro's handwritten notation "+\$1,000 installation" -- Respondent's estimated cost for installing the system -- which Respondent had given to Clerk Puorro.

45. Around the time that Court Clerk Puorro submitted the Application to OJCS, Respondent contemplated furnishing and installing the security camera system himself but he did not disclose his thinking to anyone.

46. On November 18, 2020 OJCS senior court analyst Erika Hanks e-mailed Respondent and Judge Pazin requesting an itemized breakdown of the security camera system's cost from a vendor as compared to the "handwritten"

security camera system. *See Hearing Tr.* at 33. On the other hand, Supervisor Butler testified that Clerk Puorro provided him only with the signature page for his execution. *See Hearing Tr.* at 197-98.

estimate included in the Application (i.e., the copy of CCTV Security Pro's webpage with handwritten notations). See Respondent's Ex. K.

47. On November 25, 2020 OJCS analyst Kathleen M. Roberts e-mailed Court Clerk Puorro (copying Respondent and Judge Pazin) requesting a cost estimate for the proposed security camera system on vendor letterhead together with a breakdown of the cost of labor and materials and the proposed location for each of the system's cameras.

48. Judge Pazin learned for the first time that Respondent intended to install a security camera system when she received a copy of the Roberts e-mail.

49. Court Clerk Puorro asked Respondent to prepare the estimate requested in the Roberts e-mail because Respondent had informed her that he intended to furnish and install the security camera system.

50. On December 1, 2020 Carol Mercer, Respondent's wife, who is an unpaid Mercer Associates estimator, e-mailed to Court Clerk Puorro Respondent's September 2, 2020 estimate on a Mercer Associates estimate form ("September 2 Estimate") estimating that the cost of furnishing and installing the security camera system at \$3,229.99 -- \$2,329.99 for the X8-S security camera system and \$1,000 for installing it. As requested by OJCS analyst Roberts the September 2 Estimate also detailed the proposed location of each of the system's cameras.

51. Respondent asserted that he gave Court Clerk Puorro the September 2 Estimate to include with her September 21 Letter requesting Board authorization for the Court's Application but that she erred in failing to do so.

52. Respondent's assertion is not credible for two reasons. First, if Respondent had given Court Clerk Puorro the very comprehensive September 2 Estimate he would have had no need to provide her with a copy of the far less detailed CCTV Security Pros webpage with handwritten notations as to security camera model and as to installation cost to include with the Application.

53. Second, the date of Respondent's very comprehensive September 2 Estimate appears inconsistent with Respondent's testimony that, as of October 7, 2020 (when Court Clerk Puorro submitted the Application to OJCS), Respondent had not yet decided to furnish and install the security camera system.

54. In contrast to Respondent's testimony Court Clerk Puorro credibly testified that she saw the September 2 Estimate for the first time on December 1, 2020 when Mrs. Mercer e-mailed it to her.

55. On December 1, 2020 Clerk Puorro e-mailed a copy of the September 2 Estimate to OJCS analyst Roberts.

56. Respondent did not speak to any member of the Board to ascertain whether it had authorized the Court to apply for a JCAP grant for a security camera system.

57. Respondent did not inform Supervisor Butler or the Board that he directed Court Clerk Puorro to add a security camera system to the Application and that he intended to furnish and install it in the Court.

58. Respondent did not inform OCJS that he intended to furnish and install the security camera system in the Court and that he owned Mercer Associates.

B. The JCAP Grant Award To The Town

59. By letter dated January 22, 2021 Gerald W. Connolly, Administrative Judge for the Third Judicial District, informed Court Clerk Puorro that the Court had been awarded a 2020-21 JCAP grant in the amount of \$3,089.99 to purchase and install a security camera system ("Award Letter"). The Court was not awarded a JCAP grant for any of the Specific Items the Court requested in the Application.

60. The Award Letter provided that JCAP grant funds had to be spent within 180 days of the Town's receipt of the grant funds -- on or before approximately August 18, 2021 based upon the February 19, 2021 date of the State's check to the Town in the sum of \$3,089.99, the amount of the JCAP grant.

61. The Award Letter enclosed a Reconciliation Report which set forth the amount of the grant and provided, among other things, “that, as required by law, funds received hereunder may not be used for purposes other than the purchase of the item(s) set forth on the enclosed award form” and that “any goods and/or services purchased with any [JCAP] funds shall be obtained in accordance with acceptable procurement practices established by the municipality including, but not limited to, competitive bidding and computer policies and procedures.” Commission Ex. 7 (internal quotation marks deleted).

62. The JCAP grant in the amount of \$3,089.99 was \$240 less than Respondent’s \$3,329.99 estimated cost for purchasing and installing the security camera system.

C. Respondent’s Furnishing And Installation Of The Security Camera System.

63. Respondent, in his capacity as town justice, took it upon himself -- i.e., hired himself -- to furnish and install the security camera system.

64. Respondent could not obtain the X8-S model of security camera system due to Covid-related supply chain issues.

65. Respondent substituted the 4POEMIC8 (“IC8”) model of security camera system for the X8-S model.

66. On June 3, 2021 Respondent ordered the IC8 model of security system costing \$1,569.99 from CCTV Security Pros.

67. Between mid-June and the first week of July, 2021 Respondent installed the IC8 security camera system in the Court.

68. When Court Clerk Puorro observed Respondent installing the security camera system she questioned him as to whether he, as town justice, should be performing that work through his private company, Mercer Associates, because “it didn’t look good” and “we should use someone not associated” with the Court.

69. Responding to Court Clerk Puorro Respondent “just said that he was going to do it.” *Id.* at 43.

70. Respondent did not disclose to Supervisor Butler or the Board or to OJCS that he had substituted the lower cost IC8 camera security system for the higher priced X8-S system.

D. Respondent’s Invoices

71. On or about July 6, 2021 Respondent submitted to Court Clerk Puorro for payment his invoice # 11283 (“Invoice”) which referred to the IC8 camera security system by its new model #POEMICX8-S.

72. The Invoice was in the total amount of \$3,329.99 -- \$2,329.99 for the IC8 model of security camera system and \$1,000 for its installation.

73. Respondent furnished and installed the less expensive (\$1,569.99) IC8 security camera system but charged the Town for the cost of the more expensive (\$2,329.99) X8-S system.

74. Respondent knew at the time he submitted the Invoice that it was inaccurate.

75. Respondent overcharged the Town in the amount of \$760.

76. If Respondent had charged the Town the correct (\$1,569.99) cost of the security camera he furnished and installed the JCAP grant would have covered the entire cost of the system and its installation with \$520 leftover in surplus JCAP funds which the Town would have been required to return to OJCS.

77. On or about July 6, 2021 Respondent directed Court Clerk Puorro to prepare a voucher to pay his \$3,329.99 Invoice. Respondent did not provide her with any documentation showing the price he actually paid for the security camera system. Court Clerk Puorro prepared voucher #288 dated July 6, 2021 ("Voucher) based solely on Respondent's Invoice.

78. The Voucher indicated that \$3,089.99 of the Invoice would be paid from a Town account created after it received the JCAP grant funds, while the remainder (\$240) of the Invoice would be paid from the Court's security fund in the Town budget.

79. On July 6, 2021 Respondent, in his capacity as town justice, approved the Voucher by signing his name in the box on the Voucher labeled “DEPARTMENT APPROVAL.”

80. In signing his name in the Voucher’s “DEPARTMENT APPROVAL” box Respondent certified that “[t]he above services or materials [i.e., the security camera system and its installation] were rendered or furnished to the [Court] on the dates stated and the charges are correct.” Commission Exs. 13, 14.

81. Respondent’s certification was false, and he knew it was false, in that he charged the Town \$2,329.99 for the IC8 security camera system which cost only \$1,569.99.

82. On July 6, 2021 Donald Pierro, the Bookkeeper to the Supervisor and the Town official responsible for finance, budget and personnel matters (“Bookkeeper Pierro”), approved the Voucher by initialing the form below the “Department Approval” box and he forwarded it to the Board.

83. After the Board approved the Voucher, Supervisor Butler and three Board members signed their names in the box on the Voucher form labeled “Approval For Payment.”⁷

⁷ Bookkeeper Pierro testified that Supervisor Butler signed the Voucher in the “APPROVAL FOR PAYMENT” box and that he recognized Supervisor Butler’s signature on the Voucher. See Hearing Tr. at 147. Supervisor Butler testified that he did not “feel comfortable” signing the

84. When the Voucher was returned to Bookkeeper Pierro for processing and payment he noticed, for the first time, the name of Mercer Associates on the Voucher which raised questions for him about the relationship between Mercer Associates and Respondent, as well as Respondent's apparent conflict of interest "[b]ecause people that work for the Town in certain capacities can't do other types of work for the Town." *Hearing Tr.* at 150.

85. Bookkeeper Pierro withheld payment of the Voucher because he was concerned about Respondent's apparent conflict of interest.

86. Supervisor Butler, too, was concerned about the Voucher and Respondent's apparent conflict of interest, as well as by Respondent's failure to follow the Town's Procurement Policies and Procedures.

87. Supervisor Butler referred the issue of Respondent's conflict of interest to the Town attorney to investigate.

88. On July 15, 2021 Respondent used his New York State Unified Court System ("UCS") judicial e-mail account address [REDACTED]@nycourts.gov to e-mail Supervisor Butler in an effort to obtain payment of his Invoice.

Voucher after he noticed that it involved the approval of the Invoice of Respondent's company, Mercer Associates. *See Hearing Tr.* at 199. The signatures in the Voucher's "APPROVAL FOR PAYMENT" box are illegible. *See Commission Ex. 14.*

89. Respondent used the title of his judicial office, “Hon. E. Timothy Mercer Town Justice,” in the signature block of his e-mail.

90. Respondent “CC’d” himself on his e-mail using an e-mail address, [REDACTED]@mercerplg.com, other than his UCS judicial e-mail account address which indicates that his use of his UCS address was not a mistake.

91. On July 15, 2021 Supervisor Butler responded to Respondent’s e-mail and he informed Respondent that the Town would not pay his Invoice until it resolved the conflict of interest issue which he had requested the Town attorney to investigate.

92. On July 21, 2021 Respondent e-mailed Hon. David Dellehunt, his supervising justice, about an “Athens Town ethically [sic] issue.” Commission Ex. 16.

93. In his e-mail Respondent informed Judge Dellehunt that the “Town of Athens is looking into an ethical issue with [him]” because he installed a security camera system in the Court and that he “[didn’t] feel [he] broke any ‘Town’ ethics, but do know that just the look of impropriety is enough. . . .” *Id.* Respondent added that he wanted to discuss the issue with Judge Dellehunt “to get in front of the problem. . . .” *Id.*

94. During the first week of August, approximately two weeks after

e-mailing Judge Dellehunt, Respondent had a conversation with Bookkeeper Pierro about his unpaid Invoice. Respondent told Bookkeeper Pierro that he would impose a finance charge if the Town did not pay it.

95. On August 18, 2021 Respondent sent two invoices to the Town. One invoice, Invoice #FC 27, imposed "Finance Charges [of \$66.59] on Overdue Balance Invoice #11283 on 07/06/2021" because the Town had not paid Respondent's invoice.

96. The other August 18 invoice (Commission Ex.17), by reference to his July 6, 2021 Invoice (#11283), again charged the Town \$2,329.99 for the IC8 security camera system although it cost only \$1,569.99 (plus \$1,000 for its installation) and it added the \$66.59 finance charge for a total balance due of \$3,396.58.

97. By November 18, 2021, about the time that Respondent learned that the Commission had commenced an investigation into his role in the JCAP grant and his furnishing and installation of the security camera system in the Court, Respondent had removed the security camera system which he had furnished and installed with the exception of four cameras.

98. On or about December 30, 2021 Respondent sent the Town another invoice stamped "PAID" which voided all charges for the IC8 system's cost and its

installation and which stated that he had removed the entire IC8 system from the Court. Commission Ex. 20.

99. The Town did not pay Respondent for the security camera system and its installation because his December 30 invoice voided all of his charges.

E. The Court's Return Of The JCAP Funds

100. The Court did not spend the JCAP grant funds by August 18, 2021 -- within 180 days of the approximate date that the Town received the JCAP grant funds as required by Judge Connolly's award letter.⁸

101. On or about May 23, 2022 Judge Pazin returned the JCAP funds to OJCS and she executed the Reconciliation Report with its handwritten notation "Funds Returned." Commission Ex. 23.

102. Had the Town paid the Respondent's Invoice with his undisclosed profit of \$760 -- the difference between Respondent's \$2,329.99 charge for the security camera system he installed and its actual cost of \$1,569.99 -- the Town unknowingly would have violated Judiciary Law § 849-h(2) and 22 NYCRR § 138.2 which prohibit the use of JCAP grant funds to compensate town or village justices.

⁸ The Hearing record does not disclose the date that the Town received the JCAP funds. The State Comptroller's JCAP check in the amount of \$3,089.99 payable to the Town is dated February 19, 2021. See Commission Ex. 8.

F. Respondent's Admissions Relating to the Security Camera System

103. Respondent admitted:

(a) that Court Clerk Puorro's (purported) error in failing to include his September 2 Estimate for a security camera system with her September 21 Letter requesting Board authorization for the Court's JCAP Application did not excuse his admitted ethics violations. *See* Hearing Tr. at 370-71.

(b) that, in his capacity as town justice, he "hired [him]self" to furnish and install the security camera system in the Court (Hearing Tr. at 354) and that the contract for that work was "self-awarded." *Id.* at 367; Letter Answer at 3; *see* Hearing Tr. at 344.

(c) that he, as town justice, had engaged in self-dealing in taking it upon himself to furnish and install the security camera system and that it was a conflict of interest to do so. *See* Hearing Tr. at 344.

(d) that he used his position as town justice to retain himself to furnish and install the security camera system. Hearing Tr. at 290, 344.

(e) that he "falsely" (Hearing Tr. at 348) charged the Town \$2,329.99 for the security camera system that he furnished and installed which cost only \$1,569.99. *See* Hearing Tr. at 285-86, 288.

(f) that he intended to retain the \$760 difference between his invoiced (\$2,329.99) cost of the security camera system and its actual cost (\$1,569.99) as “personal gain” or “personal[] profit (Hearing Tr. at 286) “because that’s what our people are in business for” and that as “a part-time judge with a full-time position as. . .Mercer Associates[] [t]hat’s how I make my living.” Hearing Tr. at 288-89.

(g) that he used his judicial position “to make money.” Hearing Tr. at 344.

(h) that he signed and approved the Voucher in his capacity as town justice again knowing that he had “falsely” overcharged the Town and that it was “dishonest” to do so. Hearing Tr. 348-49; *see id.* at 288.

(i) that, notwithstanding his e-mail to Judge Dellehunt acknowledging that his conduct created an appearance of impropriety, he nevertheless imposed a finance charge on his unpaid Invoice because he “was still maintaining the interests of Mercer Associates.” Hearing Tr. at 292-93.

(j) that in 2020-21 -- the period during which Respondent participated in the JCAP grant application process, furnished and installed the security and camera system in the Court, invoiced the Town for his work and signed the Voucher approving payment of his Invoice -- his personal and private

financial interests as owner of Mercer Associates took precedence over his judicial duties. *See id.*

(k) that he should not have used his New York State UCS judicial e-mail account address “[REDACTED]@nycourts.gov” to e-mail Supervisor Butler in an effort to obtain payment of his Invoice. *See* Hearing Tr. at 290-291.

(l) that he “lent the prestige of [his] judicial office for [his] private financial interests” in using the title of his judicial office, “Hon. E. Timothy Mercer Town Justice,” in the signature block of his e-mail to Bookkeeper Butler. Hearing Tr. at 354-55.

(m) that his “actions were wrong” and that he “failed to uphold the highest standards of judicial ethics. . .[,] failed to avoid the appearance of impropriety [and failed] to act in a manner that promotes public confidence in the judiciary.” Hearing Tr. at 411; *see* Letter Answer at 9.

**IV. Proposed Findings of Fact With Respect To FWC
Paragraph 31’s Allegation That Respondent Failed To
Cooperate With Town Officials When He Initially Refused
to Accept and Acknowledge Receipt Of Town Documents**

104. In Fall 2021 Supervisor Butler directed Bookkeeper Pierro to distribute a copy of the Town’s Employee Handbook, Code of Ethics and Procurement Policies and Procedures to all Town elected officials and employees.

105. Supervisor Butler required all Town elected officials and employees to accept and to sign for a copy of the Documents.

106. After each elected official and employee signed a distribution sheet acknowledging their receipt of the Documents Bookkeeper Pierro placed a copy in their personnel file.

107. Supervisor Butler included Respondent and Judge Pazin among the Town elected officials and employees whom he compelled to accept and sign for a copy of the Documents.

108. Supervisor Butler did not differentiate Town Court judges from all other Town elected officials and employees as to whom he required to accept and sign for the Documents.

109. Bookkeeper Pierro was unable to recall the date he first distributed a copy of the Documents to Respondent and to Town elected officials and employees. He “guess[ed]” that he distributed a copy of the Documents “around Thanksgiving 2021.” Hearing Tr. at 154.

110. Respondent initially refused to accept and sign for a copy of the Documents.

111. “[O]ne day” (*Hearing Tr.* at 156) when Respondent walked by Bookkeeper Pierro’s office Bookkeeper Pierro again presented a copy of the

Documents to Respondent who accepted them, and he signed a distribution sheet acknowledging that he received them.

112. Bookkeeper Pierro was unable to recall the date that Respondent accepted and signed for a copy of the Documents. He testified, “I’m going to say in January [2022], but I can’t be 100 percent positive.” Hearing Tr. at 156.

113. The distribution sheet is titled, “Official Document Distribution-Town Handbook (11/4/21), Procurement Policy & Ethics Code to Elected Officials and Staff as of 11/9/21.” Commission Ex. 22.

114. Respondent’s signature appears at line 6 of the Distribution Sheet which seems to indicate that “as of 11/9/21” Respondent had accepted and signed for a copy of the Documents.

V. Additional Factors

115. Respondent took full responsibility for his improper conduct.

116. Respondent was contrite and remorseful and he “express[ed] [his] heartfelt regret” for his improper conduct. Hearing Tr. at 411; see Letter Answer at 9.

VI. Proposed Conclusions Of Law With Respect To Respondent's Conduct Relating To The Security Camera System

Upon the foregoing Proposed Findings of Fact the Referee concludes as a matter of law that Commission counsel proved by a preponderance of the evidence that Respondent violated the Rules, §§ 100.1, 100.2, 100.2(A), 100.2(C), 100.3(A), 100.3(B)(1), 100.3(C)(1), 100.4(A)(1-3) and 100.4(D)(1)(a) of the Rules. *See Operating Rules, § 7000.6(i)(1)* (“The attorney for the commission has the burden of proving, by a preponderance of the evidence, the facts justifying a finding of misconduct”).

Accordingly, Charge I of the FWC, except as to the allegations contained in paragraph 31 (*see § VII, infra* at 46-52), is sustained insofar as it is consistent with the above findings and these conclusions of law, and Respondent's misconduct is established.

A. The Commission's *Knab* Decision

The Commission previously has considered a judges' Rules violations involving a JCAP grant award. In *Matter of Knab, supra*, the Commission censured a town justice for his dishonesty in administering a JCAP grant awarded to his court.

The *Knab* judge completed and filed a JCAP Reconciliation Report with OJCS in which he falsely represented that he had spent the entire amount of a JCAP grant

-- \$7,479.47 -- on three items approved by OJCS when he knew that he had spent only \$5,764.97, a savings of \$1,714.50. The judge also failed to disclose in his Reconciliation Report that he had realized a savings of \$1,714.50 and that he had used the unexpended JCAP funds toward the purchase of an audio-visual system with a 50-inch LED TV for his court which he knew OJCS had not approved as required by the terms of the JCAP grant. The judge, however, did not “personally benefit from [his misrepresentations].” *Knab, supra* at 8, para. 22.

The Commission determined that the judge “violated his ethical obligations and brought reproach on the judiciary when he signed a Reconciliation Report knowing it contained inaccurate information about the expenditure of JCAP grant money.” *Knab, supra* at 9. The Commission reasoned that

[e]ach judge is obligated to “act at all times in a manner that promotes confidence in the integrity of the judiciary” and must observe high standards of conduct “so that the integrity and independence of the judiciary will be preserved.” (Rules, §§100.1 and 100.2) Section 100.3(C)(1) of the Rules requires that each judge “shall diligently discharge the judge’s administrative responsibilities. . .and maintain professional competence in judicial administration. . . .” In *Matter of McDermott*, 2019 NYSCJC Annual Report 161 the Commission held, “[t]he handling of official funds is one of a judge’s most important responsibilities. . . .This responsibility requires strict adherence to mandated procedures to avoid even the appearance that court funds have been mishandled or misappropriated.” *Id.* at 167.

Id.

Respondent's misconduct is more serious than that of the *Knab* judge because personal profit motivated him. Respondent admitted that he knowingly approved, in his capacity as town justice, a false Voucher predicated upon his own false invoice surreptitiously charging the Town \$2,329.99 for a security camera system which cost only \$1,569.99 and that he intended to retain the \$760 savings as "personal[] profit" (Hearing Tr. at 286) and "to make money." Hearing Tr. at 343. *See Matter of Moore, Comm'n Jud Conduct* (Nov. 10, 1983) (removing judge who "engaged in a scheme to misappropriate funds received in his official capacity and to conceal his misconduct by falsifying court records").

Respondent was consistently secretive and withholding. Respondent (a) added a security camera system to the Application without informing Judge Pazin and the Board; (b) failed to disclose to anyone that he intended to furnish and install the system himself; (c) had Court Clerk Puorro transmit to OCJS his estimate of the cost of the system and its installation on a Mercer Associates estimate form without disclosing his relationship to Mercer Associate; and (d) hid the fact that he charged the Town for a more expensive security camera system than the system he actually installed. At every juncture where Respondent could (and

should) have shared information with Judge Pazin, Court staff, the Board, Town officials or OCJS he failed to do so. Respondent was deliberately deceptive. See *Matter of Myers*, 67 N.Y.2d 550, 554 (1986) (“deception is antithetical to the role of a Judge who is sworn to uphold the law and seek the truth” (citation omitted)).

B. Respondent’s Business Interests And His Judicial Responsibilities

1. Conflict of Interest

“It would be a breach of judicial ethics for a judge acting in [an administrative capacity] to confer, or approve of, a financial benefit to himself or herself. . .where there is a conflict of interest.” *Judges Meeting With Vendors*, CJEOP Formal Op. 2017-009 (July 26, 2017), 2017 Cal. Jud. Ethics Op. LEXIS 4 at 8, quoting Rothman, Cal. Judicial Handbook Section 6.07 at 261 (3d ed. 2007). For this reason, a judge’s personal business and financial interests must never conflict with their judicial responsibilities, and a judge has a duty to see that they do not. See *Johnson Timber Corp. v. Sturdivant*, 758 S.W.2d 415, 416 (Ark. 1988), 1988 Ark. LEXIS 573 at 3 (A judge’s “personal legal business should never conflict with his role as a justice, and it his duty. . .to see to that”).

Respondent breached that duty -- and the Rules -- because he failed to appreciate that his financial interests as sole owner of Mercer Associates conflicted with, and were incompatible with his public responsibilities as town

justice. Respondent not only prioritized his personal interests as a full-time contractor and owner of Mercer Associates over his responsibilities as a part-time town justice but he exploited his judicial position to further his private business interests. To summarize:

Respondent, as town justice, involved himself in the preparation of the Court's JCAP Application notwithstanding his interest in performing the security camera work. Although the Board did not authorize a security camera system Respondent, as town justice, directed Court Clerk Puorro to add a system to the Application without informing his co-judge (Judge Pazin), the Board or any other town official, much less discussing his addition with them.

When OJCS requested a more detailed estimate of the cost of furnishing and installing the security camera system proposed in the Application, Respondent, as town justice, provided it on a Mercer Associates estimate form without disclosing that he was sole owner of Mercer Associates

Following the OJCS's JCAP grant award to the Court, Respondent, as town justice, hired himself to furnish and to install the security camera system.

Due to the unavailability of the X8-S model of security system Respondent substituted the lower cost (\$1,569.99) IC8 model for the more expensive (\$2,329.99) X8-S model. Nevertheless, Respondent knowingly charged the Town

\$2,329.99 for the IC8 system which cost only \$1,569.99, a \$760 differential which Respondent intended to retain as profit.

Then Respondent, in his capacity as town justice, signed and approved the Voucher authorizing payment of his own Invoice which he knew falsely charged the Town \$2,329.99 for the security camera system which cost only \$1,569.99. And in signing and approving the Voucher Respondent, as town justice, falsely certified that his charge for the system was “correct”. Commission Ex. 14.

Respondent’s conduct violated the mandates of the Rules’ ethical standards that judges must: “uphold the integrity and independence of the judiciary” (§ 100.1); “avoid impropriety and the appearance of impropriety in all the judge’s activities” (§ 100.2); “respect and comply with the law and . . .act. . . in a manner that promotes public confidence in the integrity. . .of the judiciary” (§ 100.2(A)); ensure that the judge’s judicial duties “take precedence over the judge’s other activities” (§ 100.3(A)); “be faithful to the law and maintain professional competence in it” (§100.3(B)(1)); “maintain professional competence in judicial administration” (§ 103(C)(1)); and conduct their extra-judicial activities so as not to cast reasonable doubt on their capacity to act impartially as a judge, detract from the dignity of their office, interfere with proper performance of their judicial duties or in a manner incompatible with their judicial office (§ 100.4(A)(1-3).

Respondent's conduct also violated the Rules' ethical standards which prohibit judges from "lend[ing]the prestige of judicial office to advance the private interests of the judge or others" (§ 100.2(C)) and from "engag[ing] in financial and business dealings that may reasonably be perceived to exploit the judge's judicial position" (§ 104.4(D)(1)(a)).

2. Advisory Committee Ethics Opinions

At the end of the Hearing (see Hearing Tr. at 412-13) the Referee requested that Commission Counsel and Respondent address in their post-hearing memorandums of law the relevance and applicability, if any, in this proceeding of the following four opinions of the Advisory Committee On Judicial Ethics: Adv Op 89-19 (Feb. 24, 1989) (part-time town justice, who is a carpenter, may perform remodeling work for the town court in which the judge presides); Adv Op 95-79 (June 29, 1995) (part-time town justice may provide computer services in connection with a new computer in the court in which the judge presides); Adv Op 98-163 (Oct. 22, 1998) (part-time town judge, who owns and operates a local construction company, may bid on and, if successful, construct an airport hangar for the town in which the judge presides); Adv Op 99-128 (Sept. 14, 1999) (part-time town justice, who is a licensed professional engineer, may occasionally work as the town engineer for the town in which the judge presides).

Commission counsel and Respondent addressed these Opinions in their post-hearing memorandums of law. The Referee concludes that they are distinguishable from the facts of this case and do not validate Respondent's conduct.

In contrast to Respondent, the judges in the Advisory Committee opinions transparently disclosed their interest in providing services or products to the town in which the judges presided. Further, unlike Respondent, they did not exploit their judicial position to award a public contract to their own private business. Additionally, as opposed to Respondent, their private business interests did not clearly conflict with and were not incompatible with their judicial responsibilities.

Moreover, the judges in the Advisory Committee opinions did not take it upon themselves (as Respondent did) to perform the work for the town in which they presided. Rather they requested an opinion from the Advisory Committee prior to rendering their services or providing their products to ensure that their proposed private business activities did not violate the Rules. *See Matter of Wolfgang*, NY Comm'n Jud Conduct (July 5, 2000) (judge could have avoided her ethical violation of the Rules by requesting an opinion from the Advisory Committee); *see also Matter of Martin*, NY Comm'n Jud Conduct (June 6, 2002) at

5 (same); Judiciary Law, § 212(2)(l)(iv) (“Actions of any judge or justice. . . taken in accordance with findings or recommendations in an advisory opinion . . . shall be presumed proper for the purposes of any subsequent investigation by the state commission on judicial conduct”).

C. Respondent’s Use Of His Judicial E-Mail Address

Respondent’s use of his UCS judicial e-mail account address to seek payment of his Invoice violated the Rule’s prohibition against judges lending the prestige of judicial office to advance their private interests. *See Rules*, § 100.2(C); *see also Matter of Persons*, Comm’n Jud Conduct (Feb. 23, 2023) (judge violated § 100.2(C) when he used his judicial e-mail account in connection with a private matter), *sanction accepted* __ NY3d __ (2023); *Matter of Tyler*, Comm’n Jud Conduct (May 1, 1989) at 10 (“by using her court letterhead in three instances involving personal disputes, [town justice] lent the prestige of her judicial office to advance her private interests” in violation of section 100.2(C)); *Matter of Smith*, Comm’n Jud Conduct (June 19, 2013) (admonishing judge for sending an unsolicited letter on her judicial stationary to the New York State Division of Parole expressing her support for an inmate’s release on parole).

D. Other Statutory, Regulatory And Code Provisions
Applicable To Respondent's Conduct

1. Judiciary Law § 849-h(2) and 22 NYCRR § 138.2

Located immediately below Respondent's signature on the JCAP Application's signature page is an unambiguously clear prohibition on the use of JCAP funds, as follows: "no funds awarded pursuant to this application shall be used to compensate justices." Commission Ex. 4 at unnumbered page 2.

The prohibition set forth on the signature page parrots the language of Judiciary Law § 849-h(2) which provides that JCAP "funds. . .shall not be used to compensate justices" and § 138.2 of the Rules of the Chief Administrative Judge which provides that JCAP [f]unding shall not be used to compensate justices."

In retaining himself to install the security camera system in the Court for \$1,000 Respondent violated these statutory and regulatory prohibitions governing the use of JCAP funds, as well as those of the JCAP grant. And Respondent would have further violated these prohibitions had he retained the \$760 profit resulting from his \$2,329.99 charge to the Town for the security camera system he installed which cost only \$1,569.99.

2. General Municipal Law § 803

Respondent likewise violated GML § 803 which requires “any municipal officer or employee” to disclose “an interest in any actual or proposed contract. . . or other agreement, including oral agreements, with the municipality of which he or she is an employee. . . .”

When Respondent, in his capacity as town justice, hired himself to furnish and install the security camera system he acquired an “interest”⁹ in his oral contract with the Town which GML § 803 required him to disclose to the Town Board. Respondent’s failure to do so violated GML § 803. *See* 1973 N.Y. Op. (Inf.) Atty Gen. 104, 1973 N.Y. AG LEXIS 53 (§ 803 required a town justice to disclose his employment contract as an attorney for special improvement districts in the town in which he presided); *see also Cunningham v. Aetna Cas. & Sur. Co.*, 125 A.D.2d 950 (4th Dept. 1986) (“A Town Justice is a town officer”(citation omitted)).¹⁰

⁹ “‘Interest’ means a direct or indirect pecuniary benefit accruing to a municipal officer or employee as the result of a contract with the municipality which such officer or employee serves.” GML § 800(3).

¹⁰ Respondent asserts he is not a town officer for purposes of GML 803 because (according to Respondent) GML § 810(2) provides that “[t]he term ‘local elected official’ shall mean an elected official of the political subdivision, except judges or justices of the unified court system.” *See* Respondent’s September 5, 2023 Memorandum of Law at unnumbered page 6. Respondent overlooks § 810’s introductory sentence which provides that the definition of “local elected official” is applicable only “[a]s used in GML § [811] and § [812].” Generally, § 811(1)(a) authorizes local governing bodies to adopt legislation promulgating the form of annual financial

Paragraph 19 of the FWC also alleged that Respondent violated GML § 801 when he “awarded the contract [for furnishing and installing the security camera system] to his own company, Mercer Associates notwithstanding that it constituted a conflict of interest . . .” GML § 801 prohibits conflicts of interest in municipal contracts by providing that “no municipal officer or employee shall have an interest in any contract with the municipality of which he is an officer or employee[] when such office or employee. . . has the power or duty to (a) negotiate, prepare, authorize or approve the contract or authorize or approve payment thereunder. . . .”

Commission counsel withdrew the allegation of paragraph 19 of the FWC that Respondent violated GML § 801 “because the record is unclear whether Respondent, in his official capacity, had [the power or duty to negotiate, prepare, authorize or approve the contract or approve payment thereunder].” Commission counsel’s September 5, 2023 Memorandum of Law at 36 n 11.

When Respondent, in his capacity as town justice, took it upon himself to hire his own company, Mercer Associates (in reality himself) and when he, in his

disclosure statements and requiring “local elected officials” to complete and file them; while § 812(1)(a) generally provides that a county, city, town or village must require their “local elected officials” to complete and file an annual financial disclosure statement with their board of ethics. The term “local elected official” does not apply in this proceeding.

capacity as town justice, signed the Voucher authorizing payment of his own Invoice, Respondent assumed the “power to. . .negotiate, prepare [and] authorize” his own contract and to “authorize [and] approve payment thereunder.” GML § 801.

At the very least, Respondent’s improper conduct was inconsistent with § 801 and the policy underlying it: the elimination of conflicts of interest by municipal officers and employees and the promotion of public confidence in their integrity -- the same policy underlying the Rules. *See e.g.*, § 100.2(A) (“A judge shall. . .act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary”).

3. The Town Ethics Code

§ 19-3 (c) of the Town Ethics Code (Commission Ex. 28) prohibits a Town officer from “receiv[ing] or enter[ing] into any agreement, express or implied, for compensation for services rendered in relation to any matter before any municipal agency of his or her municipality of which he or she is an officer, member or employee. . . .” Respondent violated § 19-3 (c) when he, in his capacity as town justice, retained himself to furnish and install the security camera system in his Court.

§ 19-3(G) of the Town Ethics Code provides that a town officer “shall not engage in, solicit, negotiate for or promise to accept private employment or render services for private interest when such employment or service creates a conflict with or impairs the proper discharge of his or her duties.” Commission Ex. 28. Respondent violated § 19-3(G) when he, in his capacity as town justice, hired himself to furnish and install the security camera system because he accepted private employment and agreed to render services for his private interest which created a conflict with his judicial duties.

In sum, Respondent’s multiple violations of the Judiciary Law, GML § 803, the Rules of the Chief Administrative Judge and the Town Ethics Code breached, among other Rules, § 100.2(A) which provides that “[a] judge shall respect and comply with the law. . . .”

**VII. Proposed Conclusions Of Law With Respect To FWC
Paragraph 31’s Allegation That Respondent Failed To
Cooperate With Town Officials When He Initially Refused to
Accept And Sign For The Documents**

Upon the foregoing Proposed Findings of Fact set forth in Section IV *supra*, the Referee concludes as a matter of law that Commission counsel did not prove by a preponderance of the evidence that Respondent violated the Rules as alleged in

paragraph 31 of the FWC. *See Operating Rules, § 7000.6(i)(1)*. Accordingly, the allegations set forth in paragraph 31 of Charge I is not sustained.

Paragraph 31 of the FWC alleged that Respondent violated the Rules when he “refused to cooperate with a request by Town officials that he accept and sign for copies of the Town of Athens’ handbook, procurement policy and ethics code” (collectively, “Documents”) until after he testified at his investigative appearance before the Commission on February 7, 2022 when the Commission raised the issue with him.

Although paragraph 31 refers to a “request by Town officials” the Hearing record clearly discloses that Supervisor Butler intended to, and did, compel all Town elected officials and employees, including town court judges, to accept a copy of the Documents and to acknowledge receiving them by signing a distribution sheet which was to be placed in their personnel files.

Bookkeeper Pierro testified that in Fall 2021 Supervisor Butler directed him to distribute a copy of the Documents to all Town elected officials and employees and to “get them” (Hearing Tr. at 154) to sign for the Documents. Bookkeeper Pierro further testified that, after an elected official or employee signed a distribution sheet, Supervisor Butler directed him to put a copy of it in their personnel file.

Supervisor Butler similarly testified that he directed Bookkeeper Pierro to distribute a copy of the Documents to all Town elected officials and employees and to require them to sign a distribution sheet acknowledging that they received them.

By including Respondent (and Judge Pazin) within the scope of coverage of his mandate that all Town elected officials and employees accept and sign for a copy of the Documents, Supervisor Butler infringed upon the Court's independence by creating the appearance that the Court is a department of Town government and a part of the executive branch serving under his direction and control. *See Adv Op 21-26* (March 11, 2021) at 2 (“a town or village judge must guard against the risk of an appearance that the justice court is part of the executive branch serving under the direction and control of the town board, town supervisor or village mayor” (internal quotation marks, ellipses, brackets and citation omitted)); *see also id.* at 1 (“town executive branch employees are presumably subject to the town board's direction and control in a way that the town justice and town court are not”).

The Advisory Committee applied these principles in several Opinions. *See e.g., Adv Op 16-104* (June 16, 2018) (for separation-of-powers reasons a judge must not acquiesce in an attempt by town officials to compel the chief court clerk

to attend monthly meetings with the village government's department heads as if the court were a part of the executive branch), *modified on other grounds*, Advisory Op 21-26, *supra*; see also Adv Op 99-104 (Sept. 14, 1999) (judge's acquiescence in mayor's directive that the judge attend monthly meetings with other village department heads would "erroneously identify the judge as a member of the executive branch of [village] government serving under the direction of the Mayor" and would jeopardize the independence of the judiciary) , *modified on other grounds*, Adv Op 21-26, *supra*; Adv Op 16-55 (June 16, 2016) at 2 (judge may not voluntarily agree to be bound by the town ethics code which may arguably be more stringent than the Rules Governing Judicial Conduct since it would impinge on the independence of the judiciary); Adv Op 19-80 (June 20, 2019) at 2 ("serious separation-of-powers concerns" preclude a judge from agreeing to be bound by the village's sexual harassment policy absent a legal requirement to do so).

In view of the cited Advisory Committee Opinions Respondent did not commit judicial misconduct when he initially refused to accept and sign for a copy of the Documents as directed by Supervisor Butler. Respondent's refusal was not only justifiable but he avoided an allegation of ethical misconduct that he failed to preserve the judiciary's independence had he complied with Supervisor Butler's

mandate compelling him to accept and sign for the Documents. *See* Rules, § 100.1 (“A judge shall uphold the integrity and independence of the judiciary”); *see also id.*, § 100.0(S) (“An ‘independent’ judiciary is one free of outside influences or control”).

At a minimum, Respondent’s assertion of “separation-of-powers” as his grounds for initially refusing to accept and sign for a copy of the Documents (*see* Letter Answer at 5 (apparently referring to Adv Op 19-80 although not by opinion number); *see also id.* at 6; *id.* at 8) provided him with a good faith basis for his refusal which precludes a finding of judicial misconduct. *See* Advisory Op 16-55, *supra* (“a judge who makes a good-faith legal determination based upon the controlling statutes and case law (if any) is necessarily acting ethically” (citation omitted)); *see also* Adv Op 19-20 (March 14, 2019) at 2 (same).

Moreover, Commission counsel’s proof did not establish that Respondent refused to accept and sign for a copy of the Documents until *after* his February 7, 2022 investigative appearance before the Commission as alleged in FWC paragraph 31.

Bookkeeper Pierro’s recollection of the distribution timeline -- commencing with the date on which he first distributed the Documents to all Town elected officials and employees and continuing through the date on which Respondent

accepted a copy of the Documents and signed the Town's distribution sheet (Commission Ex. 22 ("Distribution Sheet")) -- was vague.

Bookkeeper Pierro was uncertain as to the date on which he first distributed a copy of the Documents to Respondent, and he was similarly uncertain as to the date Respondent accepted them and signed the Distribution Sheet.

The Distribution Sheet seems more definitive. The Distribution Sheet's title, "Official Document Distribution-Town Handbook (11/4/21), Procurement Policy & Ethics Code to Elected Officials and Staff *as of 11/9/21*" (italics added), indicates that "as of 11/9/21" Respondent had accepted a copy of the Documents and had signed the Distribution Sheet. *See Commission Ex. 22* at line 6.

The Distribution Sheet appears to show that Respondent accepted and signed for a copy of the Documents on or before November 9, 2021, and that he did not refuse to cooperate with Town officials by waiting until after he testified during his February 7, 2022 investigative appearance before the Commission to do so as alleged in FWC paragraph 31.

At a minimum, Bookkeeper Pierro's testimony calls into question FWC paragraph 31's allegation that Respondent did not accept and sign for a copy of the Documents until *after his February 7, 2022* Commission investigative appearance. Bookkeeper Pierro recalled that Respondent accepted the

Documents and signed the Distribution Sheet “one day” *in January 2022*. Hearing Tr. at 156. For this reason alone Commission counsel did not prove by a preponderance of the evidence that Respondent violated the Rules as alleged in FWC paragraph 31.

October 4, 2023
Syracuse, New York

s/David M. Garber
David M. Garber, Referee