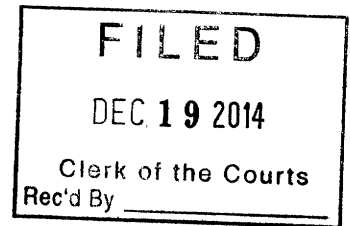


**IN THE TENNESSEE BOARD OF JUDICIAL CONDUCT**

**IN RE: THE HONORABLE JOHN A. DONALD  
GENERAL SESSIONS JUDGE  
SHELBY COUNTY, TENNESSEE**



**Docket No. M2013-02204-BJC-DIS-FC**

**File No. 11-4762**

**OPINION OF THE HEARING PANEL**

This matter came on to be heard before the Hearing Panel of the Tennessee Board of Judicial Conduct (the “Hearing Panel”) on the 1<sup>st</sup> day of October, 2014, in accordance with provisions as set forth in Tenn. Code Ann. § 17-5-301, *et seq.*, on formal charges filed by Disciplinary Counsel for the Tennessee Board of Judicial Conduct against Shelby County General Sessions Judge John A. Donald. This hearing was held in Shelby County, the home county of Judge Donald, in accordance with Tenn. Code Ann. § 17-5-308. The Hearing Panel found by clear and convincing evidence that by his actions, Judge Donald violated the Code of Judicial Conduct.

**JURISDICTION**

The Honorable John A. Donald, at all times relevant, was a duly elected General Sessions Judge in Shelby County, Tennessee, and is subject to judicial discipline by the Board of Judicial Conduct pursuant to Tenn. Code Ann. § 17-5-102.

**FACTS**

Judge John A. Donald came before this hearing panel on formal charges filed by Disciplinary Counsel. The facts under consideration began when an initial complaint was filed by Attorney David Gold. David Gold is a licensed Tennessee attorney, who was practicing law in Judge Donald’s court in September of 2011. Mr. Gold appeared the first time in Judge Donald’s court on behalf of a client pertaining to a collection matter. During the course of his exchange with Judge Donald, Mr. Gold admitted that his speech became loud, due to the fact that he has a hearing loss condition, and did not, at that time, have hearing aids. All parties agreed

that during the course of the hearing, there was a verbal exchange between Judge Donald and Mr. Gold. Ultimately, Mr. Gold was instructed by the Judge to return to court, so as to present a legal brief pertaining to the collection issue. On September 26, 2011, Mr. Gold re-appeared in Judge Donald's court, along with his associate Mr. Grittdoll, presenting his brief and, in his words, attempting to present his client's argument. Mr. Gold testified that Judge Donald took a temporary recess and adjourned to his chambers to read his brief concerning the legal issue. Mr. Gold testified that when Judge Donald returned to court, that Judge Donald essentially refused to let him speak, and ultimately Judge Donald disagreed with Mr. Gold's presentation of the law as set out in his brief. Judge Donald informed Mr. Gold that he had consulted with a U. S. Bankruptcy Judge who agreed with Judge Donald's view of the law, and who ultimately disagreed with Mr. Gold's view of the law. Mr. Gold then testified that Judge Donald said, more than once, "I don't want to hear from you, be quiet, be quiet." Mr. Gold testified that, apparently after further reflection, Judge Donald sent to Mr. Grittdoll a letter apparently reconsidering his earlier position pertaining to the law. Finally, another hearing was held before Judge Donald on October 6, 2011, wherein Mr. Gold testified that Judge Donald informed him that he (Mr. Gold) was rude and disrespectful. These statements by Judge Donald were intermingled with Judge Donald's ultimate ruling, based upon Mr. Gold's testimony. There is no question that another verbal exchange took place between Judge Donald and Mr. Gold at this October 6<sup>th</sup> hearing. Mr. Gold testified, based upon his belief of how poorly his interaction with Judge Donald had gone that day in court, that he and his mentor should go and see Judge Donald to attempt to apologize and/or to clear things up between himself and Judge Donald. Therefore, the next day Mr. Gold and his mentor went to Judge Donald's chambers in an attempt to meet with the Judge. This meeting also did not go well. Judge Donald refused to allow Mr. Gold to speak and/or refused to speak with Mr. Gold. Again, Judge Donald expressed, to Mr. Gold and his mentor, his feelings about Mr. Gold's actions in his court.

Subsequent to the court appearances and the attempted meeting with Judge Donald in his chambers, Mr. Gold filed a Board of Judicial Conduct Complaint against the Judge (on or about 10/17/2011). After Judge Donald received the complaint, and after Judge Donald responded to the Board of Judicial Conduct pertaining to the allegations made in the complaint, Judge Donald

then filed his own complaint with the Board of Professional Responsibility against Mr. Gold. After Judge Donald did not receive a response pertaining to his complaint, Judge Donald then filed a second complaint against Mr. Gold. In his second complaint, Judge Donald requested an inquiry, not only of Mr. Gold, but also of the attorney who had signed an affidavit that had accompanied Mr. Gold's complaint against Judge Donald, and who was mentioned as a possible witness against Judge Donald. In his complaint, Judge Donald alleged that Mr. Gold was not only untruthful in his complaint, but also in his second complaint to the Board of Professional Responsibility. Judge Donald requested that the Board check into Mr. Gold's personal finances so as to investigate his possibly setting up a shell corporation so as to apparently have a law practice, even though he (Mr. Gold) did not have a license for a time. Judge Donald further alleged and/or insinuated the possibility that Mr. Gold was practicing without a license and requested an investigation as to that as well. All of this occurred after Judge Donald was informed, by another attorney who practices in Judge Donald's court, Attorney Mike Mitchell, who testified on behalf of Judge Donald, that Mr. Gold had previously been suspended from the practice of law, and had only recently been re-admitted to practice law in the State of Tennessee. Mr. Mitchell testified that he was the one who did the research concerning Mr. Gold's background and provided that information to Judge Donald.

Ms. Perkins and Ms. Allen, who work in the General Sessions Clerk's Office in Davidson County, Tennessee, testified as well. Both clerks testified that they were shocked with Mr. Gold's demeanor and the loudness of his voice. Ms. Allen testified that not only was Mr. Gold loud, he was also very aggressive. Both Ms. Allen and Ms. Perkins testified that Judge Donald stayed calm during the in court proceedings.

The hearing panel also heard the testimony of Sandy Garrett, who is the Chief Disciplinary Counsel for the Board of Professional Responsibility. Ms. Garrett testified that the initial complaint from Judge Donald was received in December of 2011; however a complaint file, for some reason, was not opened. Ms. Garrett testified that a second complaint was received from Judge Donald in January of 2012, along with a letter. Again, for some reason, a complaint file was not opened. Ms. Garrett testified that a complaint file was finally opened in May of 2012. However, after Mr. Gold's response to the complaint, she testified that the Board of

Professional Responsibility did no other investigation, and the complaint was dismissed. Ms. Garrett testified that the file was closed and a closing letter was sent to Judge Donald. Ms. Garrett testified that Judge Donald did not appeal the Board of Professional Responsibility's dismissal of the complaint.

## **ISSUES**

The issues before the Hearing Panel were whether, by his actions, Judge Donald violated the Code of Judicial Conduct, specifically as to the following two Canons:

### **CANON 1 – A Judge Shall Uphold the Integrity and Independence of the Judiciary**

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

**Commentary.** - Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

### **CANON 2 – A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities**

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

**Commentary.** – Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge.

Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules, or other specific provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.

### **RETALIATION AGAINST DAVID GOLD**

The Hearing Panel found by clear and convincing evidence that by his actions, Judge Donald intentionally retaliated against David Gold for the sole reason that Mr. Gold engaged in a legally protected activity, that of filing a complaint against Judge Donald. In doing so, he failed to "participate in establishing, maintaining, and enforcing high standards of conduct and ... personally observe those standards ...," violating Canon I. The commentary to that Canon states that "violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law." The Hearing Panel also finds that Judge Donald violated Canon 2A by failing to act "at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." His retaliatory actions were particularly egregious in that they were meant to injure an attorney who had filed a complaint against the judge's prior conduct under Title 17, Chapter 5, creating the Board of Judicial Conduct, which begins with the following language:

It is expressly declared to be the legislative intent in the enactment of this chapter to:

- (1) Provide an orderly and efficient method for making inquiry into:
  - (A) The physical, mental and moral fitness of any Tennessee judge;
  - (B) The judge's manner of performance of duty;
  - (C) The judge's commission of any act calculated to reflect unfavorably upon the judiciary of the state or bring the judiciary into disrepute or that may adversely affect the administration of justice in the state ... .

Tenn. Code Ann. § 17-5-301. If this type of retaliatory conduct were allowed, it would effectively chill the statutory right of any and all attorneys who appear before a judge to have that judge's misconduct inquired into. Attorneys, along with court staff and other personnel, are the very persons

who are in the best position to perceive any irregularities or violations of the Code. They are also, however, those most vulnerable to retaliation by a judge. The attorney retaliated against in the instant case was particularly vulnerable to retaliation due to his recent reinstatement after suspension. The hearing panel finds that this fact was seized upon by Judge Donald in his attempt to injure the attorney.

Although there are no Tennessee cases on point addressing judicial misconduct based on retaliation, other states with similar Canons have addressed this issue. In *In re Danikolas*, 838 N.E.2d 422 (Ind. 2005), a judge caused a magistrate to be fired because she testified against him in a hearing on another complaint that had been filed against him. In suspending that judge without pay, the Supreme Court of Indiana held that the “retaliatory discharge ... constitutes willful misconduct and an abuse of the power of his judicial office to advance a private vendetta, and is prejudicial to the administration of justice.” In another case involving a judge’s retaliation against an attorney who questioned his actions, by *sua sponte* vacating an award of attorney’s fees to that attorney, the Court stated that “[t]he use of judicial power as an instrument of retaliation is a serious violation of the Code of Judicial Conduct.” *In re Boles*, 555 N.E.2d 1284, 1288 (Ind. 1990). *See also In re Buchanan*, 100 Wash.2d 396, 669 P.2d 1248 (1983) (holding that a judge violated Judicial Canons 1 and 2(A) by discharging court employees in retaliation for their participation in another Judicial Conduct Commission’s case against the judge). The hearing panel finds that there is no question that the retaliatory conduct of Judge Donald in this case diminished public confidence in the judiciary, thereby doing injury to the system of government under law, violating Canon 1, and created, in reasonable minds, a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence was impaired, violating Canon 2A.

### SANCTIONS

Having found by clear and convincing evidence that Judge Donald’s actions violated the Code of Judicial Conduct, specifically Canons I and II, in determining the appropriate sanctions pursuant to Tenn. Code Ann. § 17-5-301(i), the Hearing Panel has considered the following factors:

The hearing panel took into consideration the entirety of all of the facts and the applicable law in this case. Based upon the findings of fact set out herein, and based upon the applicable law,

the hearing panel finds by clear and convincing evidence that Judge Donald violated both Canon 1 and Canon 2 of the Code of Judicial Conduct. Specifically, the hearing panel finds by clear and convincing evidence that it was the intent of Judge Donald to retaliate against Mr. Gold for Mr. Gold's having filed a complaint against him with the Board of Judicial Conduct. Judge Donald not only filed his complaint, but went a further step by filing a second complaint with a specific request for an inquiry to be made as to the personal finances of Mr. Gold that were in some way associated with a shell corporation that Mr. Gold might have set up or might have been a part of. Judge Donald went the further step of requesting that an investigation be made pertaining to his opinion that Mr. Gold might be engaging in the unauthorized practice of law and/or practicing without a license. The timing of Judge Donald's complaints, and the specific requests made in his complaints to the Board of Professional Responsibility, leave no question, in the hearing panel's opinion, that it was Judge Donald's intent to retaliate against Mr. Gold.

In addition, the hearing panel finds that a great deal, if not all, of this entire situation could have and/or should have been avoided by Judge Donald by simply allowing Mr. Gold to speak with him the day that Mr. Gold and his mentor came to the office of Judge Donald. While the hearing panel notes that it would have been a better practice for Mr. Gold and his mentor to have scheduled an appointment with Judge Donald rather than just showing up unannounced and without an appointment, nevertheless, Judge Donald's refusal to hear any discussion by Mr. Gold or from Mr. Gold, is not only inappropriate, but in the opinion of the hearing panel, likely caused a good part of this situation if not the entirety of the outcome of this situation. The hearing panel finds that Canon 1 specifically notes that an independent and honorable judiciary is indispensable to justice in our society. The hearing panel finds that the Canon goes on to note that a Judge should participate in establishing, maintaining and enforcing high standards of conduct, and should personally observe those standards, so that the integrity and independence of the judiciary be preserved. By his failure to allow Mr. Gold, along with his mentor and/or in the presence of his mentor, to speak, this fails to maintain and/or reflect the high standard of conduct required of a Judge. His failure to allow Mr. Gold to speak does not further the objective of Canon 1. His failure to allow Mr. Gold to speak does not do anything to further the public confidence in the integrity of judges. Judge Donald's actions, in the hearing panel's opinion, serve to diminish the public's confidence in the judiciary.


Furthermore, Judge Donald's action of filing the two complaints against Mr. Gold appear to be in clear retaliation for Mr. Gold's action of filing a complaint against him.

With regard to Canon 2, the hearing panel finds that Judge Donald's actions were both irresponsible and improper. The commentary to Canon 2 specifically notes that a judge must avoid all impropriety and the appearance of impropriety. Judge Donald's actions in this particular case fail to avoid the appearance of impropriety and in fact, his actions appear to be just the opposite of what is required of Canon 2. To file his complaint suggesting the specific inquiries be made was improper and the appearance of an improper motive is clear to this panel. Furthermore, to refuse to hear Mr. Gold's position, especially in the presence of his mentor, was improper and should not have occurred. These violations of the Canons are found by the hearing panel by clear and convincing evidence.

Based upon these findings, the Hearing Panel imposes a Public Censure as authorized by Tenn. Code Ann. § 17-5-301. The costs of this matter are assessed to Judge Donald.

This Opinion has been reviewed by all members of the Hearing Panel, and the Presiding Panel Member is authorized to enter this Opinion on their behalf.

Entered this 15<sup>th</sup> day of December, 2014.

  
Michael Sharp  
Presiding Panel Member