

JUDICIAL INVESTIGATION COMMISSION

ANNUAL REPORT - 2011



SUPREME COURT OF APPEALS OF WEST VIRGINIA

Pursuant to Rule 1.11(3) of the Rules of Judicial Disciplinary Procedure, the Judicial Investigation Commission of West Virginia respectfully submits this Annual Report for its activities during the period of January 1, 2011, through December 31, 2011.

## THE COMMISSION

The Supreme Court of Appeals of West Virginia is required by Article 8, Section 8 of the Constitution of West Virginia to use its inherent rule-making power to "from time-to-time, prescribe, adopt, promulgate, and amend rules prescribing a judicial code of ethics, and a code of regulations of standards of conduct and performances for justices, judges and magistrates, along with sanctions and penalties for any violation thereof." Under this constitutional authority the Court "is authorized to censure or temporarily suspend any justice, judge or magistrate having the judicial power of this State, including one of its own members, for any violation of any such code of ethics, code of regulations and standards, or to retire any such justice, judge or magistrate who is eligible for retirement under the West Virginia judges' retirement system (or any successor or substitute retirement system for justices, judges, and magistrates of this State) and who, because of advancing years and attendant physical or mental incapacity, should not, in the opinion of the Supreme Court of Appeals, continue to serve as a justice, judge or magistrate."

The Constitution provides that "no justice, judge or magistrate shall be censured, temporarily suspended or retired under the provisions of this section unless he shall have been afforded a right to have a hearing before the Supreme Court of Appeals, nor unless he shall have received notice of the proceedings, with a statement of the cause or causes alleged for his censure, temporary suspension or retirement, at least 20 days before the day on which the proceeding is to commence." When rules authorized by this provision of the Constitution are "prescribed, adopted and promulgated, they shall supersede all laws and parts of laws in conflict therewith, and such laws shall be and become of no further force or effect to the extent of such conflict." Under the constitutional provision "[a] justice or judge may be removed only by impeachment in accordance with provisions of section nine, article four, of this Constitution. A magistrate may be removed from office in the manner provided by law for the removal of county officers."

By Order entered December 15, 1982, the Supreme Court of Appeals of West Virginia created the Judicial Investigation Commission to exist as of 12:01 A.M., December 16, 1982. At that time, the Judicial Inquiry Commission, created by Rule promulgated October 1, 1976, ceased to exist. The Chairman and the Executive Secretary of the Judicial Inquiry Commission provided to the Judicial Investigation Commission all of the records, files, and reports on cases of the Judicial Inquiry Commission. By Orders entered November 29, 1989, and December 20, 1989, effective January 1, 1990, and an Order entered November 29, 1990, effective January 1, 1991, and an Order entered March 24, 1993, effective July 1, 1993, the Supreme Court of Appeals of West Virginia further amended the Rules of Procedure for the Handling of Complaints Against Justices, Judges, and Magistrates which are now the Rules of Judicial Disciplinary Procedure. By Order entered on May 25, 1993, effective

July 1, 1994, the Rules of Judicial Disciplinary Procedure superseded the prior Rules of Judicial Disciplinary Procedure adopted December 15, 1982, and amended by Orders as stated hereinabove.

The West Virginia Rules of the Judicial Disciplinary Procedure, Rule 1, establishing the Judicial Investigation Commission, states "the ethical conduct of judges is of the highest importance to the people of the State of West Virginia and to the legal profession. Every judge shall observe the highest standards of judicial conduct. In furtherance of this goal, the Supreme Court of Appeals does hereby establish a Judicial Investigation Commission [Commission] to determine whether probable cause exists to formally charge a judge with a violation of the Code of Judicial Conduct promulgated by the Supreme Court of Appeals to govern the ethical conduct of judges or that a judge, because of advancing years and attendant physical and mental incapacity, should not continue to serve."

The West Virginia Rules of Judicial Disciplinary Procedure, Rule 2, using the Code of Judicial Conduct definition, defines "judge" as "anyone whether or not a lawyer who is an officer of a judicial system and who performs judicial functions including but not limited to Justices of the Supreme Court of Appeals, Circuit Judges, Family Court Judges, Magistrates, Mental Hygiene Commissioners, Juvenile Referees, Special Commissioners, and Special Judges."

The Commission consists of nine members: three circuit judges; one magistrate; one family court judge; one retired circuit judge; and three members of the public. The Supreme Court of Appeals appoints all members of the Commission.

The Commission shall have the authority to: (1) determine whether probable cause exists to formally charge a judge with a violation of the Code of Judicial Conduct or that a judge, because of advancing years and attendant physical or mental incapacity should not continue to serve; (2) propose rules of procedure for judicial disciplinary proceedings for promulgation by the Supreme Court of Appeals; (3) file an annual report with the Supreme Court of Appeals on the operation of the Commission; (4) inform the public about the existence and operation of the judicial disciplinary system, the filing of formal charges, and the discipline imposed or recommended on formal charges; (5) delegate in its discretion, to the Chairperson or Vice-Chairperson, the authority to act for the Commission on administrative and procedural matters; (6) nominate, for selection by the Supreme Court of Appeals, candidates for the position of Judicial Disciplinary Counsel; and (7) engage in such other activities related to judicial discipline as it deems appropriate.

The Commission held five regular meetings during 2011, in the Judicial Investigation Commission Conference Room, 4700 MacCorkle Avenue SE, Suite 1200 A, Charleston, West Virginia, on February 25, May 6, August 26, October 28, and December 9, 2011. Copies of all pertinent documents are distributed to the members of the Commission prior to each meeting so that they may review the materials and be prepared to discuss them actively in the meeting. The Commission has a support staff

of a full-time Executive Secretary, full-time Counsel, and three part-time Investigators, who conduct investigations of complaints.<sup>1</sup>

## PROCEDURE FOR HANDLING COMPLAINTS

Complaints filed with the Commission are referred to counsel, who reviews each complaint and either refers it to an investigator for investigation, asks the respondent judge for a response, or sends it directly to the members of the Commission for study prior to consideration at the next meeting. Those complaints that are referred directly to the Commission for consideration at a meeting are dismissed for lack of probable cause, referred to the judge for response or referred to an investigator for investigation.

Prior to a finding of probable cause by the Commission, a respondent judge shall be notified in writing of the nature of the complaint. The judge shall have ten days after the date of the notice to file a written response to the complaint. All decisions on whether probable cause exists to refer the complaint to the Judicial Hearing Board are made by the Commission at meetings with a majority of the members in attendance. Likewise all decisions on dismissal of complaints are made by the Commission at meetings with a majority of the members in attendance. Parties are contacted about the action of the Commission after a decision has been made on a complaint.

Some complaints contain more than one allegation against a judge, and the Commission may dismiss part of a complaint and find probable cause on part of a complaint.

By Orders entered March 24, 1993, effective July 1, 1993, and May 25, 1993, effective July 1, 1994, the Rules of Judicial Disciplinary Procedure were amended to include a provision that all information provided, documents filed or testimony given with respect to any investigation or proceeding under the Rules of Judicial Disciplinary shall be privileged in any action for defamation. All members of the Commission, the Judicial Committee on Assistance and Intervention, the Office of Disciplinary Counsel, and their employees, shall be absolutely immune from civil suit in the same manner as members of the judiciary in this State for any conduct in the course of their official duties.

All proceedings of the Commission are confidential except that when a complaint has been filed or an investigation has been initiated the Office of Disciplinary Counsel may release information confirming or denying the existence of a complaint or

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<sup>1</sup> While not a part of the work of the Commission, Counsel to the Judicial Investigation Commission pursuant to the Protocol for Fatality Review Teams, initially promulgated by the Supreme Court of Appeals in 1994 and amended in 1998 and 2000, is charged with initiating a confidential investigation and preparing a report for a designated Fatality Review Team. These reports are subsequently presented to a Fatality Review Team at a scheduled meeting. Commission staff is utilized in the investigation and preparation of these reports. During 2011 there were fifty-eight (58) fatalities referred to the Commission for investigation; forty-nine (49) completed FRT reports were submitted to the Fatality Review Teams during the year. A portion of the reports were referrals from 2010.



investigation, explaining the procedural aspects of the complaint or investigation, or defending the right of the judge to a fair hearing. Prior to the release of information confirming or denying the existence of a complaint or investigation, reasonable notice shall be provided to the judge.

## **EXTRAORDINARY PROCEEDINGS**

The Rules of Judicial Disciplinary Procedure provide that when the Administrative Director of the Courts has received information that a judge:

- (1) has been convicted of a serious offense;
- (2) has been indicted or otherwise charged with a serious offense;
- (3) has engaged or is currently engaging in a serious violation of the Code of Judicial Conduct, or;
- (4) has become unable or unwilling to perform his or her official duties, the Administrative Director may file a complaint with Judicial Disciplinary Counsel.

Upon receipt of such complaint, Judicial Disciplinary Counsel shall conduct an immediate investigation and shall within ten days present to the Chief Justice of the Supreme Court a report indicating whether, in the opinion of Judicial Disciplinary Counsel, the integrity of the legal system has been placed into question by virtue of a judge's (1) having been convicted of a serious offense; (2) having been indicted or otherwise charged with a serious offense; (3) having engaged in or currently engaging in a serious violation of the Code of Judicial Conduct; or (4) inability or unwillingness to perform his or her official duties. The Office of Disciplinary Counsel shall attempt to provide reasonable notice to the judge prior to the filing of this report.

Upon receipt of the report, from the Chief Justice, the Supreme Court shall determine whether probable cause exists. A finding of probable cause hereunder shall be in lieu of a probable cause finding made pursuant to Rule 2.7(c). If it is determined that probable cause exists, the Court may:

- (1) direct Disciplinary Counsel to file formal charges with the Clerk of the Supreme Court; and
- (2) provide notice to the judge of a right to a hearing on the issue of temporary suspension, said hearing to be in not less than 30 days; with the judge provided notice of the hearing is not less than 20 days before the proceeding; or

(3) in the alternative, remand the complaint for proceedings pursuant to Rule 2.7(d) and Rule 4.

If the judge has been convicted of a serious offense or has been indicted or otherwise charged with a serious offense, the Chief Justice may order that the judge not hear any further civil or criminal matters or perform other judicial functions while the matter is pending, with or without pay.

If pursuant to the rule on extraordinary proceedings the Court finds probable cause to believe that a judge has engaged or is currently engaging in a serious violation of the Code of Judicial Conduct or has become unable or unwilling to perform his or her official duties, the Court may direct that the judge not hear any further civil or criminal matters or perform other judicial functions while the matter is pending, with or without pay.

After the hearing on the issue of suspension, the Court may temporarily suspend the judge with or without pay while the matter is pending before the Judicial Hearing Board and until the Court has disposed of the formal charges.

Both the details of the complaint filed by the Administrative Director of the Courts and the investigation conducted by the Office of Disciplinary Counsel under this rule shall be confidential, except that when a formal charge has been filed with the Clerk of the Supreme Court, all documents filed with the Clerk and the Judicial Hearing Board shall be made available to the public.

However, Disciplinary Counsel may release information confirming or denying the existence of a complaint or investigation, explaining the procedural aspects of the complaint or investigation, or defending the right of the judge to a fair hearing. Prior to the release of information confirming or denying the existence of a complaint or investigation, reasonable notice shall be provided to the judge.

## **ADVISORY OPINIONS**

A judge or the Administrative Director of the Courts may, by written request to the Commission, seek an advisory opinion as to whether certain specific actions contemplated may constitute a violation of the Code of Judicial Conduct. The Commission may render in writing such advisory opinion as it may deem appropriate. An advisory opinion is not binding upon the Judicial Hearing Board or the Supreme Court, but shall be admissible in any subsequent disciplinary proceeding involving the judge who made the request. During 2011 there were (20) issues raised in advisory opinion requests, and a synopsis of the Commission's opinion on each follows:

- A former Family Court Judge should not serve as a mediator in a county in which he also sits as a temporary Family Court Judge. The possibility that

any action he takes, or statements he makes as a mediator, may be at least perceived to direct how he would proceed when serving in his judicial capacity. The opportunity for such misperception exists and could cloud the perception of his activities as a judicial officer in that county;

- A judge should disclose that she indicted a defendant who was a co-defendant of a man the judge represented before taking the bench in Family Court. The Commission advised that the judge review relevant sections of Canon 3 to determine whether after disclosure is made to all parties, one of the parties may decide to file a Motion for the judge's Recusal and the provisions for handling such Motions would then be followed. Canon 3E;
- In an advisory opinion from the Administrative Director of the Courts, the Director asked whether membership on a committee working on systemic problems with groups that may have individuals appearing before the judge is a violation of the Code of Judicial Conduct. After reviewing the previous opinions in March 2010 and October 2010 and February 2011, it is still the unanimous opinion of the Commission that it cannot issue an advisory opinion approving the participation of a judge on a committee that is working on systemic problems with groups that will have individuals from those groups appearing before the judge. It remains the opinion of the Commission that the judicial involvement contemplated in the February 2011; request would constitute a violation of the Code of Judicial Conduct. (This opinion was overturned by a Supreme Court of Appeals of West Virginia Administrative Order dated June 16, 2011);
- A judge should follow the Rule setting forth the procedures when disqualification of a judge is sought since her probation officer is married to an attorney who practices and has office in the judge's county. Secondly, a judge should follow the procedures when the spouse of a law clerk for a circuit judge appears before that judge should be followed in the case of the law clerk living with her significant other, an attorney who appears before the judge;
- A judge asked whether he/she could preside over cases where, 13-years ago the judge was a plaintiff in a wrongful discharge action against the judge's former employer, an attorney. He and his wife both appear before the judge now. The Commission feels that there is no potential conflict for the attorney couple to appear before you;
- A judge asked whether he/she could donate to the County Democratic Executive Committee to establish and maintain a year-round Democratic Headquarters. The Commission review Canon 5C(1)(a)(iii) concerning this request. It was their opinion that the judge can contribute to the political organization;

- The wife of a newly appointed judge can continue to serve as CEO of the Hospice program. The Commission recommended that the judge should not participate in any fund-raising activities for that organization. The Commission also felt that the judge's wife could remain in her position as a member of a bank board. However, if there are cases involving the bank it would be advisable for the judge to review his docket and recuse himself from all cases involving the bank;
- A judicial officer can serve as a member of the County Extension Service Committee. *See, JIC Advisory Opinion 4/15/05. Canon 4C(3)(a)(b)(c);*
- A judicial officer can participate in a Home Care Service LLC that is owned by the judicial officer and four other partners if he/she does so by acting within the language set forth in Canon 4. The Commission also advises the judicial officer to seek consent from the Administrative Office of the Courts involving himself/herself in any outside employment beyond the job as magistrate;
- When an attorney who has represented a judge in litigation appears before that judge a disclosure of the prior representation by the attorney should be made when the attorney appears in court. Canon 2A and Canon 3E(1);
- It is incumbent upon any judge to scrutinize attorney vouchers more closely and approve only those charges, costs and/or expenses that are valid. If it is likely that a judge should be a material witness in a proceeding arising out of either the trust fund or voucher matters, the judge should recuse himself/herself from handling those cases;
- A judge may serve as an auxiliary coach for the judge's daughter's basketball team; however, the judge would be precluded from presiding over any cases involving the County Board of Education in order to ensure the public's continued faith in the independence and impartiality in the judiciary. Canon 4A(1)(2)(3) and Canon 4C(3);
- A Mental Hygiene Commissioner shall not accept any mental hygiene matters or serve as an attorney in any proceeding related to a case in which he or she has served as a Mental Hygiene Commissioner. The Commissioner is precluded from representing any party in a Guardianship/Conservatorship proceeding as long as he/she continue to serve as a Mental Hygiene Commissioner;
- The Commission advised a newly appointed judge that he should sell his/her interest in a building equally owned by the judge and his former law partner. The law partner intends to continue occupying the space for his law practice. The Commission recommended that the newly appointed judge should sell his interest in that building by January 2013, in order to comply with the language set forth in Canon 4;



- Because a newly appointed judge is entitled to fees worked for before being appointed judge, a judge can continue to be on a checking and trust account with his/her old partner until the fees are collected. After that the account should be closed. Canon 4;
- A newly appointed judge should sever all interest in a life insurance policy with his/her law partner after all contingency fees are collected. Canon 4D
- A newly appointed judge can serve on the West Virginia Bar Foundation so long as he/she does not participate in public fundraising activities. The Commission would further caution the judge that if any recipients of grants made by the Foundation were to appear before he/she the question of the judge's recusal would be relevant and disclosure of the judge's membership should be made. Canon 4C(2);
- There is no conflict when an elected County Commissioner appears as an attorney before a Circuit Court Judge;
- A judicial officer should disclose the fact that his/her granddaughter is employed by an attorney that appears before the judge; and
- A judicial officer should not serve on a committee which is involved in identifying areas in the city water system that need attention. Because the city is likely to be involved in court proceedings either before the judicial officer or other judicial officers in other courts. Canon 4C(3)(a);

## STATISTICS

On January 1, 2011, there were 39 complaints which remained pending before the Judicial Investigation Commission. During 2011, 186 new complaints were received for a total of 225 to be considered by the Commission. Of these 225 complaints considered, 54 required formal investigations. One hundred and fifteen 115 were dismissed when no probable cause was found; it was determined that the Commission had no jurisdiction in 6 complaints; 0 complaint were withdrawn by the complainant with the approval of the Commission; there are 52 pending complaints at the end of 2011. No probable cause was issued to send any matters on to the Judicial Hearing Board for hearing. However, the Commission issued four admonishments. A synopsis of the admonishments is as follows:

### **In the Matter of Carol Fouty, Magistrate of Kanawha County,** **Complaint No. 12-2010:**

A judicial officer was admonished for violating Canons 1A, 2A, 2B, 3A, 3B(1) and (2), and 3E(1)(a) of the Code of Judicial Conduct. Upon

initiation of the complaint, the investigation revealed that on November 17, 2009, a friend of the judicial officer and two others secured peace bonds from the judicial officer and against an adjacent landowner. The investigation further revealed that the Judicial Officer helped her friend draft the peace bond, even writing some of the narrative in her own hand. The judicial officer then found probable cause to issue the three peace bonds. The complaint and the investigation were reviewed by the Judicial Investigation Commission at its December 9, 2011 meeting. The Commission determined that probable cause existed to believe that the judicial officer violated Canons 1A, 2A, 2B, 3A, 3B(1) and (2), and 3E(1)(a) of the Code of Judicial Conduct but that formal discipline was not appropriate under the circumstances and that pursuant to Rule 2.7(c) of the Rules of Judicial Disciplinary Procedure a written admonishment was given to that judicial officer.

**In the Matter of Janice Wiseman, Magistrate of Fayette County,  
Complaint No. 55-2011:**

A judicial officer was admonished for violating Canons 1A, 2A, 2B, 3A, 3B(1) and (2), and 3E(1)(a) of the Code of Judicial Conduct. Upon initiation of the complaint, the investigation revealed that on February 9, 2011, the former boss of the judicial officer contacted her and asked her to assist in getting his granddaughter's traffic tickets dismissed. The judicial officer agreed to contact the police officer who issued the tickets and determine whether he would consent to their dismissal. When contacted, the police officer declined to dismiss the tickets. The judicial officer then called her former boss and told him that the police officer refused to dismiss the tickets. During the call, it was decided that the granddaughter would go to the judicial officer's office and file a Motion to Dismiss pursuant to W. Va. Code § 61-11-9. Later that day, the granddaughter signed the already completed Motion. The judicial officer then granted the Motion to Dismiss and had an assistant prosecutor sign off on the document as approved without first advising him that the police officer had objected to any dismissal. The complaint and the investigation were reviewed by the Judicial Investigation Commission at its December 9, 2011 meeting. The Commission determined that probable cause existed to believe that the judicial officer violated Canons 1A, 2A, 2B, 3A, 3B(1) and (2), and 3E(1)(a) of the Code of Judicial Conduct but that formal discipline was not appropriate under the circumstances and that pursuant to Rule 2.7(c) of the Rules of Judicial Disciplinary Procedure a written admonishment was given to that judicial officer.

**In the Matter of the Honorable John C. Yoder, Judge of the 23rd Judicial Circuit, Complaint No. 85-2011:**

A judicial officer was admonished for violating Canons 1, 2, 2B, 3A, and 3B(1) of the Code of Judicial Conduct. Upon initiation of the complaint, the investigation revealed that the judicial officer had scheduled two name change hearings for Friday, May 13, 2011. A scheduling conflict occurred on the judicial officer's calendar. Instead of continuing the hearings to another date, the judicial officer pre-signed the Orders permitting the requested name changes and had his law clerk preside over the hearings. The judicial officer was not present in the courtroom during the proceedings, and he was not even present in the courthouse complex. Following the hearing, the law clerk told the petitioners in the two cases that if they waited a few moments they could get copies of the Order which had been pre-signed by the judicial officer. The complaint and the investigation were reviewed by the Judicial Investigation Commission at its August 26, 2011 meeting. The Commission determined that probable cause existed to believe that the judicial officer violated Canons 1, 2, 2B, 3A, and 3B(1) of the Code of Judicial Conduct but that formal discipline was not appropriate under the circumstances and that pursuant to Rule 2.7(c) of the Rules of Judicial Disciplinary Procedure a written admonishment was given to that judicial officer.

**In the Matter of Lynn Fields Slater, Candidate for Magistrate of Greenbrier County, Complaint No. 165-2011:**

A judicial candidate was admonished for violating Canons 5A(1)(a), 5A(3)(a) and 5C2 of the Code of Judicial Conduct. Upon initiation of the complaint, the investigation revealed that during an October 2011 meeting of the County Democratic Women's Club, the judicial candidate announced her intention to run for judicial office in the 2012 election and distributed campaign material even though she had not yet filed pre-candidacy papers. The material distributed failed to show evidence that she had established a campaign committee. At the same meeting, the judicial candidate was installed as the Club's parliamentarian. The complaint and the investigation were reviewed by the Judicial Investigation Commission at its December 9, 2011 meeting. The Commission determined that probable cause existed to believe that the judicial candidate violated Canons 5A(1)(a), 5A(3)(a) and 5C2 of the Code of Judicial Conduct but that formal discipline was not appropriate under the circumstances and that pursuant to Rule 2.7(c) of the Rules of Judicial Disciplinary Procedure a written admonishment was given to that judicial candidate.

Respectfully submitted,  
JUDICIAL INVESTIGATION COMMISSION

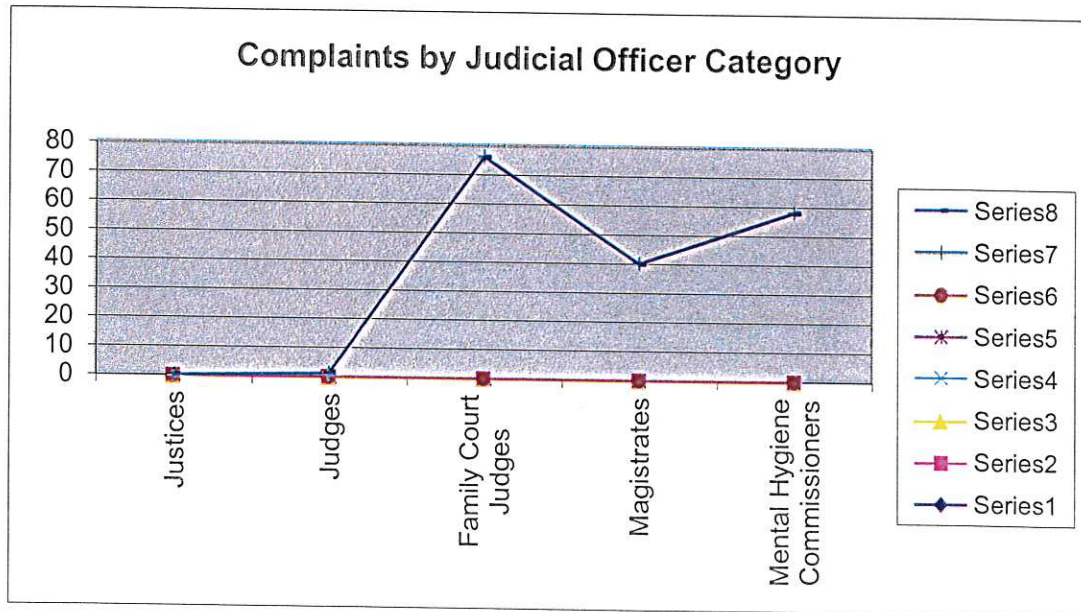
By: 

Ronald E. Wilson, Chairperson



## Complaints by Judicial Officer Category

Justices	1
Judges	76
Family Court Judges	40
Magistrates	58
Mental Hygiene Commissioners	4
No Jurisdiction	7



## Complaints Received in the Last Five Years

FY 2007	196
FY 2008	174
FY 2009	159
FY 2010	168
FY 2011	186

