JUDICIAL INVESTIGATION COMMISSION

Room E-400, State Capitol

Charleston 25305

April 8, 1987

Re: JIC Advisory Opinion 1987-02

IN RE: State of West Virginia ex rel. James Shaw and Russell Stonestreet, et al. v. The Board of Education of the County of Braxton, et al., Supreme Court of Appeals of West Virginia No. 17208

Dear

In an Order entered on March 11, 1987, you requested an advisory opinion from the Judicial Investigation Commission on a motion seeking your disqualification which has been filed in the above-stated matter. The Board of Education of Braxton County, by its attorney Prosecuting Attorney of County, presented to the Court a motion seeking the disqualification of the justices from hearing the above-stated case.

In his motion, states that he and the five justices are adverse parties in litigation currently pending in the U.S. District Court for the District of West Virginia, at Charleston, styled , et al., Civil Action No. 2:87-0049. He said that the nature of that action is such that "an average person might reasonably question the impartiality of the justices of the West Virginia Supreme Court in proceedings wherein the co-movant prosecuting attorney would appear as counsel, either in person or of record." (Citing Canon 3C(1)). He also alleges that the "mere existence of [the] federal suit, could legitimately invite inquiry concerning personal bias or prejudice of the justices toward the co-movant prosecutor in cases where the latter would serve as an advocate." (Citing Canon 3C(1)(a)).

Taking the motion as legally sufficient and the allegations as true, the Commission will address the question of whether the justices of the Supreme Court should disqualify themselves in the above-stated action for the reasons set forth in the motion.*

The Judicial Code of Ethics, Canon 3C(1)(a) states:

> C. Disqualification.
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> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to, incidences where:
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> (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; ...

These provisions in Canon 3 require a judge to disqualify himself in a proceeding in which his impartiality might reasonably be questioned or he has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding.

This Court addressed the question of recusal when a challenge to a judge's impartiality has been made in State v. Hodges, 305 S.E. 2d 278 (W.Va. 1983). In that case, the defendant in a criminal case had sought to have the trial judge recused, stating that the trial judge had recused himself in two prior civil actions in which the defendant was a party. In that decision, the Court stated:

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*The motion fails to specifically allege the grounds set forth and fails to support the allegations by affidavit or other verified papers. See Rule 17, Rules of Appellate Procedure, West Virginia Supreme Court of Appeals. See e.g. Rule XVII, Trial Court Rules for Trial Courts of Record.

> "In Syllabus Point 14 of Louk v. Haynes, W.Va. 223 S.E. 2d 780 (1976) we stated, in part, '[w]here challenge to a judge's impartiality is made for substantial reasons which indicate that the circumstances offer a possible temptation as to the average man as a judge not to hold the balance nice, clear and true between the state and the accused, a judge should recuse himself.' Finding no substantial reasons tending to impair the trial judge's impartiality, we affirm his decision not to recuse himself. (Emphasis Supplied). 305 S.E. 2d at 282--283.

The Hodges decision indicates that when a challenge to a judge's impartiality is made, there must be substantial reasons set forth which demonstrate a lack of impartiality. Furthermore, in the context of the Hodges decision, the fact that a judge had recused himself in two prior actions in which the individual seeking his disqualification was a party would not in itself be a ground for the judge's recusal.

In Graley v. Workman, 341 S.E. 2d 850 (W.Va. 1986), this Court discussed judicial qualifications under Canon 3C(1) of the West Virginia Judicial Code of Ethics. In that decision, the Court stated:

> This court emphatically stated in Stern Brothers, Inc. v. McClure, 160 W.Va. 567, 578--79 n.8, 236 S.E. 2d 222, 229 n.8 (1977):
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> 'We are in firm accord with the rule followed particularly in the federal courts, the judge 'has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified', Laird v. Tatum, 409 U.S. 824, 837, 93 S.Ct. 7, 15, 34 L.Ed. 2d 50 (1972), and the cases cited therein. We would also point out the parties may, by express written agreement, waive a

> particular disqualification of a judge so long as the disqualification does not involve a matter of public policy. 46 Am. Jur. 2d, Judges, § 224; annot. 73 A.L.R. 2d 1238 at 1272 (1960); see West Virginia Code, § 51-2-8.

The language in Graley imposes a duty on a judge to sit on a case where he is not otherwise disqualified that is equal to the requirement to recuse himself where required. These dual responsibilities must be weighed in each case where disqualification is sought.

The motion filed in the above-stated matter by the attorney for the County Board of Education alleges that the Court would be biased against the Braxton County Board of Education because the attorney for that party has filed an action in the Federal District Court against the justices of the Supreme Court of Appeals. It alleges an appearance of impropriety would be forthcoming if the justices were to hear the above-stated action and render judgment in that matter. A review of the pleadings filed in the Federal District Court action demonstrates that the suit is brought against the justices of the Supreme Court of Appeals in their official capacity as justices of the court. The action seeks declaratory and injunctive relief against the justices in their official capacity. No money damages are sought nor are attorney's fees and costs prayed for in the complaint.

The form and substance of the action filed in the Federal District Court is analogous to an extraordinary remedy being sought in the Supreme Court of Appeals against a circuit judge. In those actions, the circuit judge is named in his official capacity as a party in the suit. Seeking a disqualification of a named judge in such a suit in all subsequent or pending actions in which the attorney served as counsel for a party would not be justified.*

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* See e.g. Dankmer v. City Ice and Fuel Company, 121 W.Va. 752, 6 S.E. 2d 771 (1940).

The question raised in the motion filed for the attorney for the County Board of Education is whether his suit against the justices of the Supreme Court creates either a bias or prejudice against his client or the appearance of partiality in the instant matter. The Supreme Court of Appeals of West Virginia has not addressed that question. Courts in other jurisdictions have. There are a number of cases which hold that the mere filing of a suit against a judge does not per se disqualify that judge from hearing a case involving the person filing the suit. See Ely Valley Mines, Inc. v. Lee, 385 Fed. 2d 188, 191 (9th Cir. 1967); U.S. v. Corrigan, 401 Fed. Supp. 795, 798 (D. Wyo. 1975), rev'd on other grounds, 548 Fed. 2d 879 (10th Cir. 1977); State v. Meyer, 31 Or. App. 775, 571 P. 2d 550 (1977); Smith v. Smith, 115 Ariz. 299, 564 P. 2d 1266 (Ariz. App. 1977); Eismann v. Miller, 619 P. 2d 1145 (Id. 1980); State ex rel. Mitchell v. Sage Stores Co., 157 Kan. 622, 143 P. 2d 652 (1943).

These cases differ from the above-stated matter since they all deal with individuals who appeared as parties before a judge and, who subsequently and while that action was pending, filed an independent suit against the judge. In the above-stated matter, the attorney for a party seeks the disqualification of the justices of the Supreme Court, based upon the attorney's suit against the justices in their official capacity and the federal district court. The above-cited cases state that the mere filing of an independent action against a judge who is presiding over a pending action against a defendant does not in itself require that judge's disqualification.

In U.S. v. Corrigan, supra, the Court stated "that the mere filing of a complaint against a judge [by a party] is not sufficient to require disqualification of that judge from another case [involving the same party]. To rule otherwise would allow a defendant to thwart the judicial process by simply filing an action against any judge assigned to hear a trial whom he did not wish to hear the matter." 401 Fed. Supp. at 798. In Smith v. Smith, supra, the Court stated that "if we were to hold as a matter of law that a party can obtain a disqualification of a sitting judge merely by filing suit against him, the orderly administration of judicial proceedings would be severly hampered and thwarted. 564 P. 2d at 1270. In State v. Meyer, supra, the

Court said that the "contemnor points to his lawsuit in federal court against the judge as a conclusive basis of bias by the judge against him, but to accept such a contention would be to allow litigious persons to choose their judges by filing lawsuits against those, however impartial, who are not to their liking." 571 P. 2d at 553.*

Based upon the foregoing, the Judicial Investigation Commission, in response to the request for advisory opinion filed by the Court, would state that no grounds exist for the disqualification of the justices of the Supreme Court based upon the motion filed, the litigation pending in federal court and the existing case law.** If the Court desires the Commission to address any aspect of this opinion or to further address any question raised, please do not hesitate to contact me.

Very truly yours,

JUDICIAL INVESTIGATION COMMISSION
OF WEST VIRGINIA

By: Daniel C Robinson
DANIEL C. ROBINSON, Chairman

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*See U.S. v. Grismore, 564 Fed. 2d 929 (10th Cir. 1977), wherein the Court, interpreting 28 U.S.C. § 144 and § 455, held that the defendant failed to show any ground for disqualification under those sections of the statute and stated that a "judge is not disqualified merely because a litigant sues or threatens to sue him." Id. at 933.

**See State ex rel. Cohen v. Manchin, 336 S.E. 2d 171 (W.Va. 1984)and State ex rel. Matko v. Ziegler, 154 W.Va. 872, 179 S.E. 2d 735 (1971), which hold that where a motion is made to disqualify or recuse an individual justice of the Supreme Court of Appeals, that question is to be decided by the challenged justice and not by the other members of the court.