



## JUDICIAL INVESTIGATION COMMISSION

Room E-400, State Capitol

Charleston 25305

June 11, 1987

Re: JIC Advisory Opinion 1987-03

Dear Mr. \_\_\_\_\_

You have requested an advisory opinion from the Judicial Investigation Commission concerning certain questions relative to The Charleston Gazette Company, Inc., a West Virginia corporation v. Glenn B. Gainer, Jr., A. James Manchin, John F. McCuskey, Charles F. Fox and Elizabeth Poundstone, Trustees of the West Virginia Public Employees Retirement System, which is pending before the Supreme Court of Appeals. You state in your letter to the Commission that in this case "it is alleged that under a rule passed by the PERS Board, the Board unlawfully gives one year of service credit to every member of the legislature who serves the 60 constitutionally-specified days. The rule, passed by the PERS Board, which expands these two months to ten months or one year pension credit, is the subject of the litigation in case of reference therein."

From the letter attached to your correspondence, it can be seen that \_\_\_\_\_ has recused himself from participating in the litigation. You state that \_\_\_\_\_ is the only member of the Court who is a paid-up member of the PERS. You are paid up in the Judicial Retirement System and have an insurance deposit in PERS; the other members of the Court belong to the Judicial Retirement System. \_\_\_\_\_ will qualify for the Judicial Retirement System in six years. You indicate that after ten years of judicial service, as is the case with every justice except Justice Brotherton, the credit in the Judicial Retirement System and the Public Employees Retirement System is reciprocal and may be transferred back or forth as a judge chooses.

June 11, 1987

Page Two

You ask that the Commission consider two questions for an advisory opinion: is ----- disqualification discretionary or is it mandatory for remote pecuniary interests; if the disqualification is mandatory, which other justices, if any, are obliged to disqualify?

Canon 3C(1)(c) of the Judicial Code of Ethics states that:

### Canon 3

A judge should perform the duties of his office impartially and diligently.

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the activities of his office prescribed by law. In the performance of these duties, the following standards apply:

#### C. Disqualification.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;...

The language of this section of the Canon sets forth in general terms the framework within which a judge must determine in a particular case when his recusal is required.

June 11, 1987  
Page Three

The Supreme Court of Appeals of West Virginia has held that whether a Supreme Court of Appeals justice should participate in the consideration or the decision of a proceeding should be decided by the justice and not by the Court. In State ex rel. Matko v. Ziegler, 154 W.Va. 872, 179 S.E. 2d 735 (1971), the Court heard a motion that Justice Browning disqualify himself from participating in that decision. The Court stated that:

[A] majority of this court, Justice Browning not participating, denies that motion for the reason that the question whether Judge Browning should participate in the consideration or the decision of this proceeding should be decided by him and not by this court. This action is taken to enable Judge Browning to determine whether he will or will not participate in the decision of the other questions involved in this proceeding.

154 W.Va. at 874.

Other decisions of the Supreme Court of Appeals have followed this holding.

In State ex rel. Bagley v. Blankenship, 161 W.Va. 630, 246 S.E. 2d 99 (1978), the respondent moved "that Justice Darrell V. McGraw, Jr. disqualify himself from further participation in this case. In the alternative, respondent moves that the permanent members of this court, or the special panel, whichever the Court deems proper, disqualify Justice McGraw pursuant to the Court's authority under Article VIII, Section 8 of the West Virginia Constitution". That motion was directed to the permanent members of the court who redirected the motion to the special panel "for consideration in light of State ex rel. Matko v. Ziegler, Judge (citation omitted)".

161 W.Va. at 642.

June 11, 1987  
Page Four

In State ex rel. Cohen v. Manchin, 336 S.E. 2d 171 (W.Va. 1984), the relator filed a motion to disqualify Justice Richard Neely on the ground "that he had been successfully nominated in the June primary election as the other democratic nominee for this court". The relator asserted that Justice Neely's primary campaign "had been in opposition to the campaigns of Justice Harshbarger and Mr. Brotherton and, therefore, Justice Neely's impartiality might reasonably be questioned under Canon 3(C)(1) of the Judicial Code of Ethics." In addressing the motion, the Court stated:

We have established law holding that where a motion is made to disqualify or recuse an individual justice of this court, that question is to be decided by the challenged justice and not by other members of this court. State ex rel. Matko v. Ziegler, 154 W.Va. 872, 873-74, 179 S.E. 2d 735, 737 (1971), overruled on other grounds, Smoot v. Dingess, 160 W.Va. 558, 236 S.E. 2d 468 (1977). See also Laird v. Tatum, 409 U.S. 824, 93 S.Ct. 7, 34 L.Ed. 2d 50 (1972) (Renquist, J., memorandum on motion to recuse); Jewel Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America, 325 U.S. 897, 65 S.Ct. 1550, 89 L.Ed. 2007 (1945) (Jackson, J. concurring opinion on denial of petition for rehearing); In Re: Estate of Carlton, 378 S. 2d 1212 (Fla. 1979), cert. denied sub nom., Hayes v. Rogers, 447 U.S. 922, 100 S.Ct. 3013, 65 L.Ed. 2d 1114 (1980); Giuliano v. Wainwright, 416 S. 2d 1180 (Fla. Dist. Ct. App. 1982); Frank, Commentary on Disqualification of Judges--Canon 3C, 1972 Utah Law Review 377; Frank, Disqualification on Judges, 56 Yale L.J. 605 (1947).

336 S.E. 2d at 175--176.

June 11, 1987  
Page Five

These decisions indicate that the question of recusal is left to the individual judgment and discretion of the justice. See State ex rel. Bagley v. Blankenship, supra at 161 W.Va. 643.

Whether a justice of the Supreme Court may or should disqualify himself in a given case is a decision to be made by that justice and not by the other members of the Court. This position was stated by the Supreme Court of Appeals in State ex rel. Monongahela Valley Traction Company v. William Beard, 84 W.Va. 312 (1919). In that decision, the Court denied a writ of mandamus which sought to have Special Judge Beard removed from a case because of alleged bias and favor. The Court stated in that opinion:

At the common law, as now administered in England and in the United States, bias or favor, not the result of interest or relationship, is not supposed to exist, and in the absence of legislative prohibition, when the judge in a particular case is not called upon to pass on the facts, he is not thereby disqualified to preside at a trial, but he may properly, of his own will, retire from a case under such circumstances. (Emphasis Supplied).

Syl. Pt. 3.

The Supreme Court of Appeals has indicated that the decision to recuse must be made by the individual justice, based upon the circumstances confronting that individual in a particular case and utilizing the justice's own judgment and discretion. It has also stated that a judge has an affirmative duty to voluntarily disqualify himself within a reasonable time following cognizance of good cause for disqualification. Graley v. Workman, 341 S.E. 2d 850 (W.Va. 1986).

June 11, 1987  
Page Six

The language of Canon 3C(1)(c) serves as a guide to a judge when he is attempting to decide whether or not to recuse himself from a case. Courts have construed this language to mean that in some cases a judge is required to disqualify himself.

The Supreme Court of Appeals of West Virginia has held that a judge is disqualified to sit in a case in which he is interested whether he is a party to the suit or not. Keith v. Gerber, 156 W.Va. 787, 197 S.E. 2d 310 (W.Va. 1973). In State ex rel. Brotherton v. Blankenship, 157 W.Va. 100; 207 S.E. 2d 421 (1973), this Court stated that:

[I]t is well settled that a judge, to be disqualified to hear and determine an action, must have a pecuniary or property interest in the matter to be decided. A remote or possible interest or merely an interest in a legal question will not warrant disqualification. 42 Am. Jur. 2d Judges, secs. 98, 99; 48 C.J.S., Judges, sec. 79. Cheuvront v. Horner, 62 W.Va. 476, 59 S.E. 964; City of Grafton v. Holt, Judge, 58 W.Va. 182, 52 S.E. 21.

157 W.Va. at 105.

A pecuniary interest sufficient to disqualify a judge must be direct, real and certain and not an interest that is merely incidental, remote, contingent or possible. State v. Sams, 210 S.E. 2d 916 (W.Va. 1975).

In In Re: VEPCO, 539 F. 2d 357 (4th Cir.), vacating and remanding 407 F. Supp. 324 (E.D.Va. 1976), the Circuit Court of Appeals stated that Canon 3C(1)(c) of the American Bar Association provides that a judge shall disqualify himself in an instance where "he knows that he has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding." In that opinion, the Court defined "financial interest" to mean "ownership of a legal or equitable interest"

June 11, 1987  
Page Seven

however small. The Court also stated that Canon 3C(1)(c) disqualifies a judge who has "any other interest that could be substantially affected by the outcome of the proceeding." "Any other interest" was not defined in terms of ownership or in any other manner. While "any other interest" is not defined, whether it would be sufficient to disqualify a judge would "depend on the interaction of two variables: the remoteness of the interest and its extent or degree." The language contained in the American Bar Association Canon 3C is virtually identical to the language in Canon 3C of the Judicial Code of Ethics, approved by the Supreme Court of Appeals.

Based upon the information contained in your request, it would appear that \_\_\_\_\_ is the only member of the Supreme Court of Appeals who is a paid-up member of PERS. You also indicate that the case which is pending before the Supreme Court of Appeals involving PERS alleges that under a rule passed by the PERS Board, the Board unlawfully gives one year of service credit to every member of the legislature who serves the 60-day constitutionally-specified days. The rule passed by the PERS Board, which expands the two months to ten months or one-year pension credit, is the subject of the litigation. Presumably \_\_\_\_\_ has been given credit for those years in which he served as a member of the West Virginia legislature and would have a vested interest in the credited time which has been given pursuant to the challenged rule.


Based upon the information contained in your inquiry, the other members of the Court belong to the Judicial Retirement System. The fact that after ten years of judicial service, the credit in the Judicial Retirement System and PERS is reciprocal and may be transferred back or forth as a judge chooses would, at most, be a remote or possible interest which would not warrant disqualification from the referenced case. State ex rel. Brotherton v. Blankenship, supra.

June 11, 1987  
Page Eight

The rule of necessity as set forth by the Supreme Court of Appeals in Wagoner v. Gainer, 279 S.E. 636 (1981) would not apply in the PERS litigation since a judge could be appointed to replace Justice Brotherton in the litigation. A judge with either no interest in PERS or with, at most, a remote or possible interest in PERS could sit and decide the referenced litigation. See e.g. State ex rel. Bagley v. Blankenship, supra.

If there is any further question concerning this matter, do not hesitate to contact the Commission.

Very truly yours,

  
JUDGE DAN C. ROBINSON, Chairman

DR:lb