



JUDICIAL INVESTIGATION COMMISSION

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June 17, 2002

Re: JIC Advisory Opinion 2002-16

Dear Judge

In two letters to the Judicial Investigation Commission you asked for an advisory opinion. You mentioned in your first letter dated May 24, 2002, that a recent advisory opinion had been issued to another senior status judge regarding a position as independent examiner with the Division of _____ In that opinion, the Commission, based upon the information provided by that senior status judge had determined that Canon 4F would preclude such service as an independent examiner. In your first inquiry you defined the position and the appeals process in greater detail.

You stated that the Department would contract with an independent examiner to conduct a recorded, but not of record, hearing subsequent to the director having issued a show cause order for _____ permit violations. Following the hearing the independent examiner, who is paid a fee based on a contracted hourly rate and who is neither an officer of, nor an employee of, the Department, makes recommended findings and conclusions to the director. Within 60 days following the hearing, the director must issue a written decision in the name of the Director and determine whether there have been violations of the _____ Act. The director's decision is not issued as a decision of the independent examiner. There is provision for an appeal from the decision of the Director; however, that appeal is not to the circuit court, but rather to the _____ Board. Under the provisions of the act and the regulations, this appeal is de novo and is of record. That is, it is only at this point that an official record is made such as might be reviewed by the courts upon further appeal from the finding of the _____ Board. The independent examiner does not have any further responsibilities or participation in the process after having made his initial recommendations to the Director following the show cause proceeding.

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You stated that this description is substantially different from the factual basis upon which the Commission based its letter of May 7, 2002, in that it found that a ruling of the hearing examiner may be appealed to the Director of the Division and eventually appealed to a court of record. In fact, the examiner is an independent contractor paid by the hour who makes recommended findings and conclusions to the Director who issues a decision in his name that may then be appealed de novo to the _____ which prepares a written official record based upon all of the facts, evidence, and circumstances which may appear at the hearing they conduct. The _____ then issues a written decision based upon that official record which may be appealed to the circuit court.

You asked for an advisory opinion based on the facts which you presented as to whether a senior status judge may contract with the Department to serve as an independent examiner for purposes of making recommended findings and conclusions to the director.

In a second letter dated June 3, 2002, you asked that the Commission also address in their response to the question which you posed an opinion as it would apply to either a senior status judge or to a retired judge not on senior status.

To address the questions which you have raised, the Commission has reviewed Canons 6B, 6E and 4F of the Code of Judicial Conduct. Those Canons state in relevant part as follows:

Canon 6. Application of the Code of Judicial Conduct.

B. Retired judges. (1) A retired judge admitted to senior status but who does not engage in the practice of law is not required to comply with Section 4E.

(2) A retired judge admitted to senior status but who engages in limited law practice is not required to comply with Sections 4E and 4G.

(3) A retired judge not admitted to senior status but who is recalled for specific cases or specific periods of service shall be deemed a pro tempore part-time judge subject to Section 6E.

(4) A retired judge, whether or not admitted to senior status and whether or not engaging in law practice, may be employed as a mediator or an arbitrator notwithstanding the provisions of Section 4F. (emphasis supplied)

* * * *

E. Pro tempore part-time judge. - A pro tempore part-time judge:

(1) is not required to comply

- (a) except while serving as a judge, with Sections 2A, 2B, 3B(9), and 4C(1);
- (b) at any time with Sections 2C, 4C(3)(a), 4C(3)(b), 4D(1)(b), 4D(3), 4D(4), 4D(5), 4E, 4F, 4G, 4H, 5A(1), 5A(1), 5A(2), 5B(2), and 5D.

(2) A person who has been a pro tempore part-time judge shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto except as otherwise permitted by Rule 1.12(a) of the Rules of Professional Conduct.

* * * *

Canon 4. A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.

F. Service as arbitrator or mediator. - A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.

A review of the above cited Canons indicates that a retired judge whether or not admitted to senior status and whether or not engaging in law practice, may be employed as a mediator or an arbitrator notwithstanding the provisions of Sections 4F. Canon 6B specifically permits service as an arbitrator or mediator which would be otherwise prohibited by Canon 4F for a retired judge, whether or not admitted to senior status. However, 4F in addition to providing that judges not act as an arbitrator or mediator also states that a judge shall not "otherwise perform judicial functions in a private capacity unless expressly authorized by law." While a senior status judge may be a mediator or arbitrator as expressly provided by Canon 6B(4), that Canon does not exempt senior status judges from the prohibition against performing judicial functions in a private capacity. It is therefore the opinion of the Commission that a senior status judge would not be permitted to perform the duties as an independent examiner as you have defined in your correspondence since that function would require performance of judicial functions.

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Canon 6B(3) states that a retired judge not admitted to senior status shall be deemed a pro tempore part-time judge subject to Section 6E. Canon 6E states that a pro tempore part-time judge is not required to comply at any time with Canon 4F. Therefore, it is the opinion of the Commission that a retired judge not admitted to senior status but who is recalled for specific cases or specific periods of service could perform the duties of an independent examiner which you have defined in your correspondence.

It is hoped that this opinion fully addresses the questions which you have raised. If there is any further question regarding these matters do not hesitate to contact the Commission.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Donald H. Cookman', with a long horizontal flourish extending to the right.

Donald H. Cookman, Chairperson
Judicial Investigation Commission

DHC:nb