



JUDICIAL INVESTIGATION COMMISSION

Post Office Box 1629
Charleston, West Virginia 25326-1629
(304) 558-0169 • FAX (304) 558-0831

September 9, 2002

Re: JIC Advisory Opinion 2002-21

Dear

Your request for an advisory opinion has been reviewed by the Judicial Investigation Commission. In your communication to the Commission you raised two issues: whether a judicial officer must disqualify or recuse himself or herself in hearing a criminal matter involving a police agency where one of its members is a witness or potential witness involving complaints against that judicial officer involving violation of ethical matters; and whether a judicial officer must disqualify or recuse himself or herself from hearing certain criminal matters where a particular police officer is the complainant and where that particular complainant/police officer is a witness or potential witness for the Judicial Investigation Commission involving allegations of ethical violations against said judicial officer.

To address the issues which you have sought an opinion on, the Commission has reviewed Canon 3 of the Code of Judicial Conduct. That Canon states in relevant part:

Canon 3. A judge shall perform the duties of judicial office impartially and diligently.

B. Adjudicative responsibilities. - (1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

* * *

E. Disqualification. - (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . .

This section of Canon 3E sets forth specific times when a judge must recuse himself or herself from the case including when the judge or the judge's spouse or a person within the third degree of relationship to either of them or the spouse of such person is a party to a proceeding, is acting as a lawyer in a proceeding, is known by the judge to have more than de minimis interest in a proceeding, or is in the judge's knowledge likely to be a material witness in a proceeding. Canon 3E further requires a judge to recuse himself or herself when the judge has a personal bias or prejudice concerning a party or a party's lawyer or personal knowledge of disputed evidentiary facts concerning the proceeding.

It is clear from the relevant section of Canon 3 that a judge has an ethical duty to hear a matter assigned to the judge unless there is some specific reason set forth in Canon 3E which would require disqualification or the judge has developed a bias or prejudice either for or against a party in a proceeding and must recuse himself or herself from the matter.

The Supreme Court of Appeals of West Virginia has addressed the requirements for judicial recusal in two cases. In State ex rel. Brown v. Detrick, 191 W.Va. 169, 444 S.E.2d 47 (1994), the Court stated that the fact that a magistrate's spouse is a chief of police of a small police force did not automatically disqualify the magistrate who was otherwise neutral and detached from issuing a warrant sought by another member of that police force. The Court stated in that opinion the fact that the judicial officer's spouse worked for the police force did not automatically disqualify the judicial officer from hearing matters involving that police agency.

In Tennant v. Marion Health Care Foundation, Inc., 194 W.Va. 97, 459 S.E.2d 374 (1995), the Court considered a case in which a circuit judge presided over a medical malpractice jury trial which resulted in a defense verdict. The judge did not know at the time that one of the defense attorneys also represented the judge in a federal lawsuit filed by a pro se litigant. When the judge received the dismissal order, he realized that he had been represented by one of the defense lawyers and voluntarily recused himself from the medical malpractice case. Another circuit judge was appointed to the case and granted the plaintiffs a new trial based on the appearance of impropriety. The Supreme Court reversed the judge's order granting a new trial, refusing to adopt a per se disqualification rule that a new trial should be granted when there was an appearance of impropriety and no additional supporting evidence that the judge was actually prejudiced or biased. The Court stated that "if the disqualification of every judge who was sued in his or her official capacity was required, it would have a substantial impact on available judicial resources."

September 9, 2002

Page Three

In the factual scenarios which you have raised, the judicial officer would be hearing matters in which a member of a police agency would be a witness or a potential witness involving a complaint filed against the judicial officer involving ethical concerns. In the other scenario, the judicial officer would be hearing a matter in which the police officer was a complainant in an ethical case brought against that judicial officer and would be a potential witness matter as well. Based upon the language contained in Canon 3 requiring a judicial officer to hear matters assigned to that judicial officer unless otherwise disqualified and considering the interpretation of the disqualification requirement set forth by our Supreme Court of Appeals, the Commission can find no reason why the judicial officer should be recused in those cases which you set forth in your letter.

The Commission can find no per se disqualification set forth in the factual scenarios which you have raised and for that reason, the Commission feels that the judicial officer should hear those cases assigned to the judicial officer unless there can be some demonstration of bias or prejudice on the part of the judicial officer.

It is hoped that this opinion fully addresses the issues which you have raised. If there is any further question regarding this matter 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