

SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA

LINDA RICHMOND ARTIMEZ, J.D.
ACTING ADMINISTRATIVE DIRECTOR



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May 18, 2005

Dear

In follow-up to our conversation yesterday, I have reviewed the issue of your Chief PO's employment as a hostess with an organization called . Please be advised that pursuant to Section 11.4 of the Personnel Manual, before any judicial-branch employee may engage in outside employment for which there is remuneration, the employee MUST submit a written request to the Administrative Director for review and approval. Such requests must also be accompanied by a recommendation, either favorable or unfavorable, from the supervising judge. Based upon the information I have received, Chief PO is in violation of this policy if she is performing services for for remuneration. The Administrative Office has no record of any written request and approval for Chief PO to engage in employment with outside her current full-time employment as Chief Probation Officer. Chief PO should therefore immediately cease such remunerative activity. As for any disciplinary action due to the violation, please note the information in the following paragraph.

It is the responsibility of both circuit judges and supervising circuit judges, pursuant to Sections 2.3 and 2.4 of the Personnel Manual, to take disciplinary action as necessary and in accordance with the policies and procedures contained in the Personnel Manual. Disciplinary procedures are outlined in Section 6 of the Personnel Manual, which include various actions for cause including written reprimand, improvement period, demoting the employee, suspension, and dismissal for cause. As all judicial employees are will-and-pleasure employees, disciplinary procedures can also include dismissal without stating any cause or reasons. You do not need Administrative Office permission to take disciplinary action, but do need to provide the Administrative Office notification as outlined in Sections 6(C) and (D) of the Personnel Manual. The extent of the disciplinary action, if any, (beyond stopping the violation) is within your discretion.

As for the next matter of which you inquired, concerning whether Chief PO outside work and recreational conduct in participating in a clothing optional resort where children are present is of a criminal nature, it may be best for you to contact the Prosecuting Attorney serving your county to discuss the matter in detail. However, based on a brief review by this office, it may be arguable that such conduct violates W.Va. Code Section 61-8-9, "Indecent Exposure" as children cannot

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consent to the act of intentional exposure of the sex organs or anus of another person. Lack of consent on the part of the victim is one element of the crime of indecent exposure. State v. Knight, 168 W.Va. 615, 285 S.E.2d 401 (1981). The question becomes whether an adult can consent for their child in this context, and whether the nude adults present, including your probation officer, know the act is likely to cause affront or harm to a child brought to the resort. This is a misdemeanor charge.

Further, W.Va. Code, Section 61-8D-5, "...displaying of sex organs by a parent, guardian, or custodian..." also describes a criminal felony offense for sexual exploitation of a child notwithstanding the fact that the child may have willingly participated or may have consented to the conduct. Sexual exploitation is defined in W.Va. Code, Section 61-8D-1, and is a matter of proof of persuasion, inducement, enticement, etc. of a child to engage in sexually explicit conduct. W.Va. Code, Section 61-8C-1, defines sexually explicit conduct to include exhibition of genitals, pubic or rectal areas of any person in a sexual context. Would kissing in a nude environment with children present be enough to establish sexual context? Even if Chief PO may not be a parent, guardian, or custodian of a child brought to the resort, the appearance of a court probation officer around activity which brings into question criminality is of concern.

Both of the criminal conduct examples provided are proof of fact dependent on whether an actual criminal violation is or has taken place at the resort or by your probation officer's participation in clothing optional conduct around children. You may want to have your law clerk research the criminal legal issues further.

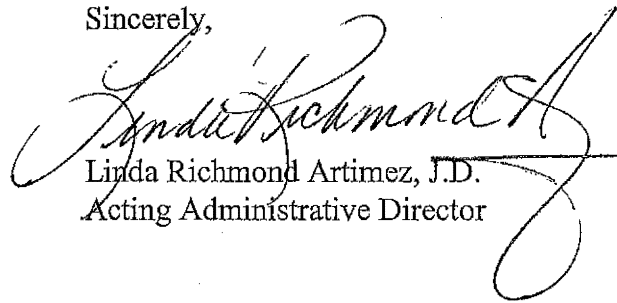
Finally, as to your inquiry of whether Chief PO conduct in participating in a clothing optional resort where children are present places you in a position of violation of the ethical Canons if you allow your probation officer to continue such activity, particularly Canon 2 which directs a judge to avoid impropriety and the appearance of impropriety, I have spoken with and he has asked me to forward to him a written request for an advisory opinion. Under Canon 3C(2) a judge must require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge, and under Canon 3C(5) a judge must prevent personnel subject to the judge's direction from acting contrary to the judicial code of ethics or engaging in any activity or performing any work not reasonably related to the official position or functions of the personnel. If your probation officer cannot engage in activity that you as judge are prohibited from engaging in, one must also consider Canon 4A which requires a judge to conduct all of the judge's extra-judicial activities so that they do not demean the judicial office.

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I will advise as soon as an advisory opinion is provided. Your action in prohibiting your probation officer from participating in the described conduct which raises questions of ethical compliance appears prudent until an advisory opinion is received from Mr. Garten.

If I can be of any additional assistance, please let me know.

Sincerely,



Linda Richmond Artinez, J.D.
Acting Administrative Director

LRA:br