



JUDICIAL INVESTIGATION COMMISSION

City Center East - Suite 1200 A
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Charleston, West Virginia 25304
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February 4, 2013

Re: JIC Advisory Opinion 2013-04.

Dear Judge

Your recent request for an advisory opinion was reviewed by the Judicial Investigation Commission. The factual scenario giving rise to your request is as follows: The _____ County Board of Education has agreed to pay the salary and benefits for a school-based truancy probation officer. The Memorandum of Understanding was signed by the Administrative Director and the Director of the Division of Probation Services for the West Virginia Supreme Court of Appeals, the two Judges and the Chief Probation Officer of the _____ Judicial Circuit, the Superintendent of _____ County Schools and the President of the _____ County Board of Education.

The Memorandum of Understanding contains several provisions including the following terms and conditions:

The school-based probation officer will be subject to the usual employment requirements and procedures for a probation officer as outlined in the Supreme Court of Appeals "Personnel Manual . . ."

The school-based probation officer will be an employee of the Supreme Court of Appeals subject to the terms and conditions of the Court's "Personnel Manual."

The Chief Judge and/or the Chief Probation Officer of the Judicial Circuit will act as the school based officer's local supervising authority.

The school-based probation officer is a will and pleasure employee of the Court. . . .

That the County Board of Education will have no supervisory authority over the probation officer and will not dictate the work schedule or responsibilities of the officer apart from the approval of the Chief Judge of the Judicial Circuit, or his designee, and the Director of the Division of Probation Services as the designee of the Director of the Administrative Office of the Court. . . . [and]

That the school-based probation officer's continued employment by the Court and service to the schools will be contingent upon the County Board of Education continuing to fund the position.

You want to know whether you need to recuse yourself from any cases involving the County Board of Education as a party or whether disclosure of the Memorandum of Understanding is sufficient.

To address the question which you have raised, the Commission has reviewed Canon 3E of the Code of Judicial Conduct and two opinions of the Supreme Court of Appeals of West Virginia. Canon 3E provides in pertinent part:

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

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

The Commentary to the provision notes that "[a] judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification." Canon 6 defines "third degree of relationship" to include the children of a judicial officer.

Whenever there is a question of disqualification, an analysis must occur of the underlying relationship and when it rises to a level causing a reasonable questioning of a judge's impartiality. In *State ex rel. Brown v. Dietrick*, 191 W. Va. 169, 444 S.E.2d 47 (1994), the Court considered whether the circuit court was correct in holding that a search warrant issued by a magistrate was void because the magistrate was married to the Chief of Police and one of

his officers had obtained the warrant. The Court held that in any criminal matter where the magistrate's spouse was involved the magistrate would be disqualified from hearing that case. The Court declined to extend a *per se rule* to other members of the police force. The fact that the magistrate's spouse was the chief of police of a small agency did not automatically disqualify the magistrate who could be otherwise neutral and detached from issuing a warrant sought by another member of the police force.

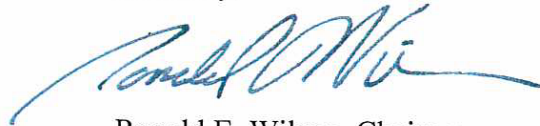
In *Tennant v. Marion Health Care Foundation*, 194 W. Va. 97, 459 S.E.2d 374 (1995), the Court held that a judge should disqualify himself/herself from any proceeding in which his/her impartiality might reasonably be questioned. The Court noted that the avoidance of the appearance of impropriety is as important in developing public confidence in the judicial system as avoiding actual impropriety itself and that the judge should take appropriate action to withdraw from a case in which the judge deems himself/herself biased or prejudiced. *Tennant* cited the commentary to Canon 3E(1) which states that a judge should timely disclose on the record information which he/she believes the parties or their lawyers might consider relevant to the question of disqualification. Litigants and counsel should be able to rely on judges complying with the Code of Judicial Conduct. There is no obligation imposed on counsel to investigate the facts known by the judge which could possibly disqualify the judge. The judge has a duty to disclose any facts even if the judge does not feel that they are grounds for disqualification *sua sponte*.

Tennant also addressed the rule that a judge has an equally strong duty to sit where there is no valid reason for recusal. In so doing, the Court set forth a balancing test between the two concepts. While giving consideration to the administration of justice and the avoidance of the appearance of unfairness, a judge must also consider whether cases may be unfairly prejudiced or delayed or discontent may be created through unfounded charges of prejudice or unfairness made against the judge. The Court noted that the standard for recusal is an objective one. Facts should be viewed as they appear to the well-informed, thoughtful and objective observer rather than the hypersensitive, cynical and scrupulous person.

In applying the foregoing to your factual scenario, the Commission is of the opinion that you do not have to recuse yourself from any cases involving the County Board of Education. You also do not have to disclose the Memorandum of Understanding or the relationship between the Board, the State Supreme Court, and the Judges as it relates to the probation officer in question since the Board has no supervisory authority over the probation officer and he/she is considered an employee of the Court. In other words, the status of the probation officer in question is the same as other probation officers in your jurisdiction so there is no need to recuse yourself from any Board of Education case or to disclose the relationship.

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.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ronald E. Wilson", with a stylized flourish extending to the right.

Ronald E. Wilson, Chairperson
Judicial Investigation Commission

REW/tat