



## **JUDICIAL INVESTIGATION COMMISSION**

WV Judicial Tower - Suite 700 A  
4700 MacCorkle Ave., SE  
Charleston, West Virginia 25304  
(304) 558-0169

November 12, 2024

Re: JIC Advisory Opinion 2024-19

Dear Judge :

Your request for an advisory opinion was recently reviewed by the Commission. The facts giving rise to your request are as follows:

The West Virginia Secondary School Activities Commission (SSAC) is a private, voluntary, non-profit organization comprised of the principals or designees of state public and private secondary schools who have elected to delegate control, supervision and regulation of their interscholastic, band and robotics activities to the Commission. This includes sports such as football. Recently, a county board of education filed a petition for an injunction against SSAC regarding the high school football rating formula. A circuit court granted the injunction which changed the playoff brackets for qualifying teams in all high school football classes. Other court action is expected to follow.

You are registered as a football official with SSAC. You have refereed high school football for 25 years. Football officials, as well as all other officials in SSAC sanctioned sports, are independent contractors who generally contract directly with schools to officiate the athletic contests. However, you pay dues to the SSAC and must meet their requirements for training, testing, etc. Additionally, the playoff games themselves are assigned referees directly by SSAC, which pays them for those games. During your officiating career, you have been assigned by SSAC to 20-30 playoff games.

In JIC Advisory Opinion 2024-04, the Commission said that a judge cannot serve as a school coach since coaches are dependent on the Board of Education for the position and salary which, in turn, would conflict the judge off any Board of Education cases by virtue of the appearance issue alone. However, the Commission said that judges can serve as referees since persons connected to competing schools shall not officiate unless all schools' consent.

Given this, you want to know if you can preside over any litigation involving SSAC that may occur now or in the future. To address your question, the Commission has reviewed Rule 2.11 of the Code of Judicial Conduct which provides in pertinent part:

**Rule 2.11 Disqualification**

- (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: . . .
  - (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

Comment 2 to the Rule notes that “[a] judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.” Comment 5 states that “[a] judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.”

When a question of disqualification arises, an analysis must be made of when a current or former relationship causes 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 matter. 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 or herself from any proceeding in which his 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 and that the judge should take appropriate action to withdraw from a case in which the judge deems himself or herself biased or prejudiced. *Tennant* cited the commentary to former 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 suspicious person.

Based upon the foregoing, a majority of the Commission is of the opinion that you are disqualified from presiding over any matters involving SSAC. The Commission hopes that this opinion fully addresses the issues which you have raised. Please do not hesitate to contact the Commission should you have any questions, comments or concerns.

Sincerely,



Alan D. Moats, Chairperson  
Judicial Investigation Commission