

# ***The Supreme Court of Ohio***

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

41 SOUTH HIGH STREET-SUITE 2320, COLUMBUS, OH 43215-6104

(614) 644-5800 (888) 664-8345 FAX: (614) 644-5804

[www.sconet.state.oh.us](http://www.sconet.state.oh.us)

OFFICE OF SECRETARY

## **OPINION 2004-3**

Issued June 3, 2004

*Withdrawn by Adv. Op. 2022-09, 2022-10*

*[Former CJC Opinion-provides advice under the former Ohio Code of Judicial Conduct which is superseded by the Ohio Code of Judicial Conduct, eff. 3/1/2009.]*

**SYLLABUS:** It is improper under Canon 7(B)(4) for a full-time or part-time magistrate to serve on a local, city, or state board of education or to run for election or re-election to a board of education. The Board suggests that this advice apply prospectively.

It is improper under Canon 7(B)(4) for a full-time or part-time magistrate to serve on a board of county commissioners or to run for election or re-election to a board of county commissioners. The Board suggests that this advice apply prospectively.

It is proper under Canon 2(C)(2) for a full-time or part-time magistrate to serve as trustee of a condominium association, which is a non-profit corporation of the condominiums where the magistrate resides and is an owner. If the condominium association becomes a party in a proceeding before the magistrate, the magistrate should disqualify himself or herself under Canon 3(E)(1).

**OPINION:** This opinion addresses three questions: two questions regarding magistrates seeking non-judicial elective offices and one question regarding a magistrate serving as a trustee of a non-profit corporation.

1. Is it proper for a full-time or part-time magistrate to serve on a local board of education or to run for election or re-election to the board?
2. Is it proper for a full-time or part-time magistrate to serve on a board of county commissioners or to run for election or re-election to the board?
3. Is it proper for a full-time or part-time magistrate to serve as trustee of a condominium association, which is a non-profit corporation of the condominiums where the magistrate resides and is an owner?

### *Question One and Two*

Is it proper for a full-time or part-time magistrate to serve on a local board of education or to run for election or re-election to the board?

Is it proper for a full-time or part-time magistrate to serve on a board of county commissioners or to run for election or re-election to the board?

The position of local board of education member is an elective office. See Ohio Rev. Code Ann. § 3313.01 (West 1995). The position of county commissioner is an elective office. See Ohio Rev. Code Ann. § 305.01 (West 1994).

The Ohio Constitution and related statutes prohibit *judges* from holding any other office of profit or trust under authority of Ohio or of the United States. See Ohio Const. Art IV, § 6 (B); Ohio Rev. Code Ann. § 141.04 (D) (West 2002) [chief justice of the supreme court, justices of the supreme court, court of appeals judges, court of common pleas judges, probate court judges] Ohio Rev. Code Ann. § 1901.11(D) (West Supp. 2004) [municipal judges]; Ohio Rev. Code Ann. § 1907.16(B) (West Supp. 2004) [county court judges].

Thus, pursuant to state constitution and laws, Ohio judges may not serve as members of boards of education. See e.g., OAG Opinion 86-004 (“A judge of a municipal court is prohibited by Ohio Const. art. IV, §6(B) and R.C. 1901.11 from holding the position of member of a board of education of a local school district.”); OAG Op. 141 (1909) (“A probate judge may not serve or be candidate for member of board of education.”); OAG Opinion 277 (1907) (probate court judge is incompatible with member of village board of education). Further, Ohio law prohibits voting members of the state board of education from holding another public position of trust or profit. Ohio Rev. Code Ann. § 3301.03(C) (West Supp. 2002). Thus, the law prohibits members of a state board of education from serving as a judge. See e.g., OAG Opinion 65-61 (1965) (“A member of the State Board of Education may not accept an appointment by a municipal Judge as substitute during the judge’s vacation period.”); OAG Opinion 512 (1910) (“A member of a board of education vacates such office by qualifying for the office of common pleas judge.”).

Resolution of the issue of whether an individual may simultaneously serve as *magistrate* while seeking election to or serving in a non-judicial elected position lies solely within the Ohio Code of Judicial Conduct. Magistrates, unlike judges, are not subject to the constitutional and statutory prohibitions on holding any other office of profit or trust under authority of Ohio or the United States. “Because the prohibition of Ohio Const. art. IV, § 6(B) and R.C. 141.04(D) does not expressly include magistrates, the prohibition is not applicable to magistrates.” OAG Opinion 96-062 (1996) (n.1). [Nevertheless, “the position of magistrate is, for purposes of Ohio Const. Art. IV, §6, an office of trust or profit under the authority of the state.” See OAG 96-024 (1996).]

Pursuant to Canon 7(B)(4) of the Ohio Code of Judicial Conduct, a judge must resign from judicial office while running for a non-judicial office.

Canon 7(B)(4) A judge shall resign from office when he or she becomes a candidate in a primary or general election for a non-judicial office. A judge may continue to hold judicial office while he or she is a candidate for election to or serving as a delegate in a state constitutional convention, if the judge is otherwise permitted by law to do so.

Pursuant to the section on Compliance with the Code of Judicial Conduct, magistrates, like judges, are subject to Canon 7(B)(4). Full-time magistrates, like full-time judges, must comply with all of the provisions of the Ohio Code of Judicial Conduct. Part-time magistrates, like part-time judges must comply with all of the provisions of the Ohio Code of Judicial Conduct except for Canon 2(C)(3); Canon 4(C)(2), (D), (E), (F); and Canon 2(D)(3) (but must file the annual disclosure statement). See Compliance with the Code of Judicial Conduct.

It is the Board's view that the position of magistrate is an "office" as used in Canon 7(B)(4). Thus, under Canon 7(B)(4), a full-time or part-time magistrate is required to resign the office of magistrate while running for a non-judicial elective office.

The requester suggests that a part-time magistrate may be permitted to serve in non-judicial elective offices such as a local board of education member or a county commissioner because part-time magistrates are not required to comply with Canon 4(C)(2). Through the Compliance Section of the Ohio Code of Judicial Conduct, part-time magistrates are not required to comply with Canon 4(C)(2), but Canon 4(C)(2) has no bearing on the issue raised. Canon 4(C)(2) addresses *appointment* to a governmental committee or commission or other governmental position. Canon 4(C)(2) does not control the issue of seeking or serving in a non-judicial *elective* office.

Canon 4(C)(2) A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice. A judge may represent a country, state, or locality on ceremonial occasions or in connection with historical, educational or cultural activities.

On June 22, 1987, this Board advised that a part-time referee "may serve as a member or officer of a local Board of Education." See, Ohio SupCt Bd Comm'rs on Grievances and Discipline, Op. 87-032 (1987). Opinion 87-032 did not address the application of the Canon 7(B)(4), the rule regarding resignation of office when running for a non-judicial elective office. On December 5, 1997, the Board withdrew Opinion 87-032 thus revoking the advice that a part-time referee may serve as a member or officer of a local board of education.

Why is it that Canon 7(B)(4) requires a judge or magistrate to resign from judicial office when running for a non-judicial office? "The avoidance of the appearance of impropriety or of trading on the prestige and dignity of the judicial office, and the fear of involving the court in political controversy are sound reasons for the resignation requirement." E. Wayne Thode, *Reporter's Notes to Code of Judicial Conduct* 29 (1973). Whether seeking or holding non-judicial elective office, these ethical concerns apply with equal force.

It strains credibility to read the Canon 7(B)(4) as prohibiting seeking election to non-judicial office, but permitting the holding of a non-judicial office. Thus, it is the Board's view that if an individual holds an elected non-judicial office and *subsequently* receives an appointment as magistrate, a choice is required. The individual should *either* decline the appointment as magistrate *or* resign from the non-judicial elective office and accept the appointment as magistrate.

Upon thorough consideration of Canon 7(B)(4), the Board now advises as follows. It is improper under Canon 7(B)(4) for a full-time or part-time magistrate to serve on a local, city, or state board of education or to run for election or re-election to a board of education. It is improper under Canon 7(B)(4) for a full-time or part-time magistrate to serve on a board of county commissioners or to run for election or re-election to a board of county commissioners. The Board suggests that the advice should apply prospectively.

### *Question Three*

Is it proper for full-time or part-time magistrate to serve as trustee of a condominium association, which is a non-profit corporation of the condominiums where the magistrate resides and is an owner?

The Board must determine whether a part-time magistrate serving as a trustee of a condominium association for condominiums where the magistrate resides and is an owner, is a permitted extrajudicial activity under Canon 2(B), a permitted real estate activity under Canon 2(C)(2), or a prohibited business activity under Canon 2(C)(1) and (3).

The pertinent provisions of the Ohio Code of Judicial Conduct are set forth.

#### Canon 2(B)

A judge may serve as an officer, director, trustee, or non-legal advisor of . . . an educational, religious, charitable, fraternal, or civic organization not conducted for profit, subject to the following limitations and other requirements of this Code.

- (1) A judge shall not serve as an officer, director, trustee, or non-legal advisor if it is likely that the organization will be engaged in either of the following:
  - (a) Proceedings that ordinarily would come before the judge;
  - (b) Adversary proceedings with frequency in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

## Canon 2(C)

- (1) A judge shall not engage in either of the following financial and business dealings:
  - (a) Dealings that reasonably may be perceived to exploit the judge's judicial position;
  - (b) Dealings that involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves.
- (2) Subject to the requirements of this Code, a judge may hold and manage investments of the judge and members of the judge's family, including real estate, and engage in other remunerative activity.
- (3) A judge shall not serve as an officer, director, manager, general partner, advisor, or employee of any business entity except that a judge, subject to the requirements of this Code, may manage and participate in either of the following:
  - a. A business closely held by the judge or member of the judge's family;
  - b. A business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.

A New York Commission on Judicial Conduct offered advice that “[a] recently appointed judge may continue to serve as treasurer and member of the Board of Directors of the co-operative apartment building where the judge resides.” New York, Commission on Judicial Conduct, Op. 98-93 (1998). The committee found no ethical barrier, stating it did not appear that serving as treasurer for the co-operative would involve the inquirer in rendering legal or investment advice, it appeared unlikely to interfere with the proper performance of judicial duties, and did not appear to be incompatible with the judicial office. *Id.*

A Virginia Judicial Ethics Advisory Committee addressed the question “[m]ay an active judge serve as an officer and/or director of a Property Owners Association related to the judge's residence?” The committee answered “[y]es, provided that serving in such positions does not interfere with the judge's judicial duties; that it is not likely the association will be engaged in litigation that would ordinarily come before his court; and that he not act as the association's legal advisor nor personally participate in the solicitation of funds.” Commonwealth of Virginia, Judicial Ethics Advisory Committee, Op. 00-9 (2000).

As aptly stated by the Virginia committee:

While a property owners association is not clearly a “civic” organization permitted under Canon 4(C)(3) [similar to Ohio Canon 2(B)] and is not a business entity prohibited under Canon 4(D)(3) [similar to Ohio Canon 2(C)(3)], it has attributes of both but is more similar to a real estate holding or investment permitted by Canon 4(D)(2) [similar to Ohio Canon 2(C)(2)]. The activities are confined to the saving of expense rather than the generation of profit and while other homeowners may share in the benefits, the judge would still find it necessary to assume these duties living in a private home not associated with other property owners. See U.S. Advisory Opinion 29 (1973), revised Jan. 16, 1998.

Commonwealth of Virginia, Judicial Ethics Advisory Committee, Op. 00-9 (2000).

This Board agrees that a property owners association is not clearly a civic organization for purposes of Canon 2(B) and is not a business entity for purposes of Canon 2(C)(3) although it may have attributes of both. It is more similar to a real estate holding that is permitted by Canon 2(C)(2).

Thus, the Board advises that it is proper under Canon 2(C)(2) for a full-time or part-time magistrate to serve as trustee of a condominium association which is a non-profit corporation of the condominiums where the magistrate resides and is an owner. If the condominium association becomes a party in a proceeding before the magistrate, the magistrate should disqualify himself or herself under Canon 3(E)(1).

**Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney’s Oath of Office.**