

# *The Supreme Court of Ohio*

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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## **OPINION 2003-9**

Issued December 5, 2003

*[Withdrawn by the Board on April 10, 2015]*

*[Former CJC Opinion-provides advice under the former Ohio Code of Judicial Conduct which is superseded by the Ohio Code of Judicial Conduct, eff. 3/1/2009.]*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:** Under Canon 4(C)(2), Canon 2(B) and Canon 2(A) of the Ohio Code of Judicial Conduct, common pleas court judges should not serve on judicial corrections boards for community-based correctional facilities and programs

**OPINION:** This opinion addresses a question regarding common pleas court judges serving on judicial corrections boards.

Is it proper under the Ohio Code of Judicial Conduct for common pleas court judges to serve on judicial corrections boards for community-based correctional facilities and programs?

Statutory duties regarding community-based correctional facilities and programs have fallen upon the shoulders of Ohio common pleas court judges. Pursuant to Ohio law, common pleas court judges are to serve as Judicial Corrections Boards to administer county or district community-based correctional facilities and programs. Ohio Rev. Code Ann. §2301.51(A)(1) and (2) (West Supp 2003).

The required involvement of judges is extensive, ranging from proposing to establishing and operating a community-based correctional facility and program. The initial role of the common pleas court judges is to formulate a proposal for a community-based correctional facility and program. Ohio Rev. Code Ann. §2301.51(A)(1) and (2) (West Supp. 2003). Next, the judges are to submit a proposal to the division of parole and community services of the department of rehabilitation and correction for its approval. Ohio Rev. Code Ann. §2301.51(B)(1) and (2) (West Supp. 2003). Then upon approval of the proposal, the judges are to serve as the Judicial Corrections Board to establish and operate the facility and program. Ohio Rev. Code Ann. §2301.51(C) (West Supp. 2003).

In determining whether it is proper to serve on a governmental committee, commission, or position, a judge must not base his or her decision on whether there is a statute specifying a judge's participation. A judge must consider his or her restrictions under the Ohio Code of Judicial Conduct. In addition, a judge must consider the constitutional and statutory prohibitions on holding any other office of profit or trust. The Ohio Constitution states: "Judges shall receive no fees or perquisites, nor hold any other office

of profit or trust, under the authority of this state, or of the United States.” Oh. Const. Article IV § 6(B). Ohio statutes echo the prohibition on holding any other office of profit

or trust. Ohio Rev. Code Ann. § 141.04(D) (West 2002) [supreme court justices, court of appeals judges, court of common pleas judges, probate court judges]; Ohio Rev. Code Ann. § 1901.11(D) (West Supp. 2003) [municipal court judges]; Ohio Rev. Code Ann. § 1907.16(B) (West Supp. 2003) [county court judges]. This Board has no advisory authority as to what constitutes an office of profit or trust under the authority of this state or of the United States; that authority lies with the Office of the Attorney General of Ohio. Ohio Rev. Code Ann. § 109.12 (West 2002). This Board's renders advice regarding the application of the Ohio Code of Judicial Conduct. See Gov.Bar R. V § 2(C).

Pertinent rules within the Ohio Code of Judicial Conduct are as follows:

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.

Canon 2(B) A judge may serve as an officer, director, trustee, or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice or of an educational, religious, charitable, fraternal, or civic organization not conducted for profit, subject to the following limitations and the 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.

(2) [Omitted].

Canon 2(A) A judge may engage in activities to improve the law, the legal system, and the administration of justice, provided those activities do not cast doubt on the judge's capacity to act impartially as a judge, demean the judicial office, or interfere with the proper performance of judicial duties.

Based on the requirements of Canons 4(C)(2), Canon 2(B) and Canon 2(A), the Board has described a three-part test for determining whether it is proper under the Ohio Code of Judicial Conduct for a judge to accept an appointment to serve on a governmental committee, commission, or in a governmental position. See Ohio SupCt., Bd Comm'rs on Grievances and Discipline, Op. 2002-9 (2002). The three-part test is as follows:

1. Would a judge's participation cast doubt on the judge's ability to act impartially, demean the judicial office, or interfere with performance of judicial duties?
2. Is it likely that the governmental entity will be engaged in proceedings that ordinarily would come before the judge or be engaged in 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?
3. Is the governmental entity 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 "Yes" answer to any of the three questions indicates the appointment to serve on a governmental committee, commission, or in a governmental position is improper under the ethical rules.

Before addressing each question, the Board reviews the duties of a judicial corrections board and the minimum standards for proposing, establishing, and operating a community-based correctional facility and program that must be satisfied.

The duties of the judicial corrections board are set forth in section 2301.55 of the Ohio Revised Code.

- (A) If a judicial corrections board establishes one or more community-based correctional facilities and programs or district community-based correctional facilities and programs, all of the following apply, for each facility and program so established:
  - (1) The judicial corrections board shall appoint and fix the compensation of the director of the facility and program and other professional, technical, and clerical employees who are necessary to properly maintain and operate the facility and program.

The director, under the supervision of the judicial corrections board and subject to the rules of the judicial corrections board that are prescribed under division (B) of this section, shall control, manage, operate, and have general charge of the

facility and program, and shall have the custody of its property, files, and records.

- (2) The judicial corrections board may enter into contracts with the board of county commissioners of the county in which the facility and program is located or, in the case of a district facility and program, with the county commissioners of any county included in the district, whereby the county is to provide buildings, goods, and services to the facility and program.
  - (3) The judicial corrections board shall adopt rules for the sentencing or other commitment or admission pursuant to law of persons to, and the operation of, the facility and program. The rules shall provide procedures that conform to sections 2301.51 to 2301.56, 5120.10, 5120.111, and 5120.112 of the Revised Code. The rules adopted under this division shall be entered upon the journal of the court of each member court of a district.
- (B) A judicial corrections board that establishes one or more community-based correctional facilities and programs or district community-based correctional facilities and programs may accept any gift, donation, devise, or bequest of real or personal property made to it by any person, or any grant or appropriation made to it by any federal, state, or local governmental unit or agency, and use the gift, donation, devise, bequest, grant, or appropriation in any manner that is consistent with any conditions of the gift, donation, devise, bequest, grant, or appropriation, and that it considers to be in the interests of the facility and program. The judicial corrections board may sell, lease, convey, or otherwise transfer any real or personal property that it accepts pursuant to this division following the procedures specified in sections 307.09, 307.10, and 307.12 of the Revised Code.
- (C) A judicial corrections board that establishes one or more community-based correctional facilities and programs or district community-based correctional facilities and programs shall provide the citizens advisory board of the facilities and programs with the staff assistance that the citizens advisory board requires to perform the duties imposed by section 2301.54 of the Revised Code

Ohio Rev. Code Ann. §2301.55 (West Supp. 2003).

Pursuant to R.C. 2301.52, the proposal submitted by the common pleas court judges must satisfy minimum standards.

Each proposal for a community-based correctional facility and program or a district community-based correctional facility and program shall provide for or contain at least the following:

- (A) The designation of a physical facility that will be used for the confinement of persons sentenced to the facility and program by a court pursuant to section 2929.16 or 2929.17 of the Revised Code or persons otherwise committed or admitted pursuant to law to the facility and program. The designate facility shall satisfy all of the following:
  - (1) Be a secure facility that contains lockups and other measures sufficient to ensure the safety of the surrounding community;
  - (2) Provide living space and accommodations that are suitable and adequate for the housing upon release, sentencing, or other commitment or admission of the following number of persons:
    - (a) For a facility that became operational prior to July 1, 1993, at least twenty, but not more than two hundred, persons;
    - (b) For a facility that becomes operational on or after July 1, 1993, at least fifty, but not more than two hundred, persons.
  - (3) Be constructed or modified, and maintained and operated, so that it complies with the rules adopted pursuant to Chapter 119. of the Revised Code by the division of parole and community services in the department of rehabilitation and correction for community-based correctional facilities and programs and district community-based correctional facilities and programs.
- (B) The designation of a general treatment program that will be applied individually to each person sentenced to the facility and program by a court pursuant to section 2929.16 or 2929.17 of the Revised Code or otherwise committed or admitted pursuant to law to the facility and program. The designated general treatment program shall not be limited to, but at a minimum shall include, provisions to ensure that:

- (1) Each person sentenced by a court or otherwise committed or admitted to a facility is provided an orientation period of at least thirty days, during which period the person is not permitted to leave the facility and is evaluated in relation to the person's placement in rehabilitative programs;
  - (2) Each person sentenced by a court or otherwise committed or admitted to a facility is placed in a release program whereby the person will be released temporarily for the purpose of employment in a manner consistent with the applicable work-release program established under section 5147.28 of the Revised Code, for vocational training, or for other educational or rehabilitative programs;
  - (3) All suitable community resources that are available are utilized in the treatment of each person sentenced by a court or otherwise committed or admitted to the facility.
- (C) Provisions to ensure that the facility and program will be staffed and operated by persons who satisfy the minimum educational and experience requirements that are prescribed by rule by the department of rehabilitation and correction;
- (D) Provisions for an intake officer to screen each felony offender who is sentenced by the court or courts that the facility and program serve and to make recommendations to the sentencing court concerning the admission or referral of each felony offender to the facility and program within fourteen days after notification of sentencing;
- (E) Written screening standards that are to be used by an intake officer in screening an offender under the provisions described in division (D) of this section and that at a minimum include provisions to ensure that the intake officer will not make a recommendation to a sentencing court in support of the sentencing of a person to the facility and program if the person is ineligible for placement in the facility and program under rules adopted by the facility's and program's judicial corrections board;
- (F) A statement that a good faith effort will be made to ensure that the persons who staff and operate the facility and program proportionately represent the racial, ethnic, and

cultural diversity of the persons released, sentenced, or otherwise committed or admitted to the facility and program.

Ohio Rev. Code Ann. §2301.52 (West Supp. 2003).

*First prong of test: Would a judge's participation cast doubt on the judge's ability to act impartially, demean the judicial office, or interfere with performance of judicial duties?*

Based upon the duties of a judicial correction board and the minimum standards that a community-based correctional facility and program must satisfy, it is the Board's view that a judge's participation on a Judicial Corrections Board casts doubt on impartiality, demeans the judicial office, and interferes with performance of judicial duties.

The far ranging duties imposed upon common pleas judges are a drain upon judicial economy. Judges cannot fulfill the duties from the bench. Fulfillment of the statutory duties interferes with the performance of judicial duties. The judges must make employment decisions as to the director and employees of the facility and their compensation. The judges must contract with the county commissioners for buildings, goods, and services. The judges must adopt rules for sentencing, commitment, or admission pursuant to law. The judges must adopt rules for operating the facility and program. The judges must accept gifts, donations, devises, or bequests of real or person property and use them in a manner consistent with any conditions imposed and in the interest of the facility, and in so doing may be involved in the sale of real or personal property. The judges must accept grants or appropriations by federal, state, or local government units or agencies and use them in the interest of the facility. The judges must provide staff assistance to the citizens advisory board. The judges must operate a physical facility that confines persons. The physical facility must be a secure facility that contains lockups and other measures to ensure safety of the community. The physical facility must be constructed, maintained, and operated in compliance with the rules of the division of parole and community services in the department of rehabilitation and correction. The judges must designate a treatment program to be applied to each person sentenced or otherwise committed or admitted. The judges must ensure that the persons who staff and operate the facility and program meet minimum education and experience requirements as prescribed by rule by the department of rehabilitation and correction. The judges must provide for an intake officer to screen each felony offender sentenced by the court and the judges must provide written screening standards. The judges must make a good faith effort to ensure racial, ethnic, and cultural diversity in the persons who staff and operate the facility and program. See Ohio Rev. Code Ann. §2301.52 (West Supp. 2003) and §2301.55 (West Supp. 2003).

A judge's participation on a judicial corrections board casts doubt upon the judge's impartiality and in so doing demeans the judicial office. The appearance of impartiality is questioned when a judge has responsibility to seek funding for a community-based correctional facility and program from a party that appears before the judge. A judicial corrections board applies to the division of parole and community services of the Department of Rehabilitation and Corrections for state financial assistance in renovating,

maintaining, and operating the facilities and programs. Ohio Rev. Code Ann. §2301.56 (West 2003). At the same time an application for funding by a judicial corrections board is pending or when issues involving funding arise, the Ohio Department of Rehabilitation and Corrections may be defendants in litigation, such as inmate actions, employee actions, or union actions, pending before a common pleas court.

The appearance of impartiality is questioned when a judge on a judicial corrections board is required to enter the required financial assistance agreement with the director of rehabilitation and correction and the deputy director of the division of parole and community services. The financial assistance agreement specifies as a term and condition that a facility and program will attempt to accept and treat at least fifteen per cent of the eligible adult felony offenders sentenced in the county or counties it serves during the period it receives state financial assistance. Ohio Rev. Code Ann. §5120.112 (C)(8) (West 2001).

The appearance of impartiality is questioned when a judge on a judicial corrections board applies for funding from the division of parole and community service of the Ohio Department of Rehabilitation because that funding is tied to the number of persons committed or referred. The amount of state financial assistance is based upon a set fee to be paid to an applicant per person committed or referred in the year of application. Ohio Rev. Code Ann. § 5120.112(B) (West 2001). Because judges must make sentencing decisions, a judge's involvement in applying for funding tied to the number of persons committed or referred casts doubt on impartiality.

The appearance of impartiality is questioned when a judge on a judicial corrections board has responsibility for adopting policies regulating offenders in community-based correctional facilities and programs and responsibility for presiding over matters that may involve those offenders and the regulations.

The appearance of impartiality is questioned when a judge is involved in employment matters involving the director and employees of a community-based correctional facility and presides over matters in which the judicial corrections board, the director, and or the employees are litigants or witnesses.

*Second prong of test: Is it likely that the governmental entity will be engaged in proceedings that ordinarily would come before the judge or be engaged in 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?*

It is likely that a judicial corrections board, or a community-based correctional facility, or its director and employees may be engaged in adversary proceedings in a common pleas court. Lawsuits might be filed against judicial corrections boards or community-based correctional facilities and their directors by employees of community-based correctional facilities and programs or by offenders who have been sentenced to a facility. Employees may be involved as witnesses in proceedings involving offenders.

*Third prong of test: Is the governmental entity concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice?*

The duties of a judicial corrections board concern issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judicial corrections board faces employment issues, business issues, financial issues, contractual issues in operating a facility and program. A judicial corrections board supervises the director of a community-based correctional facility and program who controls, manages, operates and has general charge of the facility and program. Ohio Rev. Code Ann. §2301.55 (West 2003). In short, judges serving on judicial corrections boards are running correctional facilities and programs. Operating a correctional facility and its programs requires judges to engage in business, financial, and employment decisions involving issues of fact and policy that are beyond the law, the legal system, and the administration of justice and that detract from judicial duties.

In closing, this Board advises that under the Canon 4(C)(2), Canon 2(B) and Canon 2(A) of the Ohio Code of Judicial Conduct, common pleas court judges should not serve on judicial corrections boards for community-based correctional facilities and programs.

**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.**