

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

OPINION 2009-7

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SYLLABUS: It is improper under the Ohio Code of Judicial Conduct for a newly appointed full-time or part-time domestic relations court magistrate to continue serving out a term as an elected member of city council. Rule 4.5 requires a magistrate to resign as magistrate upon becoming a candidate in a primary or general election for a nonjudicial elective office. A corollary of Rule 4.5 is that a magistrate may not continue to serve in a nonjudicial office that he or she was elected to prior to becoming a magistrate. Rule 1.2 and Rule 1.3 buttress the view that a magistrate may not continue to serve in a nonjudicial elective office. Rule 1.2 requires a magistrate to act in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and to avoid impropriety and the appearance of impropriety. Rule 1.3 requires that a magistrate not abuse the prestige of judicial office to advance personal or economic interests. The simultaneous holding of a position as magistrate and an elective position of city council member may compromise public confidence in the magistrate's independence, integrity, and impartiality; may create an appearance of impropriety; and may appear to lend the prestige of being a magistrate to advance personal interests. Further, there may be statutory compatibility issues to consider, but those are beyond the scope of this advisory opinion.

OPINION: This opinion addresses a question regarding a newly appointed part-time magistrate continuing to hold an elected office as city council member.

Is it proper for a newly appointed part-time domestic relations court magistrate to continue serving out a term as an elected member of city council?

Part-time magistrates like part-time judges are subject to Rule 4.5 of the Ohio Code of Judicial Conduct. See Part III, Application, Ohio Code of Judicial Conduct. Full-time magistrates and full-time judges are also subject to Rule 4.5. See Part I, Application, Ohio Code of Judicial Conduct.

Rule 4.5 of the Ohio Code of Judicial Conduct requires that “[u]pon becoming a candidate in a primary or general election for a nonjudicial elective office, a judge shall resign from judicial office.” Rule 4.5 provides one exception, not applicable herein, that “[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 Rule 4.5, a magistrate must resign as magistrate, just as a judge must resign as judge, if he or she becomes a candidate in a primary or general election for a nonjudicial office.

A necessary corollary to the Rule 4.5 requirement that a magistrate resign as a magistrate upon becoming a candidate in a primary or general election for a nonjudicial elective office is that a magistrate may not continue to serve in a nonjudicial office to which he or she was elected prior to becoming a magistrate.

In Opinion 2004-3 (2004), the Board addressed, among other issues, whether a magistrate may simultaneously serve as a magistrate while serving in a nonjudicial elected position. That opinion interpreted Canon 7(B)(4) of the former Ohio Code of Judicial Conduct which was superseded by the Ohio Code of Judicial Conduct, effective March 1, 2009. Rule 4.5 is identical in substance to former Canon 7(B)(4). See Comparison Section, Rule 4.5, Ohio Code of Judicial Conduct.

In Op. 2004-3, the Board advised: “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 also advised: “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 expressed the 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 *or* resign from the non-judicial elective office and accept the appointment as magistrate.”

Like the Board’s view in Opinion 2004-3 that Canon 7(B)(4) prohibits a magistrate from simultaneously serving in a nonjudicial elective office, the Board’s view is that Rule 4.5 prohibits a magistrate from continuing to serve in a nonjudicial elective office.

Further, other rules in the Ohio Code of Judicial Conduct buttress the view that a magistrate may not continue to serve in a nonjudicial elective office. Full-time and part-time magistrates like full-time and part-time judges are subject to Rule 1.2 and Rule 1.3. See Parts I and III, Application, Ohio Code of Judicial Conduct.

Rule 1.2 requires that “[a] judge shall act at all times in a manner that promotes public confidence in the *independence, integrity, and impartiality* of the

judiciary, and shall avoid *impropriety* and the appearance of *impropriety*.” Rule 1.3 requires that “[a] judge shall not abuse the prestige of judicial office to advance the personal or *economic interests* of the judge or others, or allow others to do so.” The simultaneous holding of a position as magistrate and the elective position of city council member may compromise public confidence in the magistrate’s independence, integrity, and impartiality; may create an appearance of impropriety; and may appear to lend the prestige of being a magistrate to advance personal interests.

For judges, the legal issue of holding another elective office is long settled. A judge may not continue to hold another elective office. The Ohio Constitution and related statutes prohibit a *judge* 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 Supp. 2009) [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 2005) [municipal court judges]; Ohio Rev. Code Ann. § 1907.16(B) (West 2005) [county court judges].

But, a magistrate, unlike a judge, is 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 Op. 96-062 (1996) (n.1). [In OAG Op. 96-062, the attorney general advised that there is statutory compatibility for a part-time domestic relations magistrate to serve as a member of the county board of election, but noted the consideration did not constitute an opinion on the applicability of the Code of Judicial Conduct.]

In Op. 2004-3, the Board stated that the “[r]esolution 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.” That statement may be overbroad, for a magistrate is subject to statutory compatibility issues. As examples, the Board notes two statutory provisions that may be relevant to the holding of the positions of magistrate and city council member.

R.C. 731.02 states that each member of the legislative authority of a municipal corporation “shall not hold any other public office, except that of notary public or member of the state militia, and shall not be interested in any contract with the city, and no such member may hold employment with said city.” Ohio Rev. Code Ann. § 731.02 (West Supp. 2009).

R.C. 705.12 states that members of the legislative authority of a municipal corporation “shall not hold any other public office or employment, except that of notary public or member of the state militia, or state or county central committeeman of a political party, or state or county executive committeeman of

a political party, or state or county officer of a political party, and shall not be interested in the profits or emoluments of any contract, job, work, or service for the municipal corporation.” Ohio Rev. Code Ann. § 705.12 (West 1994). [R.C. 705.12 is applicable to each plan of city government provided for in R.C. 705.41 to 705.86 (commission plan, city manager plan, federal plan). Ohio Rev. Code Ann. § 705.07 (West 1994).]

The Board acknowledges that advice as to statutory compatibility issues is under the advisory authority of the Office of the Ohio Attorney General. See e.g., Ohio Rev. Code Ann. §§ 109.12-109.14 (West 2002). Advice as to the application of the Ohio Code of Judicial Conduct is under the advisory authority of the Board of Commissioners on Grievances and Discipline. See Gov. Bar R. V(2)(C).

In conclusion, the Board advises as follows. It is improper under the Ohio Code of Judicial Conduct for a newly appointed full-time or part-time domestic relations court magistrate to continue serving out a term as an elected member of city council. Rule 4.5 requires a magistrate to resign as magistrate upon becoming a candidate in a primary or general election for a nonjudicial elective office. A corollary of Rule 4.5 is that a magistrate may not continue to serve in a nonjudicial office that he or she was elected to prior to becoming a magistrate. Rule 1.2 and Rule 1.3 buttress the view that a magistrate may not continue to serve in a nonjudicial elective office. Rule 1.2 requires a magistrate to act in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and to avoid impropriety and the appearance of impropriety. Rule 1.3 requires that a magistrate not abuse the prestige of judicial office to advance personal or economic interests. The simultaneous holding of a position as magistrate and an elective position of city council member may compromise public confidence in the magistrate’s independence, integrity, and impartiality; may create an appearance of impropriety; and may appear to lend the prestige of being a magistrate to advance personal interests. Further, there may be statutory compatibility issues to consider, but those are beyond the scope of this advisory opinion.

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 Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Attorney’s Oath of Office.