

Maryland Judicial Ethics Committee

Opinion Request Number: 1988-03

Date of Issue: January 17, 1989

■ Published Opinion □ Unpublished Opinion □ Unpublished Letter of Advice

Judge May Not Accept Commission on Staff of Adjutant General's Office of State Militia

A judge has inquired whether he may accept a commission on the staff of the Adjutant General's Office of the State Militia. Specifically, the judge tells us that the organization involved is the Maryland State Guard Association, Inc., a group of 250 retired military officers, not on active duty, and loosely organized for the purposes of providing a cadre to staff and stand in the stead of the National Guard should the guard be called to duty. The judge indicates that the basis for the organization is Section 5 of Article 65* of the Annotated Code of Maryland. Moreover, he indicates that commissions are made by the Governor at the recommendation of ranking state guard personnel, that no salary is involved and that it is unlikely that he would be called to active duty. He says further that he will be asked to review with members of the State Militia, Adjutant General Section, the law with regard to the State Militia, and organize and deliver law related schooling to state guard personnel.

Canon 4, Maryland Code of Judicial Conduct, Extra-Judicial Activities, provides in relevant part, that:

Except as otherwise prohibited or limited by law or these canons, a judge may engage in the following activities, if doing so does not interfere with the proper performance of judicial duties, does not reflect adversely upon the judge's impartiality, and does not detract from the dignity of the office. (Emphasis supplied.)

* * *

B. Government Activities

(2) A judge may serve on governmental advisory bodies devoted to the improvement of the law, the legal system or the administration of justice and may represent his or her country, state or locality on ceremonial occasions or in connection with historical, educational and cultural activities.

Nevertheless, the commentary to subparagraph (2) indicates that a judge cannot hold an "... 'office' under the Constitution or laws of the United States or State of Maryland." In that regard, Article 33 of the Maryland Declaration of Rights provides** ,

... No Judge shall hold any other office, civil or military, or political trust, or employment of any kind, whatsoever, under the Constitution or Laws of this State, or of the United States, or any of them, or receive fees, or perquisites of any kind, for the discharge of his official duties.

Thus, it is obvious that the Maryland Code of Judicial Conduct incorporates, by reference, the

* As of the editing date [July 1, 2006], Maryland Code, Public Safety Article, § 13-101 *et seq.*

** Wording prior to ratification of Chapter 61, Acts of 1990.

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provisions of Article 33 of the Declaration of Rights. The question at hand, then, turns on whether the Judge's position in the Maryland State Guard Association, Inc., is an "office."

In Board v. Attorney General of Maryland, 246 Md. 417, the Court of Appeals pointed out that the following standards have evolved to test whether a position is an "office": (1) the position was created by law and casts upon the incumbent duties which are continuing in nature and not occasional, (2) the incumbent performs an important public duty, (3) the position calls for the exercise of some sovereign power of the State, (4) the position has a definite term, for which a commission is issued, a bond required and an oath required, (5) the position is one of dignity and importance. Although the Court has said that "none of [the tests] itself necessarily is determinative," Hetrich v. County Commissioners, 222 Md. 304, it has also said that the most significant tests are the oath requirement and the exercise of sovereignty. Gary v. Board of Trustees, 223 Md. 446 (1960).

As we said earlier, the Judge indicates the association is organized pursuant to Md. Ann. Code, Article 65. Section 5 of Article 65 divides the militia into two classes:

Organized and unorganized militia.

The militia of this State shall be divided into two classes: The organized militia and the unorganized militia. The organized militia of the State shall consist of officers appointed and commissioned by the Governor, and of such able-bodied citizens of the State, and such able-bodied persons of foreign birth as have declared their intentions to become citizens of the State, resident therein, as shall be regularly enlisted therein, including the National Guard, the State Guard and the reserve militia (Minute Men). A military office for which no salary is provided in the budget shall not be considered an office of profit.

The unorganized militia shall consist of all those liable to serve but not regularly enlisted.*

From this, we assume that the position the Judge has been asked to accept is within the unorganized branch of the militia, and may be considered one "created by law." See also Article 33, supra. Although it is unclear from the information provided whether an oath is required, the Judge indicated, as we have noted, that he had been asked to "accept a commission upon the staff, Adjutant General's Office of the State Militia."

As we also noted earlier, the Judge has advised that a fundamental purpose of the organization is to "stand in the stead of the National Guard should the guard be called to duty." We observe that Article 65, § 2** provides,

* Wording prior to enactment of Chapter 638, Acts of 1999. The State Guard had previously been renamed the Maryland Defense Force.

** As of the editing date [July 10, 2006], reworded and codified as Maryland Code, Public Safety Article, § 13-701.

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When ordered out.

When the militia of this State or any part thereof, is called or ordered under the Constitution and laws of the United States, into the active military service of the United States, the Governor shall order out for service the organized militia, or such part thereof as may be necessary and if the number available be insufficient he shall order out such part of the unorganized militia as he may deem necessary. (Emphasis supplied.)

It is clear from Section 2 that, under certain circumstances, the Judge may be ordered to active duty and required to exercise the sovereign powers of the State during declared periods of emergency.¹ In that regard, our [Opinion Request No. 1979-09] is instructive. There, we determined that a judge's position as acting director of a county's civil defense and disaster preparedness was contrary to Rule 3 of the former Rules of Judicial Ethics. We noted that Rule 3 mirrored the language of Article 33, supra. The agency's services, though considerably broad when activated, were merely to supplement the services normally provided by the local and federal governments. As such, the possibility that a judge might rise to active duty was deemed to call for the exercise of a "substantial portion of the sovereign powers of the local government."

On the other hand, our [Opinion Request No. 1971-03 (unpublished)] approved, under former Rule 3, the retention of judge on an inactive status in the reserve component of the armed forces. Significantly though, we did not apply the traditional tests of "public office" to question. Board, supra, 246 Md. 417. We simply concluded that the constrictions of Rule 3 were broader than those of Article 33.

To sum up, the Judge has been asked to accept a commission in an organization created by State law. Moreover, his duties may be considered continuing in nature. See 60 Opinions of the Attorney General 121 (1975) (citing Lilly v. Jones, 158 Md. 260 (1930)) ("The question ... should be determined, not upon what is done, ... but what he may do under the power conferred upon him.") Of most importance is the requirement that a judge not exercise the sovereign powers of the State. While the Judge's participation in the association will be for the most part advisory and therefore appropriate under Canon 4, State law clearly contemplates mobilization of the association under certain circumstances. If that eventuality were to occur, the Judge would be called upon to exercise a portion of the State's sovereign powers.

In view of the fact that the Judge advises that the continuing purpose of the association is to provide a standing staff to supplement the National Guard should the guard be ordered out, we conclude that the commission which the judge has been asked to accept is an "office" within the meaning of the Maryland Judicial Code of Conduct and, as such, should be declined.

¹ In 23 Opinion of the Attorney General 383 (1938), an office in the Maryland National Guard was found to conflict with Article 33, supra.