

**JUDICIAL ETHICS ADVISORY COMMITTEE
OF THE
STATE OF DELAWARE**

The Hon. Joseph R. Slight, III, Chair
The Hon. Mardi F. Pyott, Vice Chair
The Hon. Kenneth S. Clark, Jr., Secretary
The Hon. James T. Vaughn, Jr.
The Hon. Sheila G. Blakely
The Hon. Donald F. Parsons, Jr.
The Hon. Robert B. Coonin

2006-1

January 6, 2006

500 North King Street
Wilmington, Delaware 19801

Dear _____ :

You have asked the Judicial Ethics Advisory Committee for an advisory opinion concerning a court employee's request that he be permitted to run for public office.

_____ has informed you that he desires to run
_____ seat in the State House of Representatives. In addition to his duties as
_____, he oversees the Court's _____.

You pose the following four questions:

Question 1: Is service in the legislature a disqualifying political activity that would require the court employee to resign?

Question 2: If service in the legislature is disqualifying political activity, must the court employee resign to run – which is a requirement for judges?

Question 3: If service in the legislature is not a disqualifying political activity, is it a "second job" with conflicting hours?

Question 4: Whether the campaign for and subsequent election to, partisan office results in a conflict of interest or adversely reflects on the Court or the Judiciary?

As the answer to the fourth question is relevant to the answer to the first question, these two questions are considered together.

While state employees are generally not disqualified from serving in the legislature,¹ judicial branch employees are subject to Supreme Court Administrative Directive 115, Code of Conduct for Court Employees, which, in Section V, entitled Political Activity, does disqualify an employee from holding partisan, elective office in some circumstances. Under Subparagraph B of Section V, a judicial branch employee is disqualified from holding partisan, elective office, if: (1) such office is likely to interfere with the primary work of the employee; or (2) such office is likely to result in a conflict of interest; or (3) such office is likely to reflect adversely on the Court. The section also provides that you, as the employee's appointing authority, must make these determinations in consultation with the Chief Justice.

The first factor -- whether the office is likely to interfere with the primary work of the employee -- is an administrative decision beyond the purview of this Committee. We note that in your memo to the Chief Justice dated November 14, 2005, you state that you do not think that service in the House of Representatives is likely to interfere with the primary work of the employee. We express no opinion on this issue.

As to the second and third factors, it is our opinion that the employee's campaign for, subsequent election to and service in the State House of Representatives are not likely to result in a conflict of interest or likely to reflect

¹ The Delaware Code contemplates that a state employee may be elected to public office, by providing that such employee must be granted a leave of absence from his state employment in order to carry out his duties as an elected official. 29 *Del. C.* § 5110. The Merit Rules, like the Code, regulate the political activity of state merit employees, but do not bar them from holding public office. Merit Rule 15.3.

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adversely on the Court or the Judiciary. The fact that the employee would vote upon the annual state budget and bond bills, including the judicial branch's budget, and his own salary as a state employee, do not, in and of themselves, create a conflict of interest. State employees serving in the legislature routinely vote on these matters, and we do not interpret the Code of Conduct for Court Employees as creating a more stringent standard for court employees on such matters. We interpret the Code of Conduct for Court Employees as referring to conflicts of interest between the role of a state legislator and the role of the employee in his or her specific court employment.

Disqualification is required if it is likely that a conflict of interest or adverse reflection upon the Court will occur, not where they are merely possible. It appears unlikely to the Committee that a conflict of interest would exist between service in the House of Representatives and the employee's employment with the Court in this case, or that his holding the office would reflect adversely on the Court. If a potential conflict of interest did present itself, the employee would be required to take appropriate precautions to avoid the conflict. In addition, during his campaign and after his election, the employee must not engage in any political activities during work hours or use his position or title in any way in connection with political activity.

Therefore, our answer to the first question is that service in the legislature is not a disqualifying political activity that would require the employee to resign, if you determine that such office is not likely to interfere with the employee's primary work. Our answer to the fourth question is that the campaign for and subsequent election to the House would not be likely to result in a conflict of interest or adversely reflect on the Courts or the Judiciary.

In rendering this opinion, we are aware that some Codes of Conduct for Court Employees adopted in other jurisdictions do disqualify a court employee from holding partisan, elective office, without exception.² We are also aware that the American Judicature Society Model Code of Conduct for Non-Judicial Court

² Arizona Code of Conduct for Judicial Employees, Canon 5; New Jersey Code of Conduct for Judiciary Employees, Canon 6.

Employees disqualifies judicial employees from holding partisan, elective office.³ We are also aware that Canon 3B(2) of the Judges' Code of Judicial Conduct, which provides that judges should require their staffs and court officials "to observe the standards of fidelity and diligence that apply to the judge," has been construed in this jurisdiction to disqualify court employees from holding partisan, elective office just as judges are disqualified.⁴ It is our opinion, however, that the Code of Conduct for Court Employees adopted by the Supreme Court, with its express provisions concerning court employee political activity, is the guide for answering your questions.

With regard to your second question, the Code of Conduct for Court Employees provides in pertinent part as follows:

The appointing authority, in consultation with the Chief Justice, shall determine whether such partisan elective office is likely to interfere with the primary work of the employee or is likely to result in a conflict of interest or reflect adversely on the Court **and if the person seeking such office must resign or take a leave of absence from the court system without pay upon the declaration of intention to run for such office or upon election.** (emphasis added). Section V.B.

If you determine that the court employee is disqualified from holding partisan, elective office because it would interfere with the employee's primary work for the Court, or because you take a view different from the Committee's with respect to the conflict of interest or adverse reflection upon the Court issues, the boldface language from the Code of Conduct for Court Employees set forth above leaves to your determination, in consultation with the Chief Justice, the issue of

³ Section 4.

⁴ Arizona Supreme Court Judicial Ethics Advisory Committee, Advisory Opinion 92-13.

whether the employee must resign or take a leave of absence from the court system without pay upon his declaration of his intention to run for office, or whether he must do so upon his successful election, taking into account the same factors already mentioned. Therefore, our answer to the second question is that the employee is not required to resign in order to run for the office, unless you determine that he must do so. If you determine that the employee is not required to resign or take a leave of absence unless and until elected, he must not engage in any political activities during his hours of employment or use his position or title within the court system in connection with political activity.

Your third question asks whether service in the legislature is a "second job" with conflicting hours. In answering this question, we are again guided by the Code of Conduct for Court Employees. It addresses "outside employment," i.e., second jobs, in Section III, entitled Abuse of Position and Conflict of Interest, Subsection D. That subsection requires that outside employment must not interfere with the employee's normal working hours and sets forth other standards for an appointing authority to consider when deciding whether to approve an employee's outside employment. Since Section V, Political Activity, fully sets forth the analysis which the appointing authority must make in connection with an employee's desire to hold partisan, elective office and regulates the employee's conduct in connection therewith, including conduct during working hours, we do not believe that partisan, elective office is also "outside employment" under Section III.D." Our answer to your third question, therefore, is that service in the legislature is not a "second job."

We state again, for emphasis, that an employee may not engage in political activities during work hours. The Delaware Code prohibits any employee in the classified service from engaging in any political activity or soliciting any political contribution "during the employee's hours of employment or while engaged in the business of the state."⁵ The Attorney General in Opinion No. 78-016 construed the quoted phrase to restrict an employee from engaging in any political activity during his regular work day or at any times when he is performing duties in connection with his regular state (in this case court system) employment. The same Attorney General Opinion gave a number of examples of what would be "political activity"

⁵ 29 *Del. C.* § 5954(b).

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for these purposes. They include: "doing campaign work, asking other employees to do campaign work or giving referrals to persons who might help in the campaign, soliciting campaign contributions from other employees, [] receiving and distributing campaign posters in bulk ..., making campaign speeches or conducting telephone campaigning ... [and] 'a wide range of legitimate "errands" performed for constituents, the making of appointments with government agencies, assistance in securing Government contracts, preparing so-called "newsletters" to constituents, [and] news releases ..."⁶ If the conclusion is reached that the person involved can continue his employment and serve in an elected capacity, we believe it is important that a clear understanding be reached at the outset with the employee on the nature and importance of the prohibition against engaging in political activity during work hours.

Very truly yours,

James T. Vaughn, Jr.

JTVJr./ds

cc: Hon. Joseph R. Slight, III
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⁶ A.G. Op. No. 78-016, quoting *U.S. v. Brewster*, 408 U.S. 401, 502 (1972).