

October 19, 2001

The Honorable

RE: Opinion from the Judicial Ethics Advisory Committee
Membership on Board of Directors for the Delaware Military Academy, Inc.

Dear Judge :

You have requested an advisory opinion from the Judicial Ethics Advisory Committee (“Committee”) on whether, consistent with the Delaware Judges’ Code of Judicial Conduct, you may serve on the Board of Directors for Delaware Military Academy, Inc.

You were kind enough to forward to my office copies of the proposed certificate of incorporation and the proposed bylaws for Delaware Military Academy, Inc. Article III of the draft certificate of incorporation states, in part, that the corporation, “shall be a not for profit corporation operating a Charter School as allowed under § [sic] 14 Del. Code §5000 [sic] et seq.” In addition, Article III states: “[n]o substantial part of the activities of this Corporation shall be carrying on propaganda or otherwise attempting to influence legislation, and the Corporation shall not participate in or intervene in

(including the publishing or distributing of statements) any political campaign on behalf or against any candidate for public office.”

In your letter dated September 17, 2001, you state that the Board of Directors of Delaware Military Academy, Inc. will be submitting an application to the State of Delaware to open a charter secondary school in New Castle County and that you have been asked to serve on the Board as a result of your background and experience of twenty seven years in the Armed Services including serving as Chief of Staff for the Delaware Armed National Guard. You represent that, if the charter is granted, the Board will operate a military high school requiring Junior Reserve Officer’s Training Corps participation. As a member of the Board of Directors, you say that you will not engage in fund raising activities for the organization.

The Committee’s Advice

The Committee believes that your willingness to participate in extrajudicial public service is commendable and that your service as a member of the Board of Directors for Delaware Military Academy, Inc., as you propose, would not violate the Delaware Judge’s Code of Judicial Conduct.

Applicable Canons of Judicial Conduct

Canon 5 of the Delaware Judges’ Code of Judicial Conduct is implicated by this request for an advisory opinion:

Canon 5. A judge should regulate extra-judicial activities to minimize the risk of conflict with judicial duties.

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B. Civic and Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of judicial duties. 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 the economic or political advantage of its members, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings in any court.

(2) A judge should not solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of the judicial office for that purpose, but the judge may be listed as an officer, director, or trustee of such an organization. A judge should not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism.

(3) A judge should not give investment advice to such an organization, but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

G. Extra-judicial Appointments. A judge should not accept appointment to a governmental committee, commission, or other 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, however, may represent the judge's country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

Prior Opinions of the Committee

This Committee has previously expressed its views regarding proposed service by judges on extrajudicial committees. On June 8, 2000, a judge was permitted to serve on

the Board of Directors of the First State Community Action Agency, a non-profit private Delaware corporation.¹ The Committee analyzed this request under Canon 5 B and found that judges should be encouraged to participate in community activities. The Committee stated, “Individuals that are appointed to the bench are considered intellectual leaders of the community, and it would be inconsistent for a judge to not share his or her knowledge and expertise when called upon by the community at large.”

On January 23, 1998, the Committee determined that a judge may serve on the Continuing Education Advisory Council for a university.² This was based on the conclusion that it would be unlikely that the council would be engaged in proceedings in the judge’s court or that the purpose was for the economic or political advantage of its members. The Committee considered Canons 5 A and B (2) and (3). The Committee reminded the judge that he or she may not solicit funds or give investment advice to an organization. This is consistent with Canon 5 B (2) and (3).

On April 22, 1999, the Committee concluded that it was not advisable for a judicial officer to serve as Chairperson of an Ethics Review Committee of a school district based on the possibility that the Ethics Review Committee of a public school district might be considered a governmental entity and thus subject to the restrictions of Canon 5 G and based on the possibility that the work of the Ethics Review Committee could become controversial.³ Because of alleged spending and purchasing abuses in the school district, which had been extensively reported in the local newspapers, the Committee noted the possibility of litigation in the judicial officer’s court.

¹ JEAC Opinion 2000-3.

² JEAC Opinion 1998-1.

³ JEAC Opinion 1999-1.

**Service on the Board of Directors
for Delaware Military Academy, Inc.**

The certificate of incorporation indicates that Delaware Military Academy, Inc. is a not-for-profit corporation, not a governmental entity. The Committee, therefore, assumes that it is not likely that the board of directors for a charter school, although publicly funded, would be considered a governmental committee or commission, for purposes of applying the canons of the Delaware Judges' Code of Judicial Conduct, to preclude your participation under Canon 5 G.

If Canon 5 G is not applicable, then you would be permitted to serve pursuant to Canon 5 B assuming: (1) it is unlikely that the organization would come before you as a judge or would be regularly engaged in adversary proceedings in any court, (2) you would not solicit funds for the organization or use or permit the use of the prestige of your judicial office for soliciting funds, and (3) you would not give investment advice to the organization.

You represent that the organization will not be conducted for the economic or political advantage of its members, that it is not likely that the organization would be regularly engaged in adversary proceedings in the courts and that you will not solicit funds for the organization. Assuming that you also will not use or permit the use of the prestige of your judicial office for soliciting funds and assuming that you will not give investment advice to the organization, it appears that the limitations of Canon 5 B (1) through (3) would not prohibit your serving.

Conclusion

Therefore, assuming the certificate of incorporation and the bylaws that are finally adopted substantially comply with those presented to us, we conclude that your service on the Board of Directors of Delaware Military Academy, Inc., with the caveats stated above, would not violate Canon 5 B and the Delaware Judges' Code of Judicial Conduct.

For the Committee:

Barbara D. Crowell, Associate Judge
Judicial Ethics Advisory Committee

BDC:dm

cc: The Honorable Myron T. Steele
Members of the Judicial Ethics Advisory Committee
The Honorable Stephen P. Lamb, Chair
The Honorable Mardi F. Pyott
The Honorable James Vaughn, Jr.
The Honorable Kenneth S. Clark, Jr.
The Honorable Sheila G. Blakely
The Honorable Joseph R. Slights, III