

Maryland Judicial Ethics Committee

Opinion Request Number: 2016-11

Date of Issue: March 31, 2016

Published Opinion Unpublished Opinion Unpublished Letter of Advice

Issue: May a District Court Commissioner serve as an election judge?

Answer: No.

Facts: The Requestor is a District Court Commissioner who seeks our opinion as to whether he/she may act as an election judge in the upcoming election cycle while continuing to serve as a Commissioner.

Analysis: Commissioners are judicial appointees and are subject to the provisions of Maryland Rule 16-814, the Maryland Code of Conduct for Judicial Appointees (the “Code”).

The Code restricts, but does not categorically prohibit, judicial appointees from having part-time or occasional employment with executive or legislative agencies. However, any secondary employment must comply with the Code. In the context of Requestor’s inquiry, Rule 3.4¹ of the Code is particularly relevant.

Rule 3.4 prohibits conduct by a judicial appointee that would undermine the doctrine of the separation of powers, a constitutional principle set out in Article 33² of the Maryland Declaration of Rights to maintain the independence and impartiality of the judicial branch of government.

Comment [2] to Rule 3.4 explains that (emphasis added):

A judicial appointee may not accept a governmental appointment that could interfere with the effectiveness and independence of the judiciary, [or] *assume or discharge an executive or legislative power*.[.]

1. Rule 3.4. APPOINTMENT TO GOVERNMENTAL POSITIONS

A judicial appointee shall not accept appointment to: (a) a Judicial Nominating Commission or (b) any other governmental committee, board, commission, or position, unless it is one that concerns the law, the legal system, or the administration of justice.

2. Article 33 reads in pertinent part (emphasis added):

That the independence and uprightness of Judges are essential to the impartial administration of Justice, and a great security to the rights and liberties of the People *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*[.]

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The Code does not explain what activities constitute the assumption or discharge of executive or legislative power. In considering inquiries similar to the Requestor's in the past, the Committee has looked to decisions by the Court of Appeals and Opinions of the Attorney General interpreting Article 33 as well as Article 35 of the Declaration of Rights,³ which also prohibits individuals from holding more than one public "office."

These constitutional principles are relevant to a Rule 3.4 analysis because decisions by the Court of Appeals and Opinions of the Attorney General have made it clear that, in order to constitute an "office," the position in question must require the discretionary "exercise of some portion of the sovereignty of the State."⁴ If a position in the executive or legislative branch involves the exercise of State sovereignty, then the position in question necessarily involves the assumption or discharge of an executive or legislative power.⁵ With this as background, we turn to the Requestor's inquiry.

3. Article 35 states in relevant part:

That no person shall hold, at the same time, more than one office of profit, created by the Constitution or Laws of this State[.]

4. JEC Opinion Request No. 2014-06 (quoting *Hetrich v. County Comm'rs*, 222 Md. 304, 307 (1960)). In the same opinion, we explained that:

A discretionary duty is one that requires personal deliberation, decision and judgment. *D'Aoust v. Diamond*, 424 Md. 549, 589 (2012). Public officials ("officers") exercise their judgment when they exercise the sovereign power of government. *James v. Prince George's County*, 288 Md. 315, 327 (1980).

5. The obverse is not necessarily the case. Rule 3.4 may prohibit a judicial appointee from holding an executive or legislative position even if the position in question is not technically an "office" for purposes of Articles 33 and 35. As we explained in JEC Opinion Request No. 2014-06:

While [a judicial appointee acting as a staff attorney for an executive agency] would not directly exercise the sovereign power of government, the advice given and the research performed would likely influence the exercise of the sovereign power of government. Lawyers function by exercising deliberation and judgment. Their duties, by their very nature, are discretionary.

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The title “election judge” is a bit misleading. Election judges do not exercise judicial authority; rather, they are responsible for assuring order and compliance with State election laws at polling places on election days. *See* Maryland Code Election Law Article (“EL”) § 10-303 (setting out powers and duties of election judges).⁶ To this end, election judges have the authority to order the arrest of persons who breach the peace at a polling place or otherwise violate a provision of the Election Law Article. EL § 10-303(c). If directed to do so by an election judge, a law enforcement officer at a polling place *must* arrest an individual. EL § 10-304.⁷

6. EL § 10-303. Authority and duties of election judges.

(a) *In general.* — Under the supervision of a chief judge, an election judge shall:

- (1) carry out the tasks assigned by the local board . . . during the period of time that begins before the election through the close of the polls and the return of materials to the local board; and
- (2) take measures throughout election day to assure that:
 - (i) each voter’s right to cast a ballot in privacy is maintained;
 - (ii) the integrity of the voting process is preserved;
 - (iii) the accuracy of the counting process is protected;
 - (iv) order in the polling place is maintained; and
 - (v) all election laws are observed.

* * * *

(c) *Authority to keep order in the polling place.* — An election judge shall:

- (1) keep the peace; and
- (2) order the arrest of any person who:
 - (i) breaches the peace;
 - (ii) breaches any provision of this article; or
 - (iii) interferes with the work of the judges in conducting the election and carrying out their assigned tasks.

(d) *Protection of challengers and watchers.* — (1) An election judge shall protect a challenger or watcher in the exercise of the rights of a challenger or watcher as provided in § 10-311 of this subtitle.

* * * *

7. EL § 10-304. Duties of police officers.

(a) *In general.* — (1) A police officer who is on duty at a polling place shall obey the order of an election judge for that polling place.

(continued...)

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The conduct of elections is an executive function. *See, e.g., Burroughs v. Raynor*, 56 Md. App. 432, 440-41 (1983). So too, of course, is the enforcement of law. The power of arrest is indisputably a sovereign power of government and the decision whether to exercise that power is a discretionary one. *See, e.g., Spry v. State*, 396 Md. 682, 693 (2007); *Ashburn v. Anne Arundel County*, 306 Md. 617, 633 (1986). While an election judge does not have the direct power to arrest, he/she can direct a police officer to make an arrest and the officer is legally required to do so. We can discern no substantive difference between the indirect, as opposed to the direct, authority to effect an arrest in this context.

We conclude that EL § 10-303 gives election judges the discretionary authority to exercise an executive function by ordering the arrest of persons who breach the peace at a polling place or otherwise violate the State's election laws. Therefore, Rule 3.4 prohibits a judicial appointee from serving in that capacity. For that reason, and even though it is an honor to be asked to serve as an election judge, the Requestor should decline to do so.

Application: The Judicial Ethics Committee cautions that this Opinion is applicable only prospectively and only to the conduct of the Requestor described herein, to the extent of the Requestor's compliance with this letter. Omission or misstatement of a material fact in the written request for opinion negates reliance on this Opinion.

Additionally, this Opinion should not be considered to be binding indefinitely. The passage of time may result in amendment to the applicable law and/or developments in the area of judicial ethics generally or in changes of facts that could affect the conclusion of the Committee. If the request for advice involves a continuing course of conduct, the Requestor should keep abreast of developments in the area of judicial ethics and, in the event of a change in that area or a change in facts, submit an updated request to the Committee.

(...continued)

(2) A police officer making an arrest under an order of an election judge is fully protected in so doing as if the police officer received a valid warrant to make the arrest.

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