

Maryland Judicial Ethics Committee

Opinion Request Number: 2022-26

Date of Issue: July 25, 2022

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Ability of active Senior Judge or non-active, fully retired judge to serve on a police discipline trial board

- Issues:**
1. May an active Senior Judge serve on a police discipline trial board?
 2. May a non-active, fully retired judge serve on a police discipline trial board?
 3. May a County Administrative Judge recommend or provide a list of such judges to the County Executive?

- Answers:**
1. No.
 2. Yes.
 3. A County Administrative Judge may provide a list of non-active, fully retired judges to the County Executive.

Facts: The Requestor has been asked by the Office of the Anne Arundel County Executive to provide a pool of possible judges for the police discipline trial board to be established pursuant to Md. Code Ann., Pub. Safety Art. (“PS”) §§ 3-101 to 3-114 (originally enacted as the Maryland Police Accountability Act of 2021, ch. 59, § 3, 2021 Md. Laws 1, 29–45). This new statute, effective July 1, 2022, provides that, with some exceptions, “each law enforcement agency shall establish a trial board process in accordance with this section to adjudicate all matters for which a police officer is subject to discipline.” PS § 3-106(a)(1). The statute provides that the trial board be comprised of:

(i) **an actively serving or retired administrative law judge or a retired judge of the District Court or a circuit court, appointed by the chief executive officer of the county;**

(ii) a civilian who is not a member of an administrative charging committee, appointed by the county's police accountability board; and

(iii) a police officer of equal rank to the police officer who is accused of misconduct appointed by the head of the law enforcement agency.

PS § 3-106(b)(1)(i)–(iii) (emphasis added).

The “actively serving or retired administrative law judge or the retired judge of the District Court or a circuit court” must:

(1) be the chair of the trial board;

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(2) be responsible for ruling on all motions before the trial board; and

(3) prepare the written decision of the trial board, including the findings, conclusions, and recommendations of the trial board.

PS § 3-106(c)(1)–(3).

Discussion: 1. The Maryland Code of Judicial Conduct (the “Code”), Title 18, Chapter 100 of the Maryland Rules, establishes standards for the ethical conduct of judges. A Senior Judge, i.e. a retired judge who has been approved for recall for temporary service, retains “all power and authority of a judge” of the courts to which the Senior Judge is assigned, *see* Md. Code Ann. Cts.& Jud. Proc. Art. § 1-320, and he/she remains subject to the Code, “[e]xcept as expressly provided in specific Rules.” Rule 18-100.2(c); *see also* Rule 18-103.9(b). A Senior Judge, therefore, subject to specified exceptions, may engage in extrajudicial activities or employment only if it is something that an incumbent judge could do.

Rule 18-103.1 provides:

Except as prohibited by law or this Code, a judge may engage in extrajudicial activities. When engaging in extrajudicial activities, a judge shall not:

(a) participate in activities that will interfere with the proper performance of the judge's judicial duties;

(b) participate in activities that will lead to frequent disqualification of the judge;

(c) participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality;

(d) engage in conduct that would appear to a reasonable person to be coercive; or

(e) make inappropriate use of court premises, staff, stationery, equipment, or other resources.

Comment 1 to the Rule notes that “to the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities,” and especially activities that concern the law.

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It is unclear how much time service on the trial board would require. There is no minimum amount of time that a Senior Judge is required to serve. As long as the work did not interfere with outstanding judicial duties, a Senior Judge would not be precluded from the activity based on the time commitment. Nor do we believe that the proposed activity would appear to be coercive. The Senior Judge would need to ensure that there was no concern regarding the “inappropriate use of court premises, staff, stationery, equipment, or other resources.”

There is concern, however, regarding the requirement that a Senior Judge not engage in activities that might appear to a reasonable person to undermine the Senior Judge’s impartiality and would lead to frequent disqualifications. The focus of the trial board, police impropriety and discipline, is a matter of great public concern and interest. Moreover, cases involving police officer witnesses are frequently on the dockets of our trial and appellate courts. In our view, a Senior Judge’s participation as a member, and chair, of the trial board could appear to a reasonable person to undermine the judge’s impartiality in cases involving police officers and could lead to possible disqualification in such cases. Accordingly, we conclude that a Senior Judge may not serve on a police discipline trial board because it would violate the Code.

2. A different analysis applies to a non-active, fully retired judge. The Code does not apply to a retired judge who is not recalled by the Court of Appeals as a Senior Judge and available to serve on temporary assignment. Accordingly, the Code does not prohibit a judge who is not approved for recall from serving on the police discipline trial board. But, if a fully retired judge anticipates seeking recall status during a term of service on the police discipline board, such service would be problematic.

3. Because Senior Judges approved for recall may not ethically serve on the trial board, it would be inappropriate for a County Administrative Judge to recommend or provide a list of such judges to the County Executive. We see nothing in the ethical rules, however, that would prohibit the County Administrative Judge from providing a list of possible non-active, fully retired judges who are willing to serve in that capacity.

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Application: The Maryland 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 opinion. 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.