

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

ADVISORY OPINION 03-04
(October 16, 2003)

**Justice of Peace Serving as Safety Officer
for Volunteer Fire Department**

Issues

1. May a justice of the peace serve as safety officer for the town's volunteer fire department?

Answer: Yes, with qualifications.

2. If so, may the justice of the peace accept a monthly stipend for his service?

Answer: Yes.

3. May the justice of the peace continue to serve as fire department safety officer if he accepts a second judicial position as a part-time town magistrate?

Answer: Yes, with qualifications.

Facts

Long before he became a justice of the peace, a man moved to a small town and joined the volunteer fire department. He was an active member for seventeen years, receiving a substantial amount of training and experience. He also worked directly in fire management with the U.S. Forest Service from 1974 until his retirement in 2002. After retiring, the man was elected to judicial office.

The justice of the peace was recently contacted by the fire department and asked to serve as the fire ground safety officer, a position in which he would use his experience and expertise to improve the safety of everyone at the scene of a fire. This would not be a typical "officer" position, and he would have no administrative or supervisory responsibilities. Based on past experience, the town generally has no more than thirty fires per year.

The fire department is an organizational unit within the town's government. Membership in the department is granted upon application and background check and subject to town council approval. The town gives each active member of the fire department a small monthly stipend and provides training opportunities. Although the fire department has an annual breakfast to raise money, the justice of the peace would not be required to participate. In addition, if the fire department were to publicly endorse a political candidate, the justice of the peace would resign from the department.

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If a future case in the justice court involves the fire department or misdemeanor fire-related crimes, the justice of the peace acknowledges that he would have to recuse himself. And, if he had to disqualify himself in a case, the town has an agreement with the county for the town magistrate to substitute as judge.

Discussion

Issue 1

Canon 4 of the Code of Judicial Conduct requires judges to conduct their extra-judicial activities so as to minimize the risk of conflict with judicial obligations. Under Canon 4A, a judge shall conduct all such activities so that they do not (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; (2) demean the judicial office; or (3) interfere with the proper performance of judicial duties. The proposed safety officer position with the town's volunteer fire department does not implicate the first or second parts of this canon. Therefore, as long as the position does not interfere with the proper performance of judicial duties, meaning that the judge would not leave his judicial post to attend to a fire during his work day, Canon 4A does not prohibit this extra-judicial activity. That conclusion is consistent with the commentary to Canon 4A, which states: "Complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives." *See also* Ariz. Op. 99-04.

We next consider whether Canon 4C precludes or otherwise applies to the fire ground safety officer position in question. Canon 4C(2) provides in part that "[a] judge shall not accept appointment to a . . . governmental 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." The town's fire department, albeit voluntary, apparently constitutes a government organization, and the town council would have to approve the justice of the peace's retention as fire ground safety officer. Therefore, the justice of the peace's appointment as such arguably would be to a "governmental position" for purposes of Canon 4C(2). On its face, however, that section only prohibits judges from accepting appointment to a governmental 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." Although the volunteer safety officer position certainly does not involve any of the latter, law-related matters, neither that position nor the fire department "is concerned with issues of fact or policy." Thus, the plain wording of section 4C(2) does not necessarily prohibit this extra-judicial activity.

We note, however, that the commentary to section 4C(2) states that this section "prohibits a judge from accepting any governmental position *except* one relating to the law, legal system or administration of justice as authorized by Section 4C(3)" (emphasis added). Similarly, the committee has stated that "Canon 4 prohibits a judge from accepting appointment to a governmental position *unless* for the improvement of the law, the legal system, or the administration of justice." Ariz. Op. 94-03 (emphasis added). Both that statement and the commentary, therefore, purportedly create a broader and more stringent

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prohibition than the canon itself. But we do not read section 4C(2) that broadly, and to do so basically ignores the section's own qualifying language noted above—"that is concerned with issues of fact or policy."

To resolve this apparent inconsistency, we conclude that the wording of section 4C(2) itself prevails over the commentary. As the preamble to the code states, the commentary "provides guidance with respect to the purpose and meaning of the canons and sections" but "is not intended as a statement of additional rules." The preamble further provides that "[t]he canons and sections are rules of reason," which "should be applied . . . in the context of all relevant circumstances." With those principles in mind, we conclude that the safety officer position with the town's volunteer fire department is more properly categorized as a permissible extra-curricular activity than a prohibited governmental position, particularly since it is not "concerned with issues of fact or policy." Canon 4C(2).

This committee's prior opinions relating to extra-judicial activities do not alter our conclusion. *See, e.g.*, Ariz. Op. 94-03 (justice of peace cannot serve as member of sheriff's posse); Ariz. Op. 96-15 (reserve police officer can serve as voluntary hearing officer on small claims cases but not on criminal or civil traffic cases); Ariz. Op. 99-02 (newly elected judge cannot retain status as reserve deputy sheriff). Those opinions are distinguishable based on the different extra-judicial position or activity involved. Each of those other opinions involved law enforcement positions that clearly raised questions about judicial impartiality, independence, and conflict of interest. We do not equate a volunteer fire ground safety officer position with law enforcement and, therefore, the problems and issues discussed in Opinions 94-03, 96-15, and 99-02 are not evident here.

Finally, we consider any separation of powers and judicial independence issues arising from this inquiry. As noted above, the town council would be approving and possibly paying the justice of the peace for his safety officer services, and he arguably might be viewed as a quasi-member of the executive branch in performing his fire-related duties. *See* Ariz. Ops. 02-08; 88-03; *In re Walker*, 153 Ariz. 307, 736 P.2d 790 (1987) (justice of the peace participated in recall election, applied for vacancy on town council created by recall, and accepted appointment to town council). The committee has stated "there must be a separation between law enforcement and the judiciary in fact and in appearance." Ariz. Ops. 96-15; 99-02. And the court in *Walker* stated: "To protect against unchecked power, it is necessary not only to have separate branches of government but also to have separate personnel in each branch." 153 Ariz. at 310, 736 P.2d at 793. The significant separation of powers issues that underlay *Walker* and the foregoing ethics opinions, however, are clearly lacking here. Accordingly, the judge's appointment as a volunteer fire safety officer would not threaten judicial independence or raise significant separation of powers issues.

Significantly, the justice of the peace has specifically acknowledged that, if he accepts appointment as fire ground safety officer, he must refrain from any fund-raising activities (*see* Canon 4C(4)(b); Ariz. Op. 00-06); he will resign if the fire department publicly endorses any political candidate (*see* Canon 5A); and he will voluntarily recuse himself from any cases when Opinion 03-04 required or otherwise appropriate (*see* Canon 3E). And, as noted

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earlier, the judge may not allow the extra-judicial activity to interfere with the proper performance of his judicial duties. Canon 4A(3). With all of those qualifications, and based on the nature and scope of the volunteer position in question, we conclude that the code does not prohibit this activity.

Issue 2

Canon 4H(1) permits a judge to receive “compensation and reimbursement of expenses for the extra-judicial activities permitted by this code, if the source of such payments does not give the appearance of influencing the judge’s performance of judicial duties or otherwise give the appearance of impropriety.” With the foregoing qualifications, the justice of the peace may serve as volunteer fire safety officer without violating the code. We further conclude that he may accept the small monthly stipend paid to all volunteer members, as long as it does not “exceed a reasonable amount or what a non-judge would receive for the same activity.” Ariz. Op. 99-04. We see no significant danger of that creating any appearance of impropriety or of undue influence.

Issue 3

If the justice of the peace were to also become a part-time town magistrate, he conceivably could still serve as volunteer fire safety officer, with all of the qualifications noted above. We assume, however, that one or more other town magistrates would be available to substitute in any cases in which the justice of the peace might have to recuse himself. And, depending upon the number of other judges available and the amount of time his two judicial functions might take vis-à-vis the time required for the volunteer fire position, practical considerations might militate against his continuing in the latter.

Applicable Code Sections

Arizona Code of Judicial Conduct, Canons 3E, 4 and 5A (1993).

Other References

Arizona Judicial Ethics Advisory Committee, Opinions [88-03](#) (May 11, 1988); [94-03](#) (Feb. 18, 1994); [96-15](#) (Dec. 4, 1996); [99-02](#) (July 2, 1999); [99-04](#) (Sept. 21, 1999); [00-06](#) (Dec. 18, 2000); [02-08](#) (Dec. 2, 2002).

In re Walker, 153 Ariz. 307, 736 P.2d 790 (1987).