

## JUDICIAL INQUIRY COMMISSION

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ADVISORY OPINION 06-872

### DISQUALIFICATION WHEN RSA IS A PARTY

#### ISSUES

May a circuit judge hear a case seeking equitable relief, including a substantial refund, from the Employees' Retirement System of Alabama? **Answer:** Yes.

#### FACTS

A circuit judge has been assigned to hear a case in which a municipality has sued the Employees' Retirement System of Alabama (RSA) for equitable relief, including a refund of an alleged overpayment in excess of \$500,000 in employer contributions. The plaintiff city claims mutual mistake or reliance on negligent misrepresentation by RSA.

A question has been raised whether the judge is disqualified to hear this case because he is a member of the Retirement System, which includes benefits and the provision of information through newsletters and other forms of correspondence.

The assets of the Employees' Retirement System are maintained in three funds: the Annuity Savings Fund, the Pension Accumulation Fund and the Expense Fund. §36-27-24, *Ala. Code* (1975). The Board of Control of the Employees' Retirement System is the trustees of these funds. § 37-27-25, *Ala. Code* (1975).

The judge is a member of a separate Judicial Retirement Fund which is made up from contributions from justices and judges and from a yearly sum paid from the state General Fund. §12-18-1(b), *Ala. Code* (1975). The Judicial Retirement Fund provides a pension for judges who meet statutorily prescribed requirements for retirement. §12-18-4, *Ala. Code* (1975). All currently serving elected circuit judges are members of this fund. *See*, §12-18-5, *Ala. Code* (1975). The Judicial Retirement Fund is administered by the Secretary-Trea-

surer of the state Employees' Retirement System, under the supervision of the Board of Control of the Employees' Retirement System. §§ 12-18-2, *Ala. Code* (1975).

#### DISCUSSION

Canon 3C(1)(c) provides, in pertinent part, that a judge should disqualify himself when he knows that he has a financial interest in the subject matter in controversy or in a party to a proceeding, or any other interest that could be substantially affected by the outcome of the proceeding. Canon 3C(1)(d)(ii) further requires disqualification whenever the judge knows he has an interest that could be substantially affected by the outcome of the proceeding. Canons 3C(3)(c) and 3C(3)(c)(iii) explain that "financial interest" includes ownership of a legal or equitable interest, but that the proprietary interest of a policyholder in a mutual insurance company or a similar interest is a "financial interest" in the organization "only if the outcome of the proceeding could substantially affect the value of the interest."

In Advisory Opinion 92-438, the Commission addressed an inquiry from a judge whose retirement with the military was soon to vest. The Commission advised the judge that his recusal was required in any case dealing with either military retirement or military retirement pay and/or benefits if the outcome of the case could affect the judge's own military retirement, pay or benefits.

In *Ex parte Darby*, 741 So.2d 404 (Ala. 1999), the Alabama Supreme Court held that a judge's status as a policy holder of a mutual insurance company did not entitle the insured to recusal of the judge in a suit to recover \$70,000 in under insured motorist benefits. The Court ruled the plaintiff was not entitled to relief because he failed to prove the outcome of the case would substantially affect the value of the judge's policy.

In Advisory Opinion 76-4, the Commission concluded that the ownership of a life insurance policy did not disqualify a judge should the insurance company be a party to litigation before the judge unless the outcome of the proceeding could substantially affect the value of the judge's interest. The same conclusion was reached in Advisory Opinions 91-425 and 92-457 (Blue Cross-Blue Shield health insurance policy and life and property insurance with inter-insurance exchange company, respectively).

Given the nature of the funds in question and their complete separation, the judge's membership in the Judicial Retirement Fund does not appear to meet the primary definition of a "financial interest" in Canon 3C(3)(c). Moreover, the structure of the judicial retirement system and the complete separation of judicial retirement funds from Employees' Retirement System funds indicate the outcome of the case cannot substantially affect the judge's interest in the Judicial Retirement Fund. Canon 3C(3)(c)(iii).

Given the foregoing facts, the Commission pretermits discussion of conditional and remote financial interests. However, it notes that, were the judge to be disqualified, the Rule of Necessity would probably apply.

Under the Rule of Necessity, where every judge has a disqualifying interest, the original judge assigned is not disqualified to hear the case. See Advisory Opinion 91-425.

It is the opinion of the Commission that the inquiring judge is not disqualified to hear the subject case.

#### REFERENCES

Advisory Opinions 76-4, 91-425, 92-438, and 92-457.

Alabama Canons of Judicial Ethics, Canons 3C(1)(c), 3C(1)(d)(ii), 3C(3)(c) and 3C(3)(c)(iii).

*Ex parte Darby*, 741 So.2d 404 (Ala. 1999).

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This opinion is advisory only and is based on the specific facts and questions submitted by the judge who requested the opinion pursuant to Rule 17 of the Rules of Procedure of the Judicial Inquiry Commission. For further information, you may contact the Judicial Inquiry Commission, P. O. Box 303400, Montgomery, Alabama 36130-3400; tel.: (334) 242-4089; fax: (334) 353-4043; E-mail: [jic@alalinc.net](mailto:jic@alalinc.net).