

# Wyoming Supreme Court Judicial Ethics Advisory Committee

## W.S.C.J.E.A.C. Advisory Opinion 2021-01

### **QUESTION PRESENTED**

Does Article V, Section 27 of the Wyoming Constitution or the Wyoming Code of Judicial Conduct prohibit a Wyoming District Court Judge (“the Judge”) from seeking or accepting appointment to a nonjudicial employment position with the executive branch of the federal government?

### **RESPONSE**

The Committee believes that neither Article V, Section 27 of the Wyoming Constitution nor the Wyoming Code of Judicial Conduct prohibit the Judge from seeking or accepting appointment to a nonjudicial employment position with the executive branch of the federal government. However, the Judge must resign from the Wyoming District Court prior to accepting the federal appointment.

### **BACKGROUND**

The Judge desires to become a candidate for nonjudicial employment within the executive branch of the federal government. The Judge must apply to become a candidate for the employment position. If the Judge is the selected candidate to fill the position, the Judge must then be appointed to the position by the executive branch. Before submitting an application for employment, the Judge wants to ensure that applying for such an employment opportunity is permitted by the Wyoming Constitution and the Wyoming Code of Judicial Conduct.

### **APPLICABLE PROVISION OF THE WYOMING CONSTITUTION**

**Article 5, Section 27 of the Wyoming Constitution** states:

Judges of supreme and district courts shall not hold other office. No judge of the supreme or district court shall be elected or appointed to any other than judicial offices or be eligible thereto during the term for which he was elected or appointed such judge.

### **APPLICABLE RULES OF THE WYOMING CODE OF JUDICIAL CONDUCT**

**Canon 1 of the Wyoming Code of Judicial Conduct** states:

A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

**Rule 1.1** states:

A judge shall comply with the law, including the Code of Judicial Conduct.

**Canon 4 of the Wyoming Code of Judicial Conduct** states:

A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.

**Rule 4.4** states:

(A) A judge shall resign his or her judicial office when the judge becomes a candidate for a nonjudicial elective office, except the judge may continue to hold his or her judicial office while a candidate for election to or serving as a delegate in a state or federal constitutional convention, if otherwise permitted by law to do so.

(B) Upon becoming a nonjudicial candidate for an appointive office, a judge is not required to resign from judicial office, provided that the judge complies with the other provisions of this Code.

## **DISCUSSION**

Rule 1.1 of the Wyoming Code of Judicial Conduct (hereinafter “W.C.J.C”) requires that all Wyoming judges “shall comply with the law, including the Code of Judicial Conduct.” Both the Wyoming Constitution and the W.C.J.C. contain specific provisions that address Wyoming judges seeking nonjudicial elective or appointed positions.

Article 5, Section 27 of the Wyoming Constitution prohibits a supreme court and district court judges from holding “other office” or being “elected or appointed to any other than judicial offices or be eligible thereto during the term for which he [or she] was elected or appointed such judge.” While it is clear that Section 27 restricts supreme and district court judges from “holding” any nonjudicial office while sitting as a Wyoming judge, Section 27 clearly does not prohibit a judge from “seeking” or “pursuing” appointment to nonjudicial employment. This Committee does not believe the phrase “or be eligible thereto” prohibits a sitting judge from applying for or otherwise seeking an appointment to federal employment. This Committee refers to the W.C.J.C. for guidance on this issue.

Cannon 4 of the W.C.J.C. addresses the harmful potential impacts on the independence, integrity, and impartiality of the judiciary when judges seek nonjudicial offices. The relevant portions of Rule 4.4(A) specifically requires that a judge “shall resign his or her judicial office when the judge becomes a candidate for a nonjudicial **elective** office.” [Emphasis added]. However, subsection (B) of Rule 4.4 goes on to state that a judge is not required to resign “[u]pon becoming a

nonjudicial candidate for an appointive office” so long as the judge complies with the other provisions of the W.C.J.C.

The Comments to Rule 4.4 are helpful in fleshing out the scope and purpose of Rule 4.4 and the distinctions drawn between Subsection (A) and (B) for when a judge must resign. The Comments to Rule 4.4 read as follows:

[1] In campaigns for nonjudicial elective public office, candidates may make pledges, promises, or commitments related to positions they would take and ways they would act if elected to office. Although appropriate in nonjudicial campaigns, this manner of campaigning is inconsistent with the role of a judge, who must remain fair and impartial to all who come before him or her. The potential for misuse of the judicial office, and the political promises that the judge would be compelled to make in the course of campaigning for nonjudicial elective office, together dictate that a judge who wishes to run for such an office must resign upon becoming a candidate.

[2] The “resign to run” rule set forth in paragraph (A) [of Rule 4.4] ensures that a judge cannot use the judicial office to promote his or her candidacy, and prevents post-campaign retaliation from the judge in the event the judge is defeated in the election. **When a judge is seeking appointive nonjudicial office, however; the dangers are not sufficient to warrant imposing the “resign to run” rule.** [Emphasis added].

In the specific factual circumstance being considered by this Committee, the Judge must submit a job application to become a candidate for the nonjudicial employment with the executive branch of the federal government. If, as a result of the application process, the Judge is then selected to fill the position, the Judge must then be appointed to the employment position. Upon review and consideration of the foregoing constitutional provision and W.C.J.C. rules, this Committee believes that it is permissible for the Judge to submit an application for nonjudicial employment, without having to resign from the District Court. The “resign to run” rule is not applicable because: 1) the Judge is not running for nonjudicial elective office; and 2) the Judge is seeking an appointive nonjudicial office. However, if selected for the position, the Judge must resign prior to being appointed to the position to comply with Article 5, Section 27 of the Wyoming Constitution.

## **CONCLUSION**

This Committee opines that it is permissible pursuant to Article 5, Section 27 of the Wyoming Constitution and the Wyoming Code of Judicial Conduct for the Judge to become a candidate for nonjudicial employment with the executive branch of the federal government. If selected to fill that position of employment, the Judge must resign prior to being appointed to the position pursuant to Article 5, Section 27 of the Wyoming Constitution.

**FINALIZED AND SUBMITTED** this 18th day of March, 2021 by the Wyoming Supreme Court Judicial Ethics Advisory Committee.