

# School Board Advisory Opinion 2017-01

Issued on February 2, 2017, by

The West Virginia Ethics Commission

## OPINION SOUGHT

**A County Board of Education Member** asks whether she must resign from the board of education before she applies to fill a vacant seat on a county commission.

## Facts Relied Upon by the Commission

The Requester is a Board of Education (“BOE”) member. A county commission seat in the same county has become vacant. The Requester asks if she may submit an application to the county commission to appoint her to fill the vacancy without first resigning from the BOE. If she is appointed as a county commissioner, she would resign from the BOE before taking office as a commissioner. Therefore, she would not hold both offices simultaneously.

## Code Provisions Relied Upon by the Commission

W.Va. Code § 18-5-1a provides:

(a) A person who is a member of a county board:

...

(3) **May not** engage in the following political activities:

(A) **Become a candidate for or hold any other public office**, other than to succeed him or herself as a member of a county board subject to the following: (i) A candidate for a county board, who is not currently serving on a county board, may hold another public office while a candidate if he or she resigns from the other public office prior to taking the oath of office as a county board member. (ii) The term “public office” as used in this section does not include service on any other board, elected or appointed, profit or nonprofit, under the following conditions: (I) The person does not receive compensation; and (II) The primary scope of the board is not related to public schools. (*emphasis added*)

...

(b) A member or member-elect of a county board, or a person desiring to become a member of a county board, may make a written request to the West Virginia Ethics Commission for an

advisory opinion to determine if another elected or appointed position held or sought by the person is an office or public office which would bar service on a county board pursuant to subsection (a) of this section.

### **Advisory Opinion**

The county board of education eligibility statute, at W.Va. Code § 18-5-1a, prohibits a BOE member from becoming a candidate for certain public offices, including the office of county commissioner. It is clear that the Requester would have to resign from the BOE before she could begin serving as a county commissioner. See School Board Advisory Opinions 2008-01 and 2003-08.

The question of first impression in the instant situation is whether, by submitting an application to become an appointed commissioner, the Requester would “become a candidate for” county commissioner, thereby making her ineligible to serve on the BOE under W.Va. Code § 18-5-1a.

### **West Virginia Elections Code and Prior Advisory Opinion**

The Commission first looks to the Elections Code, at W.Va. Code §§ 3-1-1 through 3-12-17, for guidance on what it means to become a candidate for public office.

W.Va. Code § 3-1-2 provides, “Candidate’ shall mean any person to be voted for at an election ... ‘Election’ shall mean the procedure whereby the voters of this state or any subdivision thereof elect persons to fill public offices, or elect members of a constitutional convention, or vote on public questions.”<sup>1</sup>

The Commission next looks at a prior School Board Advisory Opinion 2008-01, in which the Commission held that “a person may not be denominated a ‘candidate’ before having filed a certificate of candidacy for nomination or election to office, as provided in West Virginia Code.”

The Requester would not be selected through an election but would instead be appointed by the county commission. Accordingly, she would not file a certificate of candidacy. Therefore, under the Elections Code, the term “candidate” does not include someone who merely submits an application to be appointed to fill a vacant county commission seat.

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<sup>1</sup> W.Va. Code § 3-1-2 further defines “any election” or “all elections” to include “every general, primary, or special election held in this state, or in any of its subdivisions, for the purpose of nominating or electing federal or state officers, or county, city, town or village officers of any subdivision now existing or hereafter created, or for the purpose of electing members of a constitutional convention, or for voting upon any public question submitted to the people of the state or any of the aforesaid subdivisions.”

## Legislative Changes in 2009

The Commission finally will consider the legislative changes made to W.Va. Code § 18-5-1a in 2009, which became effective in 2010, to determine what the Legislature intended the word “candidate” to mean.

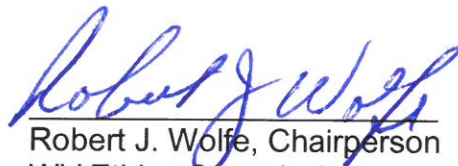
The Act (at least as far back as 1967<sup>2</sup>) before the 2009 amendment stated that no BOE member “shall be eligible for nomination, election or **appointment** to any public office ..., unless and until after that membership on the board ... has been terminated at or before the time of his filing for such nomination for, **or appointment to**, such public office or committee ...”<sup>3</sup> (*emphasis added*)

The legislature changed the pertinent language in 2009 to its current form by replacing “nomination, election or appointment” with the language “to become a candidate.” Therefore, the Commission concludes that the Legislature in 2009 intended to eliminate the prohibition against BOE members being considered for appointment to public positions.

**Therefore, the Ethics Commission finds that the Requester may submit an application to the county commission to fill a vacant seat on the commission without first resigning from the BOE.**

*This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester must contact the Ethics Commission for further advice as it may alter the analysis and render this Opinion invalid.*

*This Advisory Opinion is limited to questions arising under W.Va. Code § 18-5-1a, and does not purport to interpret other laws or rules. In accordance with W.Va. Code § 18-5-1a, this Opinion has precedential effect and may be relied upon in good faith by public servants and other persons unless and until it is amended or revoked or the law is changed.*

  
Robert J. Wolfe, Chairperson  
WV Ethics Commission

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<sup>2</sup> See *Carr v. Lambert*, 179 W.Va. 277, 367 S.E.2d 225 (1988) (The Supreme Court of West Virginia interpreted the 1967 version of the eligibility statute.)

<sup>3</sup> Just prior to the 2009 amendment, the Commission rendered Advisory Opinion 2008-01, in which the Commission interpreted the 1967 version.