

# School Board Advisory Opinion 2022-02

Issued on October 6, 2022, by

The West Virginia Ethics Commission

## OPINION SOUGHT

A **County Board of Education Member** asks whether she may serve on a County Public Library Board per W. Va. Code § 18-5-1a(a)(3)(A).

## Facts Relied Upon by the Commission

A County Public Library (“Public Library”) was created by a Special Act (“Act”) of the West Virginia Legislature<sup>1</sup> which only created this specific public library. The Act provides that the Public Library shall be supported by the County Board of Education (“BOE”) and the County Commission. The Act also states that Public Library employees are entitled to public employee retirement benefits.

The Act states that the Public Library Board shall consist of five members who shall serve without compensation. The terms of office for the Public Library Board, per the Act and as required by the West Virginia Code<sup>2</sup>, is five years.

The Act further requires the BOE and County Commission to each appoint two members and a city, situated in the same County, to appoint one member. Moreover, the Act expressly subjects the Public Library Director to all duties imposed by W. Va. Code §§ 10-1-6, 7, 8, 9, 10,<sup>3</sup> and 11. These Code sections prescribe the authority and duties of the Public Library Boards.

The Act states that the Public Library shall be a body corporate and the board of directors shall be a corporation.<sup>4</sup> The Public Library has a 501(C)(3) tax-exempt status with the United States Internal Revenue Service (“IRS”), and the IRS classifies the Public Library as a public charity. The Public Library has not organized as a nonprofit corporation with the West Virginia Secretary of State’s Office nor is there any indication that it is required to do so.

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<sup>1</sup> “A statute relating to persons or things as a class is a general law; one relating to particular persons or things of a class is special.” *State ex rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 758, 143 S.E.2d 351, 363 (1965)(quoting *McEldowney v. Wyatt*, Syl. Pt. 1, 44 W. Va. 711, 30 S.E. 239 [1898]).

<sup>2</sup> W. Va. Code Ann. § 10-1-5 (establishing a five-year term of office for a public library board member).

<sup>3</sup> W. Va. Code § 10-1-10 was repealed by Acts 2021, c. 59, eff. July 4, 2021. This Code section related to penalties for injuries to library property.

<sup>4</sup> This requirement is consistent with the West Virginia Code which states that: “The board of directors of each public library shall be a corporation; and as such it may contract and be contracted with, sue and be sued, plead and be impleaded, and shall have and use a common seal.” W. Va. Code § 10-1-9.

The Public Library's by-laws state that its purpose is "[t]o serve the residents of the county. . . by promptly and courteously providing library materials and information to the area's residents to meet their personal, professional, and educational needs." The by-laws further provide as follows:

The purposes for which the corporation is organized are exclusively religious, charitable, scientific, literary and educational within the meaning of section 501(C) 3 of the Internal Revenue Code of 1986 or the corresponding provision of any future United States Internal Revenue law.

The by-laws also provide that the board of directors shall serve without compensation.

This School Board Advisory Opinion has been submitted by the General Counsel for a BOE. The BOE may appoint the BOE's Vice President to serve on the Public Library Board<sup>5</sup> but wants to first ensure that her service on the Public Library Board complies with W. Va. Code § 18-5-1a which restricts BOE members from holding another public office under certain circumstances.

### **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:

(1) Shall be a citizen and resident in the county in which he or she serves on the county board. Also, a person who is a candidate for membership on a county board or who is a member-elect of a county board shall be a citizen and resident in the county in which he or she seeks to serve on the county board;

(2) May not be employed by the county board on which he or she serves, including employment as a teacher or service person;

(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.

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<sup>5</sup> The BOE and Public Library are in the same county.

(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.

(B) Become a candidate for, or serve as, an elected member of any political party executive committee;

....

(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.

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### **Advisory Opinion**

W. Va. Code § 18-5-1a restricts the political activities of board of education members. The Legislature has authorized the Ethics Commission to issue opinions to BOE members and members-elect on the restriction in this statute which states that a BOE member may not “[b]ecome a candidate for or hold any other public office, other than to succeed him or herself as a member of a county board. . . .” W. Va. Code § 18-5-1a(a)(3)(A).

A BOE member may not hold another public office unless (1) the person does not receive compensation and (2) the primary scope of the board [other public office] is not related to public schools. W. Va. Code § 18-5-1a(a)(3)(A)(ii).

To apply the statute, the Ethics Commission must first determine whether service on the Public Library Board constitutes holding a “public office.” Neither W. Va. Code § 18-5-1(a) nor Chapter 18 of the West Virginia Code contains a definition of “public office.” In prior Opinions, the Ethics Commission has relied upon *State ex rel. Carson v. Wood*, 154 W. Va. 397, 405, 175 S.E.2d 482, 487 (1970) to determine whether another position held is a public office. While the focus of the *Carson* Opinion was whether a person was a public employee versus a public official, the Ethics Commission reaffirms its reliance upon *Carson* for purposes of determining whether under W. Va. Code § 18-5-1a another position is a “public office” with a government agency.

The West Virginia Supreme Court held in *Carson*:

Generally speaking, a public office is a position created by law with duties cast upon the incumbent which involve an exercise of some portion of sovereign power and in which the public is concerned, continuing in their nature, and not merely occasional or intermittent. Among the criteria for determining whether an employment is a public office or not are: that the powers are created and conferred by law, and not by contract; and the fixing of the duration or term of office. That an official oath is required by law is a sign of office, and where a statute prescribes specific duties for an office there is a strong presumption that an office is intended.

. . . .

One occupying a position created by the law is a public officer. . . .

*Id.* at 405, 175 S.E.2d at 487 (1970).

In applying the *Carson* test, the Ethics Commission held in [School Board Advisory Opinion 2005-02](#) and [School Board Advisory Opinion 2003-04](#), that service on a nonprofit YMCA board and service on a nonprofit community action board, respectively, do not constitute holding a public office.<sup>6</sup> In both School Board Advisory Opinion 2003-04 and School Board Advisory Opinion 2005-02, the Ethics Commission also made an implicit finding that neither the nonprofit YMCA board nor the community action board were government agencies created by law and that, therefore, their board members did not exercise “some portion of sovereign power.” *Carson* at 405, 175 S.E.2d 482, 487

The West Virginia Legislature has established the terms of board members for public libraries. W. Va. Code § 10-1-5. The West Virginia Legislature has also prescribed specific duties for library board members. W. Va. Code § 10-1-6.<sup>7</sup> Further, in the instant case, the Public Library was formed pursuant to a Special Act of the Legislature and the Special Act expressly subjects the library directors to all duties imposed by W. Va. Code §§ 10-1-6, 7, 8, 9, and 11.<sup>8</sup>

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<sup>6</sup> The West Virginia Supreme Court applied the *Carson* criteria in *Carr v. Lambert*, 179 W. Va. 277, 367 S.E.2d 225 (1988), *holding modified on other grounds by State v. Macri*, 199 W. Va. 696, 487 S.E.2d 891 (1996)(finding that the position of assistant prosecutor is a public office for purposes of the restrictions in W. Va. Code § 18-5-1a).

<sup>7</sup> W. Va. Code § 10-1-6, states, in part: “The board of directors of each public library established or maintained under this article shall: (a) Immediately after appointment, meet and organize by electing one member as president and one as secretary, and such other officers as may be necessary. All officers shall hold office for one year and shall be eligible for re-election. (b) Adopt such bylaws, rules and regulations as are necessary for its own guidance and for the administration, supervision and protection of the library and all property belonging thereto as may not be inconsistent with the provisions of this article. (c) Supervise the expenditure of all money credited to the library fund. . . .”

<sup>8</sup> The Legislature has stated that public libraries shall be corporations, but the Legislature has not designated whether public libraries shall be public corporations, nonprofit corporations, or for profit corporations. W. Va. Code § 10-1-9. One definition of corporation is “a body formed and authorized by law to act as a single person although constituted by one or more persons and legally endowed with

**Based upon its prior Opinions and the *Carson* criteria, the Ethics Commission finds that a Public Library Board Member position is a public office for purposes of W. Va. Code § 18-5-1a because it was created by a Special Act of the Legislature, West Virginia Code defines the terms of office and duties for public library board members, and the Board Members exercise some portion of sovereign power through their administration of the Public Library.<sup>9</sup>**

Having determined that the position is a public office, the Ethics Commission must next determine whether a BOE member may simultaneously serve as a public library board member based upon the exception in W. Va. Code § 18-5-1a(a)(3)(A)(ii) which states that the term “public office” for purposes of the restrictions on holding another office do not include “service on any other board, elected or appointed, profit or nonprofit” if:

- (1) the person does not receive compensation and
- (2) the primary scope of the board is not related to public schools.

W. Va. Code § 18-5-1a(a)(3)(A)(ii).

An analysis of each element that must be satisfied to qualify for the exception to the general restriction follows.

#### *Compensation*

The West Virginia Code expressly prohibits library board members from receiving compensation. W. Va. Code § 10-1-5(g). Further, the Special Act creating the Public Library and the Public Library’s by-laws prohibit board member compensation. Hence, this element is met.

#### *Primary scope of a library board*

The next element to be considered is whether the *primary* [emphasis added] scope of the Public Library Board is not related to public schools. The Ethics Commission ruled in [School Board Advisory Opinion 2011-01](#) that the primary scope of the board of directors of a state community college was not related to public schools even though it involved education in the more general sense.

The Public Library’s by-laws state that its purpose is to “[t]o serve the residents of the county. . . by promptly and courteously providing library materials and information to the area’s residents to meet their personal, professional, and educational needs.” The Code specifically provides that “[e]ach library established or maintained by any

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various rights and duties including the capacity of succession. *Merriam-Webster.com Dictionary*, s.v. “corporation,” accessed September 27, 2022, <https://www.merriam-webster.com/dictionary/corporation>.

<sup>9</sup> The Supreme Court has held: “What is clear is that whether a position is a public office or whether a person is a public officer may differ in accordance with the statutory or constitutional provisions under which a given position is being examined.” *City of Bridgeport v. Matheny*, 223 W. Va. 445, 448–49, 675 S.E.2d 921, 924–25 (2009)

governing authority shall be free for the use of all persons living within the area represented by such governing authority, except for those charges for which provision may be made elsewhere in this article.” W. Va. Code § 10-1-7.

The Ethics Commission finds that the primary scope of a public library is not related to public schools because public libraries provide services “free for the use of all persons living within the area” not just to schools or students in the school system. W. Va. Code § 10-1-7. Hence, this element is satisfied as well.

**In conclusion, the Ethics Commission holds that a county board of education member may serve on the Public Library Board because there is no compensation for serving on the Public Library Board and the primary scope of public libraries does not relate to public schools.**

*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 which the Ethics Commission is authorized to interpret 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  
West Virginia Ethics Commission