

# School Board Advisory Opinion 2024-04

Issued on November 7, 2024, by

The West Virginia Ethics Commission

## **OPINION SOUGHT**

A member of a county board of education asks whether the position of interim cabinet secretary for a department of the executive branch of state government constitutes a prohibited public office pursuant to W. Va. Code § 18-5-1a(a)(3)(A), which would render its occupant ineligible to serve on a county board of education.

## **Facts Relied Upon by the Commission**

The Requester is a member of a county board of education. The Requester has been offered the position of interim cabinet secretary, hereinafter “secretary,” for a department of the executive branch of state government for the remainder of the current Governor’s term. The department in question is designated as the principal state agency to coordinate the receipt, distribution, and monitoring of all funds available from any source for the purpose of equipping, training, research, and education in regard to its designated purposes. It is authorized by statute to coordinate and establish standards for all operations and activities of the state related to its designated purpose and to establish protocols for coordinating and sharing information with state and federal agencies responsible for investigating and collecting information related to its purpose.

As interim secretary, the Requester would possess all the powers and responsibilities of an appointed secretary during the limited time in which he or she would hold the position. Pursuant to the enabling legislation<sup>1</sup>, the secretary is the chief executive officer of the department. The secretary is appointed by the Governor, with the advice and consent of the Senate, and serves at the will and pleasure of the Governor. The secretary is required to possess the qualifications specified in enabling legislation for the department and position of secretary. The secretary is required to take an oath of office and give a bond conditioned on the faithful performance of the duties of the office. The secretary receives an annual salary fixed by law.

The enabling statute for the department, subject to and consistent with W. Va. Code § 5F-2-2, provides that the secretary shall have the power, authority, and responsibility to:

- Organize the department for the accomplishment of its objectives and purposes.
- Appoint various officials and employees to assist in the accomplishment of the objectives of the department.
- Delegate his or her powers, duties, authority, and responsibility to subordinates.

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<sup>1</sup>To preserve the anonymity of the Requester to the extent possible, the citation to the pertinent statute is omitted.

- Conduct the intergovernmental relations of the department.
- Sign and execute in the name of the state by the department any contract or agreement with the federal government or its departments or agencies, subdivisions of the state, corporations, associations, partnerships, or individuals.
- Require individuals and companies contracting with the department to provide fingerprints for individuals connected with the business.

**Code Provisions Relied Upon by the Commission**

W. Va. Code § 18-5-1a provides, in pertinent part, the following:

(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 . . . .

(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.

(1) Within thirty days of receipt of the request, the Ethics Commission shall issue a written advisory opinion in response to the request and also shall publish the opinion in a manner which, to the fullest extent possible, does not reveal the identity of the person making the request.

(2) A county board member who relies in good faith upon an advisory opinion issued by the West Virginia Ethics Commission to the effect that holding a particular office or public office is not a bar from membership on a county board and against whom proceedings are subsequently brought for removal from the county board on the basis of holding that office or offices is entitled to reimbursement by the county board for reasonable

attorney's fees and court costs incurred by the member in defending against these proceedings, regardless of the outcome of the proceedings.

(3) A vote cast by the member at a meeting of the county board may not be invalidated due to a subsequent finding that holding the particular office or public office is a bar to membership on the county board.

(4) Good faith reliance on a written advisory opinion of the West Virginia Ethics Commission that a particular office or public office is not a bar to membership on a county board is an absolute defense to any civil suit or criminal prosecution arising from any proper action taken within the scope of membership on the county board, becoming a member-elect of the county board or seeking election to the county board.

### **Advisory Opinion**

A board of education 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). The Legislature has given the Ethics Commission authority to issue advisory opinions at the request of any person who is a member of a board of education on whether 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. W. Va. Code § 18-5-1a(b). The question before the Commission is whether the position of interim cabinet secretary for a department of the executive branch of state government constitutes such a public office.

In [School Board Advisory Opinion 2022-01](#)<sup>2</sup>, the Commission held:

Neither W. Va. § 18-5-1a nor W. Va. Code § 18-1-1<sup>3</sup> defines “office” or “public office,” although the former provision states that the term “public office” does not include unpaid service on another board unrelated to public schools. The Ethics Commission has analyzed in other School Board Advisory Opinions what constitutes a public office. In [School Board Advisory Opinion 2014-04](#), the Commission cited *Carson v. Wood*, 175 S.E.2d 482 (W. Va. 1970), in which the Supreme Court explained the criteria that should be considered in determining if a particular position is a public office:

Among the criteria to be considered in determining whether a position is an office or a mere employment are whether the position was created by law; whether the position was designated an office; whether the qualifications of the appointee have been prescribed;

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<sup>2</sup> See also [School Board Advisory Opinion 2024-01](#), [School Board Advisory Opinion 2024-02](#), and [School Board Advisory Opinion 2024-03](#).

<sup>3</sup> Establishing definitions for Chapter 18 of the Code.

whether the duties, tenure, salary, bond and oath have been prescribed or required; and whether the one occupying the position has been constituted a representative of the sovereign.<sup>4</sup>

Application of the *Carson* criteria to the position of cabinet secretary for a department of the executive branch of state government yields the following:

- *The position was created by law.*

The position of secretary for this department of the executive branch of state government was created by law.

- *The position is designated as an office.*

The relevant provisions of the W. Va. Code references the position as an “office” at several points. Most notably, the enabling legislation references the secretary as the “chief executive officer” of the department.

- *The qualifications for holding the position are set forth in the statute or other law establishing the position.*

The qualifications for holding the office of secretary for the department of the executive branch of state government at issue in this advisory opinion are specified by statute.

- *The duties, tenure, salary, bond, and oath of the position are prescribed or required.*

The duties and salary of the secretary are prescribed by law. A bond and oath are required by law. The tenure of the secretary for the department of the executive branch in this opinion is designated as at the will and pleasure of the Governor.

- *Occupying the position makes one a representative of the sovereign.*

The concept of representative of the sovereign is somewhat amorphous. In [Op. Atty. Gen. 2018 No. 6 \(Jun. 6, 2018\)](#), the West Virginia Attorney General addressed this issue by assessing the ability of an individual in a position to exercise independent power or authority as illustrated by the authority to represent and bind the state in contractual relations with third persons. See *State ex rel. Key v. Bond*, 94 W. Va. 255,

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<sup>4</sup> See also *Carr v. Lambert*, 367 S.E.2d 225 (W. Va. 1988), the holding modified on other grounds by *State v. Macri*, 487 S.E.2d 891 (W. Va. 1996), *State v. Hubert*, 544 S.E.2d 919 (W. Va. 2001), and *Cales v. Town of Meadow Bridge*, 800 S.E.2d 874 (W. Va. 2017) in which the Supreme Court of Appeals of West Virginia used the *Carson* criteria to determine whether an individual was a public officer rather than a mere employee. In *Carr*, the Court held that the position of assistant prosecuting attorney is a public office for purposes of eligibility to serve on a board of education. In *Cales*, the Court found that a member of a municipal sanitary board was not a public officer for purposes of removal pursuant to W. Va. Code § 6-6-7.

118 S.E. 276, 279 (1923) and *Cales v. Town of Meadow Bridge*, 239 W. Va. 288, 296, 800 S.E.2d 874, 882 (2017). Other factors considered by the Attorney General included whether the position is “subject to the supervision and policy direction” of other officials, *Christopher v. City of Fairmont*, 167 W. Va. 710, 714, 280 S.E.2d 284, 286 (1981), and whether it involves authority “regarding the enforcement of the laws of this State,” *City of Bridgeport*, 223 W. Va. at 450, 675 S.E.2d at 926.

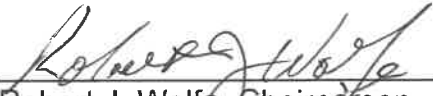
The secretary in this opinion may bind the state through his or her department to a contract as well as the authority to acquire and/or lease property. The secretary is not under the supervision of any official regarding policy other than, in a larger sense, to the Governor of the state. The secretary has the responsibility of enforcing the applicable laws of the state. A particular example of this responsibility is the authority to require individuals and companies contracting with the department to provide fingerprints for individuals connected with the business for background checks. All of the *Carson* factors indicate that a secretary for this department of the executive branch of state government is a public officer.

No where in the W. Va. Code does the designation of “interim” diminish or alter the powers, authority, or responsibilities of a secretary of this department of the executive branch of the state government. An “interim officer” is defined as: “One appointed to fill the office during a temporary vacancy, or during an interval caused by the absence or incapacity of the regular incumbent.” *Interim Official*, Black’s Law Dictionary (5th Ed. 1979). Therefore, the interim secretary of the department is treated as the secretary for application of W. Va. Code § 18-5-1(a).

**The Ethics Commission holds that the position of interim cabinet secretary for this department of the executive branch of state government constitutes a public office for purposes of W. Va. Code § 18-5-1a(a)(3)(A). Accordingly, the Requester may not serve on a county board of education if he or she accepts the appointment to this position.**

*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