

# School Board Advisory Opinion 2026-01

Issued on February 5, 2026, by

The West Virginia Ethics Commission

## OPINION SOUGHT

An **Assistant Superintendent** of a county board of education asks whether his current position would constitute a prohibited public office pursuant to W. Va. Code § 18-5-1a(a)(3)(A), which renders its occupant ineligible to run for or serve on a county board of education in a different county.<sup>1</sup>

## Facts Relied Upon by the Commission

The Requester is an assistant superintendent of a county board of education. The duties of an assistant superintendent are determined by the county superintendent.<sup>2</sup> The Requester has a one-year contract of employment. Assistant superintendents are entitled to a contract of “not less than one nor more than four years: Provided, That his or her term may not extend beyond that of the incumbent county superintendent.”<sup>3</sup> The West Virginia Code does not specify the salary of assistant superintendents, leaving the amount to the discretion of the county board of education.<sup>4</sup>

The West Virginia Code grants the authority to establish the qualifications of an assistant superintendent to the state board of education with the proviso that such qualifications shall not exceed those required of a county superintendent.<sup>5</sup> The Code does not specify that assistant superintendents are required to swear an oath of office, and the Requester has taken no such oath. Assistant superintendents are not required by law to give a bond<sup>6</sup>, and the Requester was not required to provide a bond. Assistant superintendents are directly answerable to and serve at the will and pleasure of the county superintendent.<sup>7</sup> As an assistant superintendent, the Requester does not have the authority to bind the county board of education to a contract, nor is he charged with the enforcement of state law.

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<sup>1</sup> Requester also asks whether a state intervention in, or “take-over” of, the county school board on which he serves would impact the answer to his query. The answer is “no” as W. Va. Code §18-2E-5(m),(n) does not empower the state department of education to alter the nature of a position from that of a public employee to a public official or the reverse.

<sup>2</sup> W. Va. Code § 18-2-1(b)

<sup>3</sup> W. Va. Code §18-5-32(a)

<sup>4</sup> W. Va. Code § 18-5-33

<sup>5</sup> W. Va. Code § 18-5-32(e)

<sup>6</sup> W. Va. Code § 6-2-10 requires a bond of certain county officials. The position of assistant superintendent of schools is not among those listed.

<sup>7</sup> W. Va. Code § 18-2-1(b)

## **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: ...

(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. . . .

## **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 or seeks to be a member of a board of education on whether another elected or appointed position held or sought by the person is a public office which would bar service on a county board. W. Va. Code § 18-5-1a(b). The primary question before the Commission is whether the position of assistant superintendent of county schools is such a public office.<sup>8</sup>

Before addressing the critical question, the Commission notes that there is no prohibition against the Requester running for the board of education of a different county other than the one he currently serves as an assistant superintendent. Although W. Va. Code § 18-5-1a(a)(3)(A) prohibits a board of education member from becoming a candidate for a prohibited public office, it does not bar the holder of a prohibited public office from running for a county board of education.<sup>9</sup>

Now let us turn to the question of whether the Requester may continue to serve as an assistant county superintendent if he becomes a member of another county’s board of education. Neither W. Va. Code § 18-5-1a nor W. Va. Code § 18-1-1<sup>10</sup> defines “public office.” The Ethics Commission has long applied the *Carson* factors to determine whether a particular position constitutes a “public office.”<sup>11</sup> In *Carson v. Wood*, 175 S.E.2d 482 (W. Va. 1970), the W. Va. Supreme Court of Appeals stated:

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<sup>8</sup> 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, 449, 675 S.E.2d 921, 925 (2009).

<sup>9</sup> For example, in [School Board Advisory Opinion 2023-04](#), a deputy county assessor was deemed to hold a prohibited office. This fact did not prohibit her from running for or serving as a board of education member, just from simultaneously serving as a deputy assessor and county board of education member.

<sup>10</sup> Establishing definitions for Chapter 18 of the Code.

<sup>11</sup> See [School Board Advisory Opinion 2014-04](#), [School Board Advisory Opinion 2022-01](#), [School Board Advisory Opinion 2024-01](#), [School Board Advisory Opinion 2024-02](#), [School Board Advisory Opinion 2024-03](#), and [School Board Advisory Opinion 2024-04](#).

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; 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>12</sup>

Application of the *Carson* criteria to the position of assistant superintendent of county schools yields the following:

*The position was created by law.* The West Virginia Code does not create the position of assistant superintendent, though it clearly permits a county superintendent to employ individuals in that capacity.<sup>13</sup>

*The position is designated as an office.* West Virginia Code does not label the position of assistant superintendent as a public “office.” To the contrary, the Code indicates that assistant superintendents are “employed” and are personnel, which means an individual employed by an organization.<sup>14</sup>

*The qualifications for holding the position are set forth in the statute or other law establishing the position.* The qualifications for holding the position of assistant superintendent are left to the discretion of the state board of education with the only limit being that such qualifications shall not exceed those required of a county superintendent.

*The duties, tenure, salary, bond, and oath of the position are prescribed or required.* The duties of an assistant superintendent are not prescribed by law. A bond and oath are not required by law.<sup>15</sup> The salary is not designated by law. The tenure of the position of county assistant superintendent is not prescribed by law, although W. Va. Code § 18-5-32(a) sets some parameters.

*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

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<sup>12</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.

<sup>13</sup> W. Va. Code § 18-5-32(a)

<sup>14</sup> W. Va. Code §§ 18A-2-1(b) & 18-5-32(a)

<sup>15</sup> Although not conclusive, the criteria of taking an oath is important. W. Va. Code § 6-1-3 provides that, “every person elected or appointed to any office in this state, before proceeding to exercise the authority or discharge the duties of such office, shall take the oath or affirmation.”

the ability of an individual in a position to exercise independent power or authority to represent and bind the State in contractual relations with third persons.<sup>16</sup> Neither the Requester nor any other assistant superintendent may bind the county board of education for whom they serve to contractual obligations. The position of assistant superintendent is directly answerable to the county superintendent, i.e., under his or her direct supervision. Finally, an assistant superintendent has no responsibility for enforcing the applicable laws of the state.

All but one of the *Carson* factors simply favor designating the position of assistant superintendent as public employment. The one factor that is open to debate is the factor of statutorily prescribed and required tenure. As noted above, the statute does not specify the term of an assistant superintendent. It does set clear boundaries, but the county board of education and the superintendent have considerable discretion within those boundaries. The application of the *Carson* factors is not an exercise in arithmetic.<sup>17</sup> However, where all factors but one clearly favor designation of the position as employment rather than an office and the lone outlier is somewhat ambiguous, the Commission's course is clear.

**The Ethics Commission holds that the position of assistant superintendent does not constitute a public office for purposes of W. Va. Code § 18-5-1a(a)(3)(A). Accordingly, the Requester may serve on a county board of education and continue to work as an assistant superintendent for another county board of education.**

*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.*



/s/ Robert J. Wolfe  
Robert J. Wolfe, Chairperson  
West Virginia Ethics Commission

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<sup>16</sup> See *State ex rel. Key v. Bond*, 94 W. Va. 255, 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, Id.* at 926.

<sup>17</sup> In *Op. Atty. Gen. 2018 No. 6 (Jun. 6, 2018)*, the Attorney General noted that the *Carson* factors are weighed holistically: the presence or absence of any one is not dispositive, nor are any “of the various combinations thereof.” *Id.* at 410, 175 S.E.2d at 490.