

SCHOOL BOARD ADVISORY OPINION NO. 2010-01

Issued On June 3, 2010 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A newly-elected **Board Member** asks whether she may serve on the County Board of Health.

FACTS RELIED UPON BY THE COMMISSION

The Requester is a newly elected Board of Education Member. She will assume office on July 1, 2010, and will serve for a four (4) year term.

Additionally, the Requester is an appointed County Board of Health Member. She has served on the Board of Health for the past seven years, but receives no compensation for her service.

W.Va. Code § 16-2-9(d) states that board of health members “may receive compensation”, and leaves the determination up to each County health board whether to provide such compensation for service. According to the Requester, the County Board of Health on which she serves does not provide compensation to any of its members.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 18-5-1a reads in relevant part:

(a) A person who is . . . a member or member-elect 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:

* * *

(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) A member or member-elect 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

In 2003 the West Virginia Legislature amended the law (W.Va. Code § 18-5-1a) regarding the eligibility standards of county board of education members. The amendment, effective July 1, 2003, authorized the Ethics Commission to render advisory opinions on whether a particular elected or appointed position held or sought would bar a person's service on a county board of education.

Since then, the Commission has consistently upheld the statutory prohibition that members of county boards of education are not permitted to hold another public office, unless: (1) they do not receive compensation for serving in that office; and (2) the primary scope of the other office does not relate to the public schools. W.Va. Code § 18-5-1a(a)(3)(ii)(2010) See SBAO 2003-01 (prohibiting board membership on Soil Conservation District); SBAO 2003-02 (prohibiting board membership on County Emergency Ambulance Authority); and SBAO 2004-03 (prohibiting board membership on Public Service District).

The Commission finds that membership on a Board of Health constitutes holding a public office. Hence, it must determine whether it is a permissible public office based upon the two criteria established by W.Va. Code § 18-5-1a(a)(3)(ii).

Compensation

The first inquiry is whether the individual receives compensation. The Requester maintains that she and other Board members do not receive compensation.

While the fact that the Requester does not receive compensation is relevant, the analysis does not end there. With respect to compensation established by statute, the Commission has previously held that a "requester may not avoid the prohibition by declining to accept such compensation." S.B.A.O. 2003-01; See *also* S.B.A.O. 2003-02 ("Had that been its intent, the proviso would have said that the prohibition does not apply to service for which the Board of Education member **accepts** no compensation.")

Additionally, in S.B.A.O. 2003-02, the Commission concluded:

The Commission believes the proviso does not exempt service in any office for which the law prescribes or requires compensation. Where compensation is

prescribed or required, the proviso offers no relief, even if the office holder declines to accept compensation.

W.Va. Code § 16-2-9(d) states that board of health members “may receive compensation”, and leaves the determination up to each county health board whether to provide such compensation to its members. The Requester maintains that her County Board of Health has historically chosen not to provide compensation to its members. Hence, the lack of Requester’s compensation is the product of an agency decision, and not due to her voluntary declination of compensation to which she is otherwise entitled in accordance with a law, policy or ordinance.

While the Commission is mindful of the permissive nature of the enabling statute, the statute nonetheless provides for compensation. The decision of the Requester’s board not to offer compensation to its members is analogous to an individual board member refusing compensation, which the Commission has held to be insufficient to avoid the prohibition. See S.B.A.O. 2003-01; S.B.A.O 2003-02.

Further, the Commission is concerned that unequal treatment would result by creating a distinction for a permissive compensation. In some counties, a BOE member could serve on an uncompensated Board of Health; whereas in other counties, the BOE member would be prevented from serving because their board accepts compensation. This also prevents the confusion and political gamesmanship of temporarily allowing the dual service due to a lack of compensation, only to be reversed by a Board later choosing to compensate its members.

Accordingly, the Commission hereby finds that when a governing body is authorized by law to provide its members compensation, but elects not to provide compensation, then the position is “compensated” for purposes of W.Va. Code § 18-5-1a(a)(3)(ii).

In light of this determination, the Commission does not need to fully evaluate whether the primary scope of the Health Board is related to public schools. The Commission would simply note that based upon the express purpose and statutory duties of a County Board of Health, that the primary scope of a County Board of Health is generally not related to public schools. W.Va. Code § W.Va. Code § 16-2-1.

CONCLUSION

Accordingly, the Commission hereby finds that because the Board of Health is a compensated public office, the Requester may not remain a Board Member of the County Board of Health pursuant to W.Va. Code § 18-5-1a.

S/S

Jonathan E. Turak, Acting Chairperson