

## SCHOOL BOARD ADVISORY OPINION NO. 2014-04

Issued On June 5, 2014 by

### THE WEST VIRGINIA ETHICS COMMISSION

#### OPINION SOUGHT

A **County Board of Education Member- Elect** asks whether, if he takes office, he may keep his job as a police officer for a city police department.

#### FACTS RELIED UPON BY THE COMMISSION

The Requester won the primary election for a position on a County Board of Education (BOE). He asks if his employment as a city police officer is a prohibited "public office" under the BOE eligibility standards.

#### CODE PROVISIONS RELIED UPON BY THE COMMISSION

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

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

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(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.

(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.

### **ADVISORY OPINION**

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.

The term "public office" is not defined in W. Va. Code § 18-5-1a. In *Carson v. Wood*, 175 S.E.2d 482 (W.Va. 1970), 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; 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.

In School Board Advisory Opinions 2004-01, 2006-01, and 2006-02, the Commission held, with little analysis, that state college professors and teachers are mere employees of the state and not public officials.

The Supreme Court of Appeals of West Virginia held that the position of assistant prosecuting attorney is a public office for purposes of eligibility on a County Board of Education in *Carr v. Lambert*, 367 S.E.2d 225 (W.Va. 1998) and *State v. Macri*, 487 S.E.2d 891 (W.Va. 1996). The *Carr* court used the same criteria it used in *Carson*, *supra*.

In *City of Bridgeport v. Matheny*, 675 S.E.2d 92 (W.Va. 2009), the Court considered whether the position of city police officer was a "public office" in determining whether a police officer may serve on a police civil service commission. The eligibility requirements of W. Va. Code § 8-14-7 prohibit police civil service commissioners from holding other public offices.

Following the analysis it used in *Carr* and *Carson*, the Court in *City of Bridgeport* examined the provisions set forth in the enabling legislation for municipal police departments, W. Va. Code §§ 8-14-1 to 24 (2007). The Court noted that these statutory provisions prescribed the qualifications of a police officer, including, for example, requirements for testing, physical fitness, age and residency. Further, a police officer's duties, tenure, salary, bond and oath are prescribed or required by statute. W. Va. Code § 8-14-12 requires a police officer to take an oath of office or affirmation at the time of application to become an officer. Finally, the Court reasoned, it is undeniable that a

police officer is vested with the power to enforce the laws of the State. W. Va. Code § 8-14-3 provides that:


[A]ny member of the police force or department of a municipality . . . shall have all the powers, authority, rights and privileges within the corporate limits of the municipality with regard to the arrest of persons, the collections of claims, and the execution and return of any search warrant, warrant of arrest or other process. . . .

The Court concluded that the position of municipal police officer is a “public office” rendering the officer ineligible to serve on a civil service commission.

Therefore, the Commission holds that for purposes of County Board of Education eligibility, a police officer holds a public office rendering the Requester ineligible for membership on a County BOE, unless: (1) his position is not entitled to 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. The Requester is employed by a paid municipal police department. As such, he is entitled to compensation. See W. Va. Code § 8-14-2 (A paid police department officer is entitled to overtime compensation in certain situations). A requester may not avoid the prohibition of receiving compensation by declining to accept such compensation. See, e.g., School Board Advisory Opinions 2003-02 and 2004-03.

Therefore, even though a city police officer’s duties do not primarily relate to public schools, as a police officer, the Requester holds a public office and is entitled to compensation for his work as a police officer. As such, he is barred from simultaneously serving on a County Board of Education and being employed as a paid police officer.<sup>1</sup>

This advisory opinion is limited to questions arising under the W. Va. Code § 18-5-1a and does not purport to interpret other laws or rules. In accordance with W. Va. Code § 6B-2-3, this opinion has precedential effect and may be relied upon in good faith by other public agencies unless and until it is amended or revoked, or the law is changed.

  
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Father Douglas Sutton  
Acting Chairperson, WV Ethics Commission

<sup>1</sup> Although the Commission has limited jurisdiction, the Commission notes that its holding appears to be consistent with the following provision: W. Va. Code §8-14-19 provides

- (a) A member of a paid police department may not:
- (4) Be a candidate for or hold any other public office in the municipality in which he or she is employed: Provided, That any municipal police officer that is subject to the provisions of 5 U.S.C. §1501, et seq., may not be a candidate for elective office.