

School Board Advisory Opinion 2022-01

Issued on June 2, 2022, by

The West Virginia Ethics Commission

OPINION SOUGHT

A **County Board of Education Member-Elect** asks whether being an unpaid volunteer coach for a public school in the same county where he will serve as a Board of Education member is prohibited employment per W. Va. Code § 18-5-1a(a)(2).

Facts Relied Upon by the Commission

The Requester has been elected to the County Board of Education (“BOE”). His term of office begins on July 1st. During the previous school year, the Requester served as an unpaid assistant volunteer coach for an athletic team at one of the public schools in the same county he was elected to the BOE. The Requester would like to continue in that role in future school years and asks, therefore, whether he may continue to be an unpaid volunteer coach while serving on the BOE in the same county.

The Requester states that he is aware that the Ethics Commission has previously ruled that it is permissible for board of education members to serve as unpaid volunteer coaches under the Ethics Act and W. Va. Code § 61-10-15. The Requester states that his question does not relate to the Ethics Act and W. Va. Code § 61-10-15 but to W. Va. § 18-5-1a, which establishes the eligibility and training requirements for board of education members. This Code states, in relevant part, that board of education members may not be “employed by the county board on which he or she serves, including employment as a teacher or service person.” W. Va. § 18-5-1a(a)(2).

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.

(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;

(C) Become a candidate for, or serve as, a delegate, alternate or proxy to a national political party convention;

(D) Solicit or receive political contributions to support the election of, or to retire the campaign debt of, any candidate for partisan office;

(4) May engage in any or all of the following political activities:

(A) Make campaign contributions to partisan or bipartisan candidates;

(B) Attend political fund raisers for partisan or bipartisan candidates;

(C) Serve as an unpaid volunteer on a partisan campaign;

(D) Politically endorse any candidate in a partisan or bipartisan election; or

(E) Attend a county, state or national political party convention.

(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.

(c) To be eligible for election or appointment as a member of a county board, a person shall possess at least a high school diploma or a general educational development (GED) diploma. This provision does not apply to members or members-elect who have taken office prior to May 5, 1992, and who serve continuously from that date forward.

(d) A person elected to a county board after July 1, 1990, may not assume the duties of county board member unless he or she has first attended and completed a course of orientation relating to boardsmanship and governance effectiveness which shall be given between the date of election and the beginning of the member's term of office under the following conditions:

.....

Advisory Opinion

The Requester is currently an unpaid volunteer assistant coach (“volunteer coach”) in the same county where he has recently been elected to the BOE. The Requester wants to know if W. Va. Code § 18-5-1a(a)(2), which prohibits a BOE member from being employed by the BOE on which he or she serves, bars him from being a volunteer coach in the county school system. The crux of the Requester’s inquiry is, therefore, whether a volunteer coach is an “employment” position for purposes of the restrictions in W. Va. Code § 18-5-1a(a)(2). As explained below, the Ethics Commission does not have the authority to answer the Requester’s specific question.

The West Virginia Legislature has established the eligibility and training requirements for county board of education (BOE) members in W. Va. Code § 18-5-1a. There are numerous requirements in this Code section. For example, a board member must be a resident of the county in which he or she serves. W. Va. Code § 18-5-1a(a)(1). Also, a BOE member “may not assume the duties of [a] county board member unless he or she has first attended and completed a course of orientation relating to boardsmanship.” W. Va. Code § 18-5-1a(d).

The Ethics Commission does not have authority, however, to interpret this Code section in its entirety. Instead, the Legislature has only given the Ethics Commission authority to issue Advisory Opinions to BOE members and members-elect on one restriction under this statute which is 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). The statute states: “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.” W. Va. Code § 18-5-1a(b).

Accordingly, the West Virginia Ethics Commission finds that it does not have authority to rule whether an unpaid volunteer coach is an employee of the county BOE for purposes of the restrictions in W. Va. Code § 18-5-1a(a)(2). The Ethics Commission finds that it only has authority to rule whether an unpaid volunteer coach for a public school is an elected or appointed public office which would disqualify the Requester from service on the BOE per W. Va. Code § 18-5-1a(a)(3)(A).

The Commission’s interpretation of the restraints on its authority is consistent with the Supreme Court’s ruling in *Reed v. Thompson*, 772 S.E.2d 617 (W. Va. 2015), in which the West Virginia Supreme Court of Appeals held:

Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise

of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication. Syl. Pt. 2, *Mountaineer Disposal Serv., Inc. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973).¹

Based upon its authority to rule whether a volunteer coach is a public office, the Ethics Commission will address this limited issue.

Neither W. Va. § 18-5-1a nor W. Va. Code § 18-1-1² 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; 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.³

The position of unpaid volunteer coach is not created by law nor is it designated as “an office.” The tenure, salary, or bond for an unpaid volunteer coach is not prescribed by law, and an unpaid volunteer coach does not take an oath of office.

The Ethics Commission holds that the position of unpaid volunteer coach does not constitute a public office for purposes of W. Va. Code § 18-5-1a(a)(3)(A). The Commission finds, however, that it does not have the authority to determine whether holding the position of unpaid volunteer coach constitutes being employed by the county board of education under W. Va. Code § 18-5-1a(a)(2).⁴

¹ See also *State ex rel. Hoover v. Berger*, 483 S.E.2d 12, 16 (W. Va. 1996) (“An administrative agency ... has no greater authority than conferred under the governing statutes.”)

² Establishing definitions for Chapter 18 of the Code.

³ 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 utilized the *Carson* criteria in determining 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 County Board of Education. In *Cales*, the Court utilized this same criteria in determining 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.

⁴In [School Board Advisory Opinion 2006-02](#), the Commission stated that a county board of education member may serve while employed by the State Department of Education as a teacher at a State Correctional facility in his county of residence. In [School Board Advisory Opinion 2014-02](#), the Commission held that a candidate for the county board of education may, if elected, work as a teacher for

The Requester may want to seek guidance from a private attorney, the BOE's attorney, or the County Prosecutor on whether a volunteer coach position constitutes being employed for purposes of W. Va. Code § 18-5-1a(a)(2). The Requester, the BOE's attorney, or the County Prosecutor may also consider seeking advice from the West Virginia Department of Education or the West Virginia Attorney General Office on the issue.

Last, the Commission considered the application of the Ethics Act and W. Va. Code § 61-10-15 to the question presented in Advisory Opinion 2022-15 and re-affirmed that the public contract restrictions do not prohibit a board of education member from being an unpaid volunteer coach. Advisory Opinion 2022-15 is hereby incorporated by reference.

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/ Terry L. Walker
Terry L. Walker, Acting Chairperson
West Virginia Ethics Commission

a multi-county Area Vocational Center that services his county. In [School Board Advisory Opinion 2014-03](#), the Commission held that a county board of education member-elect would be disqualified from service on the board of education if he continued as a substitute bus operator for the same county school system. The Commission finds that it exceeded its authority on these occasions.