

# School Board Advisory Opinion 2024-01

Issued on March 7, 2024, by

The West Virginia Ethics Commission

## Opinion Sought

The **President of a Community and Technical College** that operates a public charter high school asks whether she may serve on a county board of education.

## Facts Relied Upon by the Commission

The Requester is the president of a community and technical college, and she serves at the will and pleasure of the community and technical college's governing board.<sup>1</sup> State law does not prescribe the qualifications, duties, salary, or tenure<sup>2</sup> of community college presidents. Further, state law does not require that presidents of community colleges be bonded or take an oath of office.<sup>3</sup>

The community college for which the Requester is president established and operates a public charter high school in the same county in which the community college is located.<sup>4</sup> The Requester appoints the charter school board members, but she does not serve on the charter school board.<sup>5</sup>

## Code Provisions Relied Upon by the Commission

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

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

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<sup>1</sup> W. Va. Code § 18B-1B-6.

<sup>2</sup> The West Virginia Code restricts the contract terms for community and technical college presidents. The Code states: "The initial contract term for a president may not exceed two years. At the end of the initial contract period, and subject to the provisions of subsection (c) of this section, the governing board may offer the president a contract of longer duration, but not to exceed five years." W. Va. Code § 18B-1B-6(a)(1).

<sup>3</sup> Further, neither the laws nor the community and technical college's policies require that the president post bond or take an oath of office.

<sup>4</sup> Community and technical colleges are authorized by statute to establish and operate charter schools, pursuant to W. Va. Code §§ 18-5G-1 through 18-5G-17.

<sup>5</sup> W. Va. Code § 18B-3C-5(a) provides that the president is the administrative head of a community and technical college, and W. Va. Code § 18-5G-7(g) provides that the governing board of the public charter school may be an administrative unit of the state institution of higher education, and the governing board may enter into the charter contract on behalf of the state institution of higher education.

(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 . . . .

W. Va. Code § 18-5-1a(b) 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.

### **Advisory Opinion**

A board of education (“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 [of education] . . . .” W. Va. Code § 18-5-1a(a)(3)(A). The Legislature has authorized the Ethics Commission to issue advisory opinions on whether another elected or appointed position held or sought by a person is an office or public office that would bar service on a county board of education. W. Va. Code § 18-5-1a(b). The Ethics Commission must determine, therefore, whether the position of community and technical college president constitutes a public office that bars a person holding this position from serving on a county board of education.

In [School Board Advisory Opinion 2022-01](#), the Commission held:

Neither W. Va. § 18-5-1a nor W. Va. Code § 18-1-1 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.<sup>6</sup>

The West Virginia Supreme Court has stated that “[t]he [*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; see also *City of Bridgeport*, 223 W. Va. at 449, 675 S.E.2d at 925 (emphasizing that there need not “be positive proof supportive of an ‘office’ as to all the various criteria”).<sup>7</sup> The Commission will now apply each of the *Carson* criteria to the position of community and technical college president.

- *The position was created by law*

W. Va. Code § 18B-3C-5(a) states, in relevant part, “The administrative head of a community and technical college is the president who is chosen pursuant to the terms of section six, article one-b of this chapter.” Hence, the Commission finds that the position of community and technical college president was created by law.

- *The position is designated as an office*

W. Va. Code § 18B-7-2(4) designates a president as a non-classified employee. This section states:

“Employee classification” or “employee class” means those employees designated as classified employees; nonclassified employees, including presidents, chief executives and administrators and faculty, as these terms are defined in this article and articles eight, nine and nine-a of this chapter.

Another provision, W. Va. Code § 18B-1B-6(d), however, uses the phrase “office of president.” This Code provision states: “The legislative rules of the commission and council promulgated in accordance with § 18B-1-6 and § 29A-3A-1 *et seq.* of this code ... provide guidance for the governing boards, but are not applicable to the statutorily exempted or the administratively exempted schools, in filling vacancies in the office of president in accordance with this chapter and shall include, but are not limited to, clarifying the powers, duties and roles of the governing boards, commission, council, and chancellors in the presidential appointment process.” The Ethics Commission

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<sup>6</sup> See *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 that the position of assistant prosecuting attorney is a public office that would bar an assistant prosecutor from serving on a BOE. In *Cales*, the Court used the same criteria to determine 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. See also W. Va. Op. Atty. Gen. 2018 No. 6 (Jun. 6, 2018) in which the Attorney General addressed whether an employee of the Division of Highways (“DOH”) may serve as a member of the Public Employees Insurance Agency (“PEIA”) Finance Board.

<sup>7</sup> W. Va. Op. Atty. Gen. 2018 No. 6 (Jun. 6, 2018).

finds that the phrase “office of president,” when read in the context of that Code section, does not make a community and technical college president a public official for purposes of W. Va. Code § 18-5-1a.

“The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled.” Syl. pt. 1, *UMWA by Trumka v. Kingdon*, 174 W.Va. 330, 325 S.E.2d 120 (1984). *Zimmerer v. Romano*, 223 W. Va. 769, 784, 679 S.E.2d 601, 616 (2009). Hence, the Commission finds the direct designation of the president of a community and technical college as an employee in W. Va. Code § 18B-7-2(4) takes precedence over the general reference to the president as an office in a section related to filling vacancies in the position.

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

The qualifications for serving as the president of a community and technical college are not set forth in the statute establishing the position.

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

The duties, tenure, and salary of a community and technical college president are not prescribed by state law. Nor does the law require a president to post a bond or take an oath of office.

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

The law does not clearly define who is a representative of the sovereign. In determining whether a position constituted a representative of the sovereign in a similar situation, the West Virginia Attorney General<sup>8</sup> considered (a) the ability of the individual holding the position to exercise independent power or authority as illustrated by the authority to represent and bind the state in contractual relations with third persons,<sup>9</sup> (b) whether the position is “subject to the supervision and policy direction” of other officials,<sup>10</sup> and (c) whether the position involves authority “regarding the enforcement of the laws of this State”.<sup>11</sup>

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<sup>8</sup> In [W. Va. Op. Atty. Gen. 2018 No. 6 \(Jun. 6, 2018\)](#), the Attorney General addressed whether an employee of the Division of Highways (“DOH”) may also serve as a member of the Public Employees Insurance Agency Finance Board under W. Va. Code § 17-2A-5, which provided that no one who holds any “public office” may be employed by DOH.

<sup>9</sup> See *State ex rel. Key v. Bond*, 94 W. Va. 255, 118 S.E. 276, 279 (1923), *Cales v. Town of Meadow Bridge*, 239 W. Va. 288, 296, 800 S.E.2d 874, 882 (2017).

<sup>10</sup> *Christopher v. City of Fairmont*, 167 W. Va. 710, 714, 280 S.E.2d 284, 286 (1981).

<sup>11</sup> *City of Bridgeport*, 223 W. Va. at 450, 675 S.E.2d at 926.

A community and technical college president may not bind the college to a contract. That authority resides with the community and technical college's governing body, through the Vice Chancellor of the West Virginia Higher Education Policy Commission. W. Va. Code R. § 130-33-6 (2016). A college president is subject to the supervision and evaluation of the board of directors of the college. W. Va. Code § 18B-1B-6(c). Further, the college president has little, if any, responsibility for enforcing the laws of the state. For purposes of the fifth *Carson* factor, therefore, the Commission finds that a community and technical college president is not a representative of the sovereign.


### **Conclusion**

The Commission finds that the position of president was created by state law, but that the other *Carson* criteria are not met. **The Ethics Commission holds, therefore, that the position of president of a community and technical college 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 while also being employed as a community and technical college president.**

The fact that the Requester's community and technical college operates a charter high school and that she appoints the members of the charter school board does not make her a public official or change the conclusion above. If the Requester was serving on the charter school board operated by the community and technical college or any charter school board, then additional analysis would be required to determine if service on such board was a public office, barring her service on a county board of education.<sup>12</sup>

*This Advisory Opinion is based on 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  
Commission

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<sup>12</sup> A BOE member may not hold another public office unless (1) the person does not receive compensation and (2) the primary scope of the board [other public office] is not related to public schools. W. Va. Code § 18-5-1a(a)(3)(A)(ii). [SBAO 2022-02](#).