

# School Board Advisory Opinion 2024-02

Issued on May 2, 2024, by

The West Virginia Ethics Commission

## Opinion Sought

A **Chief Deputy Sheriff** asks whether he may serve on a county board of education.

## Facts Relied Upon by the Commission

The Requester has been a deputy sheriff since 2004. The Sheriff appointed him to serve as his chief deputy in 2019.

The Requester asks whether a deputy sheriff, and specifically a chief deputy sheriff, is eligible to serve on a board of education. The Requester asserts that a chief deputy is also appointed as a deputy sheriff.

The Requester asserts that a chief deputy sheriff is distinct from a deputy sheriff for purposes of determining if the position is a public office under state law restricting board of education members from holding another public office. As chief deputy, his current daily job duties are mainly administrative and supervisory. He wears a deputy uniform while on duty.

## 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:

. . .

(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 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). As directed by W. Va. Code § 18-5-1a(b), the Ethics Commission must determine whether the positions of deputy sheriff and chief deputy sheriff are public offices that bar a person holding these positions from serving on a county board of education.

In [School Board Advisory Opinion 2014-04](#), the Ethics Commission applied the test set forth in [Carson v. Wood, 175 S.E.2d 482 \(W. Va. 1970\)](#) by the Supreme Court providing the criteria that should be considered in determining if a particular position is a public office. The Supreme Court, in [Carr v. Lambert, 367 S.E.2d 225 \(W. Va. 1988\)](#)<sup>1</sup>, used this same test for purposes of the school board eligibility statute in W. Va. Code § 18-5-1a:

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 Opinion 2014-04, the Commission concluded that the position of municipal police officer satisfies each of the criteria of public office, rendering the requester ineligible to serve on the county board of education. The Commission found that the criteria were met because [W. Va. Code §§ 8-14-1 to 24](#) provides for the qualifications, duties, salary, bonding requirements, and taking an oath of office for municipal police officers.

In [Advisory Opinion 2013-15](#), the Commission found that a chief deputy sheriff is a public officer for purposes of W. Va. Code § 61-10-15. The Commission analyzed the Code provisions applicable to all deputy sheriffs, making no distinction between deputies and chief deputies. Although this finding was made in relation to a different statute, the Ethics Commission employed factors similar to the *Carson* factors to hold that a chief deputy sheriff was a public officer.

To apply the *Carson* factors to the positions of deputy sheriff and chief deputy sheriff,<sup>2</sup> it is necessary to examine the laws governing deputy sheriffs and chief deputy sheriffs. The relevant state laws are below.

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<sup>1</sup> The *Carr* holding was slightly modified by *State v. Macri*, 487 S.E.2d 891 (W. Va. 1996).

<sup>2</sup> The term “chief deputy” or “chief deputy sheriff” is found in only two of these state Code provisions, W. Va. Code §§ 7-14-1 and 13. The term “chief deputy sheriff” is not distinctly defined in the Code.

[W. Va. Code § 6-2-10](#). [Officers and other Bonds] When official bonds to be given, provides:

Every . . . deputy sheriff . . . shall give bond with good security, to be approved, unless otherwise provided by law, by the county commission of the county in which such officer is to act . . . The penalty of the bond of each . . . deputy sheriff . . . shall not be less than \$35,000 nor more than \$100,000 . . . .

For the purposes of this section, "deputy sheriff" shall mean a person appointed by a sheriff as his deputy whose primary duty as such deputy is within the scope of active, general law enforcement and as such is authorized to carry deadly weapons, patrol the highways, perform police functions, make arrests or safeguard prisoners.

The bond described in this section is not required for deputy sheriffs if a county purchases professional liability insurance pursuant to the provisions of section three, article fourteen-a, chapter seven of this code.

[W. Va. Code § 6-3-1](#). [Deputy Officers and Conservators of the Peace] Appointment of deputies and local conservators of the peace; powers and duties; compensation; vacating appointment of deputy sheriff; removal of conservators, provides:

(a) (1) The clerk of the Supreme Court of Appeals, or of any circuit, criminal, common pleas, intermediate or county court, or of any tribunal established by law in lieu thereof, may, with the consent of the court, or such tribunal, duly entered of record, appoint any person or persons his deputy or deputies.

(2) A sheriff, surveyor of lands, or assessor may, with the consent of the county court duly entered of record, appoint any person or persons his deputy or deputies.

(3) A sheriff, when in the opinion of the judge of the circuit court the public interest requires it, may, with the assent of said court, duly entered of record, appoint any person or persons his deputy or deputies to perform any temporary service or duty.

(4) Each deputy so appointed shall take the same oath of office required of his principal, and may, during his continuance in office, perform and discharge any of the official duties of his principal, and any default or misfeasance in office of the deputy shall constitute a breach of the conditions of the official bond of his principal.

. . . .

[W. Va. Code § 7-7-7.](#) [County Commission and Officers - Compensation of Elected County Officials] County assistants, deputies and employees; their number and compensation; county budget.

(a) The county clerk, circuit clerk, sheriff, county assessor and prosecuting attorney, by and with the advice and consent of the county commission, may appoint and employ, to assist them in the discharge of their official duties for and during their respective terms of office, assistants, deputies and employees.

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(d) The county . . . sheriff . . . shall then fix the compensation of their assistants, deputies and employees based on the total amount of money designated for expenditure by their respective offices by the county commission . . . .

(e) The county officials, in fixing the individual compensation of their assistants, deputies and employees . . . shall give due consideration to the duties, responsibilities and work required of the assistants, deputies and employees and their compensation shall be reasonable and proper.

[W. Va. Code § 7-14-1.](#) [County Commission and Officers - Civil Service for Deputy Sheriffs.] Appointments and promotions of deputy sheriffs, provides:

Notwithstanding the provisions of article three, chapter six, and article seven, chapter seven of this code [cited above], all appointments and promotions of full-time deputy sheriffs shall be made only according to qualifications and fitness to be ascertained by examinations, which, so far as practicable, shall be competitive, as hereinafter provided. On and after the effective date of this article, no person except the *chief deputy* shall be appointed, promoted, reinstated, removed, discharged, suspended or reduced in rank or pay as a full-time deputy sheriff, as defined in said section two, of any county in the State of West Virginia subject to the provisions hereof, in any manner or by any means other than those prescribed in this article. (emphasis added).

[W. Va. Code § 7-14-13.](#) [Civil Service for Deputy Sheriffs.] Vacancies filled by promotions; eligibility for promotion; *rights of chief deputy*, provides:

Vacancies in positions of deputy sheriff shall be filled, so far as practicable, by promotion from among persons holding positions in the next lower grade. Promotions shall be based upon merit and fitness, to be ascertained by competitive examinations to be provided by the civil service commission, and upon the superior qualifications of the persons promoted, as shown by their previous service and experience: Provided, That, except for the *chief deputy* . . . , no person shall be eligible for

promotion from the lower grade to the next higher grade until such person shall have completed at least two years' service in the next lower grade: Provided, however, That notwithstanding the provisions of section one of this article, any person occupying the *office of chief deputy . . .* shall, except as hereinafter provided in this section, be and shall continue to be *entitled to all of the rights and benefits of the provisions of this article [article 7. Compensation of elected county officials], except that he or she may be removed from such office of chief deputy . . .* without cause and the time spent by such person in the office of such *chief deputy . . .* shall be added to the time, if any, served by such person during the entire time he or she was a deputy sheriff of such county prior to his or her appointment as *chief deputy . . .* shall in all cases of removal, except for removal for just cause, retain the regular rank within said sheriff's office which he or she held if any, at the time of his or her appointment to the office of chief deputy . . . or which he or she has attained, if any, during his or her term of service as chief deputy . . . . *The provisions of this section shall be construed to apply and to inure to the benefit of all persons who have ever been subject to the provisions of this article.* The commission shall have the power to determine in each instance whether an increase in salary constitutes a promotion. (emphasis added).

The Commission will now apply the *Carson* factors to the positions of deputy sheriff and chief deputy sheriff to determine whether the positions are public offices for purposes of W. Va. Code § 18-5-1a.

- *The position was created by law*

W. Va. Code § 6-3-1(a) provides that a sheriff, with the consent of the court, may appoint deputies who have the same powers, duties, and responsibilities as the sheriff. The Code does not define "*chief deputy sheriff.*" (emphasis added). The Requester asserts that a chief deputy sheriff is also appointed as a deputy sheriff. The Commission assumes the appointment of a chief deputy is made under the law, at W. Va. Code § 6-3-1(a). Therefore, the Commission finds that the position of chief deputy sheriff is created by law.<sup>3</sup>

- *The position is designated as an office*

The position of deputy sheriff has been designated as an office in W. Va. Code § 6-3-1(a)(4), which states, "Each deputy so appointed shall take the same oath of office required of his principal, and may, during his continuance in office. . . ." This law, governing the appointment of deputies, does not excuse deputies with the designation of chief in their title from taking an oath of office. Additionally, W. Va. Code § 7-14-13 uses the term "office of chief deputy" three times. Therefore, the Commission finds that the state law has designated the positions of deputy and chief deputy sheriff as offices.

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<sup>3</sup> W. Va. Code § 7-7-7 also authorizes a sheriff to appoint deputies and employees.

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

The qualifications for serving as a deputy sheriff are set forth in W. Va. Code § 7-14-1. However, chief deputies are exempted from these qualification requirements by W. Va. Code § 7-14-13. The Commission finds that the law does not define the qualifications for a chief deputy sheriff.

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

*Duties* - A deputy sheriff is defined as “a person appointed by a sheriff as his deputy whose primary duty as such deputy is within the scope of active, general law enforcement and as such is authorized to carry deadly weapons, patrol the highways, perform police functions, make arrests or safeguard prisoners.” W. Va. Code § 6-2-10. A chief deputy is not separately defined in the Code. A chief deputy sheriff is a deputy sheriff. The distinction is that a chief deputy is not required to have any defined qualifications and is not entitled to all of the civil service protections as prescribed by law for deputies. Therefore, the duties prescribed by statute in W. Va. Code § 6-2-10 apply to a chief deputy sheriff.

*Tenure* - The tenure of a deputy sheriff is not limited by statute, but the appointment of a chief deputy is implicitly limited to the duration of the sheriff’s term.

*Salary* - The law requires a sheriff to fix the compensation of his or her deputies, pursuant to the parameters set in W. Va. Code § 7-7-7. This provision of law is specifically applicable to chief deputies pursuant to W. Va. Code § 7-14-13 (rights of chief deputies). The law does not, however, prescribe the specific compensation of a chief deputy.

*Bond and oath* - A deputy sheriff is required to post a bond and take an oath of office. This law, governing the appointment of deputies, does not excuse deputies with the designation of chief in their title.

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

The law does not clearly define who is a representative of the sovereign. In School Board Advisory Opinion 2024-01, the Commission employed the test used in [W. Va. Op. Atty. Gen. 2018 No. 6 \(Jun. 6, 2018\)](#) to determine whether a position constituted a representative of the sovereign.<sup>4</sup> The West Virginia Attorney General considered (a) the

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<sup>4</sup> [W. Va. Op. Atty. Gen. 2018 No. 6 \(Jun. 6, 2018\)](#), 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 provides that no one who holds any “public office” may be employed by DOH.

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, (b) whether the position is subject to the supervision and policy direction of other officials, and (c) whether the position involves authority regarding the enforcement of the laws of this State. *Id.*

A deputy sheriff and a chief deputy sheriff have authority to enforce the laws of the state in the county in which they serve. The Supreme Court in *City of Bridgeport v. Matheny*, 223 W. Va. 445, 675 S.E.2d 921 (2009) stated, “Because of the authority vested in police officers regarding the enforcement of the laws of this State, as well as the consequences for the failure to carry out the statutory duties, it is clear that a police officer is a representative of the sovereign.”<sup>5</sup> *Id.* at 926. The Commission finds both a deputy sheriff and a chief deputy sheriff are representatives of the sovereign.

## **Conclusion**

The Requester asserts that a chief deputy sheriff is distinct from a deputy sheriff for purposes of determining if a chief deputy sheriff holds a public office, for purposes of the restrictions in W. Va. Code § 18-5-1a(a)(3)(A), because a chief deputy does not have the protections given to deputy sheriffs in relation to their hiring, promotions, and removal from office.<sup>6</sup> Nonetheless, a chief deputy sheriff receives some of the protections and benefits given to all deputy sheriffs. For example, chief deputies retain the rights to compensation, annual leave, and access to the deputy sheriff’s retirement system. The Commission does not find these distinctions to be relevant in determining if a chief deputy sheriff holds a public office under W. Va. Code § 18-5-1a(a)(3)(A).

Finally, 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.’” *Carson* 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 Ethics Commission finds that the positions of deputy sheriff and chief deputy sheriff satisfy most of the *Carson* criteria and therefore holds that the positions of**

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<sup>5</sup> In [School Board Advisory Opinion 2024-01](#), the Commission applied the *Carson* test and found that a community and technical college president held public employment rather than a public office. The Commission stated that a contributing factor to this decision was that “the college president has little, if any, responsibility for enforcing the laws of the state.”

<sup>6</sup> If a chief deputy is removed from office without cause, he or she still retains the regular rank left to serve as chief deputy and his or her time as chief deputy will be added to the time in service as a deputy sheriff, presumably for purposes of seniority and retirement eligibility.

<sup>7</sup>A BOE member may hold another public office if (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). This exception is not applicable because deputy sheriffs and chief deputy sheriffs hold compensated positions.

**deputy sheriff and chief deputy sheriff are public offices for purposes of W. Va. Code § 18-5-1a(a)(3)(A). Accordingly, the Requester may not serve on a county board of education while serving as a deputy sheriff or chief deputy sheriff.**

*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.*

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