

School Board Advisory Opinion 2024-03

Issued on May 2, 2024, by

The West Virginia Ethics Commission

Opinion Sought

A **County Deputy Assessor** asks whether she may serve on a county board of education.

Facts Relied Upon by the Commission

The Requester states that her title is Deputy Assessor. Her job duties mainly include entering data on oil and gas assessment values. The West Virginia Tax Division sets the values for all oil and gas assessments. The Requester enters the data provided by the State and creates accounts with a name and address for each payor. The Requester's job duties also include answering questions from the public about oil and gas assessments. The Requester states that she has no authority to speak on behalf of the Assessor on policy matters and has no authority to contractually bind the Assessor's Office.

The Requester states that she is a will and pleasure employee of the Assessor's Office and may be terminated at any time unless it is for an unlawful reason. The Requester states that she is paid from the County's general funds, not the revolving valuation fund under W. Va. Code § 11-1C-8, and the Assessor must seek the advice and consent of the County Commission before hiring her or others for positions funded through the County's general fund. The Requester took an oath of office, but she is unsure if state law requires her to take one. She also states that state law does not require her to have a bond, and she does not have one. Her salary is set by the Assessor, not by statute.

The Requester is a candidate for the County Board of Education. The Requester wants to know if she is elected whether she may, pursuant to W. Va. Code § 18-5-1a, continue her employment as a deputy assessor after being sworn in as a board of education member.

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 (“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 deputy assessor constitutes a public office that bars a person holding this position from serving on a county board of education for purposes of W. Va. Code § 18-5-1a(a)(3)(A).¹

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

¹ What is clear is that whether a position is a public office or whether a person is a public officer may differ in accordance with the statutory or constitutional provisions under which a given position is being examined. *City of Bridgeport v. Matheny*, 223 W. Va. 445, 449, 675 S.E.2d 921, 925 (2009).

prescribed or required; and whether the one occupying the position has been constituted a representative of the sovereign.²

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. 445, 449, 675 S.E.2d 921, 925 (2009) (emphasizing that there need not “be positive proof supportive of an ‘office’ as to all the various criteria”).

To apply the *Carson* criteria, it is necessary to analyze the relevant state laws governing deputy assessors, which are:

W. Va. Code 6-2-10. Bonds of county officers; required for deputy sheriffs.

Every commissioner of a county commission and every clerk of a circuit court shall give bond with good security, to be approved by the circuit court, or the judge thereof in vacation; and every sheriff, deputy sheriff, surveyor of lands, clerk of a county commission, assessor, county superintendent of schools, notary public and magistrate 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

W. Va. Code § 6-3-1. Appointment of deputies and local conservators of the peace; powers and duties; compensation; vacating appointment of deputy sheriff; removal of conservators.

(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.

² See *Carr v. Lambert*, 367 S.E.2d 225 (W. Va. 1988)(holding was modified on other grounds by *State v. Macri*, 487 S.E.2d 891 (W. Va. 1996). In *Carr*, the West Virginia Supreme Court 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 board of education. In *Cales v. Town of Meadow Bridge*, 800 S.E.2d 874 (W. Va. 2017), 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 and held that PEIA Finance Board members are public officials.

(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 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. The county clerk may designate one or more of his or her assistants as responsible for all probate matters.

(b) The county clerk, circuit clerk, sheriff, county assessor and prosecuting attorney shall, prior to March 2 of each year, file with the county commission a detailed request for appropriations for anticipated or expected expenditures for their respective offices, including the compensation for their assistants, deputies and employees, for the ensuing fiscal year.

(c) The county commission shall, prior to March 29 of each year by order fix the total amount of money to be expended by the county for the ensuing fiscal year, which amount shall include the compensation of county assistants, deputies and employees. Each county commission shall enter its order upon its county commission record.

(d) The county clerk, circuit clerk, sheriff, county assessor and prosecuting attorney 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 and the amount expended shall not exceed the total expenditure designated by the county commission for each office.

(e) The county officials, in fixing the individual compensation of their assistants, deputies and employees and the county commission in fixing the total amount of money to be expended by the county, 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 § 11-1C-8. Additional funding for assessors' offices; maintenance funding.

(a) In order to finance the extra costs associated with the valuation and training mandated by this article, there is hereby created a revolving valuation fund in each county which shall be used exclusively to fund the assessor's office. No persons whose salary is payable from the valuation fund shall be hired under this section without the approval of the valuation commission, the hirings shall be without regard to political favor or affiliation, and the persons hired under this section are subject to the provisions of the ethics act in chapter six-b of this code, including, but not limited to, the conflict of interest provisions under chapter six-b of this code. Notwithstanding any other provisions of this code to the contrary, assessors may employ citizens of any West Virginia county for the purpose of performing, assessing and appraising duties under this chapter upon approval of the employment by the valuation commission.

....

W. Va. Code § 11-2-1. Assessment districts and assessors

Each county in this state shall constitute one assessment district and shall elect one assessor, whose term of office shall be four years. The assessors now in office shall serve until the expiration of the term for which they were elected, and their successors shall be elected at the general election of one thousand nine hundred thirty-six and every four years thereafter. No person shall be eligible to the office of assessor who is not a resident of the county at the time of his election. The assessor's office, properly equipped at the county seat, shall be kept open throughout the year.

W. Va. Code § 11-2-2. Deputy assessors

The assessor in every county shall select his deputies, assistants and other employees in the same manner as is provided for the selection of deputies, assistants and employees of sheriffs and clerks of courts.

W. Va. Code § 11-2-3. Selection of deputy assessors

The deputy assessors shall be appointed by the assessor with the advice and consent of the county commission, and may be removed at any time

in the discretion of the assessor. Vacancies occurring from any cause in the office of any deputy assessor shall be filled by the assessors.

W. Va. Code § 11-2-4. Apportionment of Work

The assessor, after consulting with his deputies, shall apportion the work of assessing property for the purpose of taxation among his deputies and himself as nearly equal as possible to magisterial districts, and may, from year to year, make such changes in the apportionment of work as to him may seem proper.

The Commission will now apply the *Carson* factors to the position of deputy assessor to determine whether the position is a public office for purposes of W. Va. Code § 18-5-1a.

- *The position was created by law*

West Virginia law requires each county to have an elected assessor. W. Va. Code § 11-2-1. County assessors may hire deputies and employees to assist them in discharging their duties. W. Va. Code § 7-7-7, W. Va. Code § 6-3-1(a)(2), and W. Va. Code § 11-2-3. The Code further states:

The deputy assessors shall be appointed by the assessor with the advice and consent of the county commission, and may be removed at any time in the discretion of the assessor. Vacancies occurring from any cause in the office of any deputy assessor shall be filled by the assessors.

W. Va. Code § 11-2-3.³

The Requester states that her job title is Deputy Assessor and that the Assessor hired her with the advice and consent of the County Commission. The Ethics Commission finds, therefore, that the position of deputy assessor is a position created by the law.

³ The West Virginia Supreme Court has made the following finding: "When a county assessor seeks to hire an employee to perform duties other than assessing and appraising duties, the assessor is required to first obtain the advice and consent of the county commission pursuant to W. Va. Code § 7-7-7 (2000) (Repl. Vol. 2006). However, when a county assessor seeks to hire an employee to perform assessing and appraising duties, which employee will be paid from the revolving valuation fund established in W. Va. Code § 11-1C-8 (1998) (Repl. Vol. 2003), the assessor is not required to obtain the advice and consent of the county commission. Instead, the assessor must obtain approval from the Property Valuation Training and Procedures Commission, as required by W. Va. Code § 11-1C-8(a)." *Harrison Cnty. Comm'n v. Harrison Cnty. Assessor*, 222 W. Va. 25, 26, 658 S.E.2d 555, 556 (2008). The Requester states that she is paid from the county's general funds, not the revolving valuation fund.

- *The position is designated as an office*

The West Virginia Code refers to the position of deputy assessor as an office in W. Va. Code § 11-2-3, which states, “Vacancies occurring from any cause in the office of any deputy assessor shall be filled by the assessors.” Another Code provision also expressly refers to the position as an office: “Any deputy appointed pursuant to section one of this article, may, at any time, be removed from office by his principal, or by the court, or other tribunal in lieu thereof, by and with the consent of which he was appointed” W. Va. Code § 6-3-2

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

The West Virginia Code does not establish qualifications for serving as a deputy assessor.

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

Duties - The Code generally states that deputies assist the assessor and may have duties relating to assessment and appraisal.⁴ The Code states that assessors and other county officers may hire deputies to assist the county officials in discharging their official duties. W. Va. Code § 7-7-7. The Code generally establishes that the duties of a deputy assessor are to provide support to the assessor in a manner prescribed by the assessor.

Tenure - The Requester does not have a set term of office or employment. She serves at the will and pleasure of the assessor.

Salary - The law does not set her salary.

Bond - The West Virginia Code requires an assessor to be bonded. W. Va. Code § 6-2-10, but not a deputy assessor.

Oath - The Requester took an oath of office. It appears that the oath is required by W. Va. Code § 6-3-1(a) that authorizes an assessor, with the consent of the county court, to appoint a person as a deputy. This Code section then states, “Each deputy so appointed shall take the same oath of office required of his principal” W. Va. Code § 6-3-1(a)(4).

- *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, the West Virginia

⁴ W. Va. Code § 7-7-7, W. Va. Code § 6-3-1(a)(2), W. Va. Code § 11-2-3, and W. Va. Code § 11-2-4.

Attorney General⁵ 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,⁶ (b) whether the position is “subject to the supervision and policy direction” of other officials,⁷ and (c) whether the position involves authority “regarding the enforcement of the laws of this State.”⁸

West Virginia law provides that a deputy assessor “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 § 6-3-1(a)(4). The Ethics Commission finds that W. Va. Code § 6-3-1(a)(4) allows an assessor to authorize his or her deputies to discharge the assessor’s official duties, but does not require an assessor to give that power to his or her subordinates.⁹

A Requester states that she may not bind the Assessor’s Office to a contract. The Requester describes her duties as being ministerial. For purposes of the fifth *Carson* factor, therefore, the Commission finds that the Requester is not a representative of the sovereign.

Conclusion

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”). The Ethics Commission has considered each of the *Carson* criteria and the applicable Code provisions governing deputy assessors. The Commission acknowledges that sound arguments may be made in support of or opposition to a finding that a deputy assessor is a public officer for purposes of W. Va. Code § 18-5-1a. In weighing the criteria, however, the Ethics Commission finds that a deputy assessor is a public official.

The Ethics Commission recognizes that a 1954 West Virginia Attorney General Opinion, analyzing a statute relating to ballot commissioners, found that a deputy assessor was

⁵ 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.

⁶ 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).

⁷ *Christopher v. City of Fairmont*, 167 W. Va. 710, 714, 280 S.E.2d 284, 286 (1981).

⁸ *City of Bridgeport*, 223 W. Va. at 450, 675 S.E.2d at 926.

⁹ The West Virginia Attorney General has stated, “To be sure, there may be some county officers who do not delegate any of their official functions to deputies or other staff” 2019 WL 2491604, at *3 ([W. Va. A.G. Apr. 2, 2019](#))

not a public official. The only analysis was, “In relation to the position of Deputy Assessor, it is our thought that he is not a public officer but is rather an employee of the Assessor. Such was the holding of Judge Brannon, in *Burns v. Waldron*, 71 W.Va. 514, 76 S.E. 894 (1912).” 45 W. Va. Op. Att’y Gen. 657 (1954). The 1912 *Burns* case involved an old law giving county assessors the right to collect commissions from tax assessments. The *Burns* Court stated: “What is an ‘assistant assessor’? He is only a deputy, an agent, and employee of the assessor.” *Id.*, 71 W. Va. 514, 76 S.E. 894, 894 (1912). The Court then concluded in *Burns* that deputy assessors are not entitled to the same commissions as assessors. The Ethics Commission does not find the reasoning in these opinions controlling in determining whether a deputy assessor is a public official.¹⁰

The Commission finds that the position of deputy assessor was created by state law and that the law requires them to take an oath of office. The West Virginia Code also designates the position as an office.¹¹ The Commission also finds that state law provides that deputy assessors, when authorized by the assessor, may “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 § 6-3-1(a)(4). While the Assessor who employs the Requester has not given the Requester authority to perform and discharge duties involving significant policy matters and public contracts, nevertheless, those powers may be delegated by an assessor to any deputy assessor in his or her office, including to the Requester. The Commission declines to find that some deputy assessors are public officials while others are not, depending on which powers the assessor in their county has delegated to them at a given time. The Commission instead gives weight to the position as created by the West Virginia Code.

The Ethics Commission holds, therefore, that the position of deputy assessor is a public office 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 also serving as a deputy assessor.¹²

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.

¹⁰ A 1962 Attorney General Opinion holds that the positions of deputy assessor and member of the legislature are not incompatible. The Opinion does not analyze whether a deputy assessor is a public official or public employee but appears to conclude that a deputy assessor is a public official for purposes of deciding if one person could perform the functions of both offices, i.e., deputy assessor and legislator. 49 W. Va. Op. Att’y Gen. 398 (1962).

¹¹ W. Va. Code § 11-2-3 and W. Va. Code § 6-3-2

¹² 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 assessors are compensated positions.

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