

# Advisory Opinion 2024-03

Issued on June 6, 2024, by

The West Virginia Ethics Commission

## Opinion Sought

A **County Board of Education Superintendent** asks whether the board members may increase their per-meeting compensation during their current terms of office.

## Facts Relied Upon by the Commission

The state law, in [W. Va. Code § 18-5-4\(e\)](#), authorizes each county board of education to set the compensation of its board members in an amount equal to or less than the statutory maximum. During the 2024 Regular Session of the West Virginia Legislature, the Legislature passed [House Bill 5514](#), amending W. Va. Code § 18-5-4(e) and allowing board of education members to be paid up to \$260 per meeting for up to 40 meetings per fiscal year. The effective date of the bill is June 6, 2024. Under the prior version of W. Va. Code § 18-5-4(e), the maximum allowable per-meeting rate of compensation was \$160 for a maximum of 50 meetings in one fiscal year.

The Requester's County Board of Education (BOE) policy sets the BOE members' compensation in that county. The policy provides, "Board members shall receive compensation at a rate of \$160 per meeting attended, and may receive pay for up to fifty (50) meetings in any one (1) fiscal year."

The Requester asks whether the BOE members may vote to raise their per-meeting compensation to a higher rate that is now authorized by House Bill 5514. In the alternative, the Requester asks whether the BOE may raise the per-meeting compensation rate now for future board members.

## Provisions Relied Upon by the Commission

[W. Va. Code § 6B-2-5\(b\)\(1\)](#) states:

A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in de minimis private gain does not constitute use of public office for private gain under this subsection. The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

## Advisory Opinion

The Ethics Commission must determine whether the Ethics Act prohibits the members of a BOE from voting to increase their per-meeting compensation for their current terms of office because the Legislature did not raise the per-meeting compensation to a set amount, e.g., \$260, when it amended W. Va. Code § 18-5-4(e). The Legislature instead authorized BOEs to pay their members up to \$260 per meeting, allowing each BOE the discretion to increase the compensation as it sees fit within the statutory limits.

The Requester's BOE has a policy that sets its per-meeting compensation at \$160, rather than simply tying the compensation to the maximum amount permitted by statute. Accordingly, the BOE must take official action to increase the per-meeting compensation rate by amending its policy.<sup>1</sup> W. Va. Code § 6B-2-5(b)(1) prohibits a public official from using his or her public office for his or her private gain or the private gain of another.<sup>2</sup> The Commission must determine, therefore, whether a board of education member's vote to increase the per-meeting compensation of its current members would violate the private gain provision of the Ethics Act.

In [Advisory Opinion 2010-08](#), a city asked whether the Ethics Act would permit it to change its election cycle for several reasons, including to have its election day cycles coincide with the primary elections in even-numbered years at which the offices of president and governor are on the ballot. To make this change, the city council proposed extending the terms of offices for its public officials by one year. The Commission held that, if the city council members voted to extend their terms of office by one year, it would constitute use of office for private gain because the city council members would be receiving an additional year of compensation through their own actions. The Commission stated, "Accordingly, the Commission hereby finds that a public official's vote to extend her or his own current term beyond that statutorily or constitutionally prescribed, and thereby obtain extra compensation, constitutes use of public office for private gain in violation of W.Va. Code § 6B-2-5(b)."

The West Virginia Attorney General has issued opinions on whether BOE members may legally raise their per-meeting compensation during their current terms of office due to the restrictions in the [West Virginia Constitution, Article VI, § 38](#), which provides, in pertinent part, "Nor shall the salary of any public officer be increased or diminished during his term of office, nor shall any such officer, or his or their sureties be released from any debt or liability due to the state . . . ."

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<sup>1</sup> If the board of education's policy simply tied the per-meeting compensation to the maximum allowed by law, then no official action would have been required by the board of education members to raise the per-meeting compensation. Under those circumstances, it would not violate the Ethics Act for the board members to receive the higher rate of pay.

<sup>2</sup> W. Va. Code § 61-10-15 and W. Va. Code § 6B-2-5(d) prohibit a public official and/or a public employee from having a financial interest in a contract over which he or she has authority to enter into or control. Neither provision relates to the statutory compensation that a public official or public employee is authorized to receive by virtue of his or her office or employment. Hence, the Commission finds that neither Code provision is applicable to the current situation.

The Commission acknowledges that the Attorney General has held that the per-meeting compensation for board of education members does not constitute “salary” for purposes of the restrictions in the West Virginia Constitution against a public official’s salary being raised during their term of office.<sup>3</sup> The Attorney General Opinions do not address, however, whether it would violate the Ethics Act for board of education members to increase the compensation for its current members.

A proposed act may violate the Ethics Act without being contrary to the State Constitution. Accordingly, the Commission must analyze the provisions of the Act and apply them to the situation at hand. The BOE members will only receive more compensation if they vote to give themselves a raise by amending the BOE compensation policy. The BOE members would thus be taking official action to benefit themselves.

**The Commission holds that W. Va. Code § 6B-2-5(b) prohibits members of a board of education from voting to increase their per-meeting compensation during their current terms of office.<sup>4</sup>**

The Requester also asks whether the Ethics Act prohibits board of education members from voting to increase the per-meeting compensation to take effect after their terms of office expire. The Ethics Commission finds that it does not. See Advisory Opinion 2010-08.

*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 arising under the Ethics Act, W. Va. Code §§ 6B-1-1 through 6B-3-11, and W. Va. Code § 61-10-15, 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 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

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<sup>3</sup> See 44 W. Va Op. Att’y Gen. 153, 154 (1951), 53 W. Va Op. Att’y Gen. 223, 225 (1969), and 68 W. Va. Op. Att’y Gen. 1 (1999).

<sup>4</sup> Other jurisdictions have also dealt with the issue of public officials granting themselves additional compensation. In *Russell v. State Ethics Comm’n*, 987 A.2d 835, 841 (Pa. Commw. Ct. 2009), the appellate court upheld the Pennsylvania Ethics Commission’s finding that Russell violated its Ethics Act by participating in actions of the Authority Board to authorize compensation in excess of that approved by the Washington Township Supervisors. The appellate court rejected the application of the class exception to the situation and reasoned that if the class exception authorized such acts, it would “allow public officials to take illegal actions so long as all the public officials involved would benefit equally from such actions.” *Id.*