

Advisory Opinion 2023-03

Issued on March 2, 2023, by

The West Virginia Ethics Commission

Opinion Sought

A **State Employee** asks whether he may seek election to the state office that regulates elections while being employed by that same office.

Facts Relied Upon by the Commission

The Requester is a high-ranking state employee. The head of the state agency is an elected official who is not seeking reelection to that position. The Requester wishes to seek election to the position currently held by his boss but wants to know whether he must resign his employment before running for that office.

The Requester's state agency regulates elections in the State of West Virginia. The Requester states that he will not, in his official capacity, be involved in any matters that uniquely affect his or an opponent's election campaign. The Requester further states that, if elected, he will resign his employment position with the state agency before being sworn into office. The Requester also asks for guidance on other restrictions in the Ethics Act that apply if he becomes a candidate.

Provisions Relied Upon by the Commission

W. Va. Code § 6B-2-5(b) states, in relevant part:

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.

W. Va. Code R. § 158-6-4 (2022) states, in relevant part:

4.2. Public officials and public employees may not use subordinate employees during work hours to perform private work or provide personal

services for their benefit or that of another person. . . . This prohibition does not apply to de minimis work or services.

W. Va. Code R. § 158-6-5 (2022) states, in relevant part:

5.2. Improper Use—Public officials and public employees may not use government property for personal projects or activities that result in private gain.

5.3. This section does not apply to the de minimis use of government property.

Advisory Opinion

The Ethics Commission has held that the Ethics Act does not prohibit a state employee from becoming a candidate for public office. [Advisory Opinion 2019-18](#) (holding that a state employee may seek election to a county public office). Further, the Ethics Commission has consistently ruled that the Ethics Act does not bar public officials or public employees from engaging in political activities but only prohibits them from using public resources for their campaigns. See [Advisory Opinion 2012-51](#) (holding that an assistant attorney general may be a city council member); [Advisory Opinion 2022-02](#) (holding that a county commission employee may be a city council candidate or member while simultaneously being employed by the county); [Advisory Opinion 1996-14](#) (holding that a county employee may seek election to the position of county magistrate), and [Advisory Opinion 2012-15](#) (holding that a sheriff may endorse candidates).

The Ethics Act and prior Ethics Commission Advisory Opinions expressly allow a state employee to be a candidate for public office. The Ethics Commission must now determine whether the same legal conclusion applies when a public employee is seeking election to a statewide office that regulates elections while being employed by that same office.

“The Ethics Act is not a general code of conduct which prohibits public servants and public officials from engaging in any and all conduct which could be viewed as unethical. Instead, it establishes certain standards of conduct for public servants and public officials to follow. . . .” [Advisory Opinion 2021-22](#). There is no provision in the Ethics Act which disqualifies a public employee or public official from becoming a candidate for public office based upon his or her current public employment, job title, or position.

Qualifications for candidates are matters governed by election laws and other laws outside the Ethics Act. For example, the Ethics Commission notes that it is usual and customary for assistant prosecuting attorneys to be candidates for prosecutor and deputy county clerks to be candidates for county clerk while maintaining their public employment positions during their candidacies. While the offices of a county prosecutor

or county clerk may become involved in an election dispute, the Legislature has not disqualified employees in these offices from being a candidate for the elected county prosecutor or county clerk position. In contrast, the Legislature has restricted other public officials or public employees from being candidates for office. For example, deputy sheriffs may not be candidates for office in the same county in which they work as a deputy sheriff. W. Va. Code § 7-14-15. Similarly, board of education members may not become a candidate for any other office other than to succeed himself or herself. W. Va. Code § 18-5-1a.

In reviewing the language of the Ethics Act, the Ethics Commission finds no provision that prohibits a state agency employee from becoming a candidate for statewide public office even if the employee's state agency regulates elections. Further, there is no provision in the Ethics Act requiring a state employee to terminate his or her state employment while being a candidate for public office.

Based upon the foregoing, the Ethics Commission holds that a state employee may seek election to the state office that regulates elections while being employed by that same office. The state employee may not be involved in matters uniquely affecting his campaign or his opponents' campaigns.

While nothing in the Ethics Act prohibits a state employee from seeking an elected office, the Commission has no jurisdiction to rule whether other laws prohibit it. Public employees seeking to become candidates for or hold public office should also consult with their agency's attorney to ensure that no agency policies, state laws, including the doctrine of incompatibility, or federal laws restrict their political activities. See [Advisory Opinion 2022-05](#) (discussing laws restricting political activities).

Finally, the Ethics Act prohibits state employees from performing campaign activities during public work hours and prohibits the use of public resources to subsidize an election campaign. See W. Va. Code § 6B-2-5(b); see also W. Va. Code R. §§ 158-6-4 through 158-6-8 (2022).

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 arising under the Ethics Act, W. Va. Code §§ 6B-1-1 through 6B-3-11, 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