

Advisory Opinion 2022-17

Issued on August 4, 2022, by

The West Virginia Ethics Commission

Opinion Sought

A **County Board of Education (“BOE”) Member** asks several questions relating to two proposed state constitutional amendments affecting boards of education that will be on the ballot in the general election. His questions are whether:

1. BOE members may take a public position at a duly convened public meeting favoring or opposing state constitutional amendments affecting the school system;
2. BOE members, in their official or private capacities, may advocate for the passage or defeat of proposed state constitutional amendments;
3. BOE superintendents, in their official or private capacities, may advocate for the passage or defeat of state constitutional amendments;
4. BOEs may form, join, or participate in an organization created for the purpose of advocating for the passage or defeat of proposed state constitutional amendments;
5. BOEs may use public funds to educate the public about the state constitutional amendments, and
6. BOEs may use public funds to advocate for the passage or defeat of the proposed state constitutional amendments.

Facts Relied Upon by the Commission

The Requester is a BOE member. He is also an official in a state-wide association whose mission relates to the public school system. BOEs are created by statute and are charged with the supervision and control of the public school system in their respective counties.¹ Two proposed amendments to the West Virginia Constitution will go before the voters of this State at the next general election. The approval or defeat of these proposed amendments may have significant impact on public education and may be controversial.

¹ See W. Va. Code § 18-5-1, et seq.

Adoption of the constitutional amendment proposed by [House Joint Resolution 102](#) would give the state Legislature greater authority over the rules and policies of the State Board of Education. The proposed Amendment is designated as the “Education Accountability Amendment.” The rules and policies of the State Board of Education in large part govern the ways and means by which county BOEs conduct the educational programs in their county and are binding upon county BOEs. The rules and policies of the State Board of Education do not, however, directly establish or impact salaries of BOE employees.

Adoption of the constitutional amendment proposed by [House Joint Resolution 3](#) would give the state Legislature authority to exempt personal property (machinery, equipment, and inventory) used for business activities and personal motor vehicle property taxes from ad valorem property taxes. It is designated as the “Property Tax Modernization Amendment.” A significant portion of the funding upon which county BOEs depend for operation of the school system is derived from such taxes. This constitutional amendment could potentially reduce a source of funding for county BOEs and, therefore, could impact the salaries of school personnel or the availability of jobs in the school systems.

The Requester states he and his fellow BOE members want to know whether they may, individually or collectively, state whether they support or oppose the passage of the amendments at a duly convened BOE meeting or memorialize their position by passing a resolution or related measure on the issue. Similarly, the Requester seeks guidance on the Superintendent voicing his or her position, in his or her public or private capacity and on other matters relating to the use of public funds for educational or advocacy purposes.

Provisions Relied Upon by the Commission

W. Va. Code § 6B-1-3(k) provides:

“Public official” means any person who is elected to, appointed to, or given the authority to act in any state, county, or municipal office or position, whether compensated or not

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

(b) Use of public office for private gain. — (1) 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 Commission must determine whether BOE members and BOE superintendents may advocate for the passage or defeat of two state constitutional amendments under various circumstances and take other actions relating to the amendments. In order to examine each of the Requester's questions, the Ethics Commission will first look to prior Advisory Opinions for guidance.

Overview of Prior Advisory Opinions Addressing Advocacy or Education for Levies

The Ethics Act, at W. Va. Code § 6B-2-5(b), provides that a public official may not use the power or prestige of his or her office for the private gain of him or herself or for the private gain of another. The Ethics Commission analyzed the application of the private gain provision in two prior Opinions involving levies.

In [Advisory Opinion 2010-23](#), a BOE member asked if the Ethics Act prohibited the BOE from using public resources to support the passage of a school levy. The primary financial beneficiaries of that particular levy were the employees of the school system. The Commission determined that the nexus between the passage of the levy and BOE employees' salaries triggered the private gain restrictions in the Ethics Act at W. Va. Code § 6B-2-5(b). Accordingly, the Commission held "that public resources, including personnel, may not be used to promote the passage of an excess levy wherein school personnel are the primary beneficiaries."

The Ethics Commission held, however, that the Superintendent may advocate for the passage of the levy. The Opinion states that a superintendent is "the appointed voice of the County BOE" and that the act of speaking out about the levy "constitutes the 'performance of usual and customary duties associated with the . . . position' [as] permitted by the Ethics Act."

The Commission recognized the possibility in Advisory Opinion 2010-23 that not all matters relating to the use of public funds to advocate for levies would necessarily be a matter governed by the Ethics Act. The Commission stated as follows:

Although the facts [of Advisory Opinion 2010-23] fall within the parameters of the Ethics Act's prohibition against the use of public office for private gain due to the direct connection between the passage of the levy and financial gain to school employees, that connection in other elections is not so obvious. For example, a levy may have as its sole purpose authorizing the construction of a new school, or there could be a municipal election for a more general ballot measure. One cannot definitively identify private beneficiaries of a favorable outcome on any such election.

Thus, the broader question presented is whether public resources may be used to promote such a levy without violating the Ethics Act. In the absence of a direct financial benefit to school employees, then it is more difficult to establish the existence of private gain. As a result, this issue falls outside the purview of the Ethics Act. Instead, other laws and policy determinations govern this matter. The Ethics Commission has limited jurisdiction: to interpret the Ethics Act. Should the Requester desire a more definitive ruling on his more general question regarding the use of public resources to promote a levy, the Commission recommends that he consult with the West Virginia State Auditor's Office, the State Department of Education, the West Virginia's Secretary of State's Office, the Office of the Attorney General, and/or the Legislature.

In [Advisory Opinion 2012-22](#), the Commission held that an ambulance authority may not use public resources in support of its levy because of the financial benefit that the passage of the levy would provide to employees of an ambulance authority. The Commission held, however, that certain activities by public servants relating to levies were permissible:

- The Executive Director or Board Members, or both, may speak out in favor of the levy at Board meetings and in other public forums.
- The Agency may use public funds to educate the public about the levy process, the nature of the services provided by the agency, and the purpose for which the levy funds will be used. The agency may not, in advertisements paid for with public funds, advocate for the passage of the levy. The advertisements may, however, state – “We urge you to vote on this issue” (or words to that effect).
- Neither the Executive Director nor Board Members may require nor pressure agency staff to support the levy. If staff members volunteer their time, they must perform their campaign activities on their own time, not during their public work hours. Additionally, they may not use public resources in furtherance of the campaign.

Advisory Opinion 2012-22 at p. 2.

The Ethics Commission will now address each of the Requester's questions based on its prior holdings and the plain language of the Ethics Act.

1) May BOE members take a public position at a duly convened public meeting favoring or opposing state constitutional amendments affecting the school system?

The Ethics Commission finds, based upon its holdings in Advisory Opinions 2010-23 and 2012-22, that BOE members may state their positions on or advocate for the passage or defeat of the proposed state constitutional amendments at

public BOE meetings.² The BOE members may orally state their opinions or pass resolutions or similar measures memorializing their positions.

The Ethics Commission recognizes that the use of the BOE meeting time and room to formally debate and announce the BOE's position on the passage or defeat of the constitutional amendments involves the use of public resources. Nevertheless, the Ethics Commission finds that it is normal and customary for a BOE or its members to express their opinion on whether they support or oppose constitutional amendments affecting the county school system. Moreover, in this circumstance, the Commission finds that voicing an opinion during a public meeting constitutes a de minimis use of resources.

2) May BOE members, in their official or private capacities, advocate for the passage or defeat of proposed state constitutional amendments?

Generally, the Ethics Act does not govern the political speech of public officials in their official or private capacities.

The Ethics Commission finds that BOE members may, in their official or private capacities, advocate for or against proposed state constitutional amendments. Further, per the holdings in Advisory Opinions 2012-22, 2010-23, and [2012-15](#), they may also use their official public title when advocating for or against the passage of the Constitutional Amendments.

3) May BOE superintendents, in their official or private capacities, advocate for the passage or defeat of state constitutional amendments?

The Ethics Commission previously ruled in Advisory Opinion 2010-23 that the county superintendent is the "appointed voice of the County BOE." Accordingly, his or her advocacy on an issue related to the welfare of the county school system constitutes the "performance of usual and customary duties associated with the position," which is clearly permitted by the Ethics Act.

The Ethics Commission finds that a county BOE superintendent may take a public position in his or her official or private capacity favoring or opposing proposed state constitutional amendments affecting the school system.

4) May a county BOE form, join, or participate in an organization created for the purpose of advocating for the passage or defeat of proposed state constitutional amendments?

The question of what organizations a BOE may form, join, or participate in are normally matters outside the parameters of the Ethics Act. A BOE and other public agencies must instead determine whether they have statutory authority to form or join an organization or to expend funds for a particular purpose. Moreover, if only a de minimis

² Likewise, they may speak out on the issue outside of public meetings.

amount of public resources are used, then it falls within the de minimis exception in the private gain provision of the Act and is permissible under the Ethics Act.³

If more than a de minimis amount of BOE resources are used to form, join, or participate in an organization created to advocate for the passage or defeat of proposed state constitutional amendments, then the Ethics Act's restrictions apply.

The Ethics Commission has previously ruled that it does not violate the Ethics Act to use public resources to advocate for or against the passage of a levy, if the passage of the levy does not directly impact salaries. Advisory Opinions 2010-23 and 2012-22.

If the passage or defeat of a constitutional amendment directly affects salaries, then the restrictions established in the levy Advisory Opinions apply. There will be two constitutional amendments on the ballot. The Commission will examine each to determine whether it violates the Ethics Act to use public funds to advocate for the passage or defeat of each.

a) "Education Accountability Amendment."

The proposed Constitutional Amendment gives the state Legislature authority over the rules and policies of the State Board of Education. The rules and policies of the State Board of Education in large part govern the ways and means by which county BOEs conduct educational programs, but these rules and policies do not establish the salaries of BOE personnel.

The Ethics Commission finds that for purposes of analyzing the Ethics Act, the Education Accountability Amendment does not directly impact BOE employee salaries. The Ethics Commission finds, therefore, that it does not violate the Ethics Act to use public funds to form, join, or participate in an advocacy group on this issue.

b) "Property Tax Modernization Amendment."

Although the Education Accountability Amendment relates to the authority to make education policy and there appears to be no discernible private gain to the members of the county BOES or their employees, that is not necessarily true for the Property Tax Modernization Amendment which potentially alters the funding source for county BOEs. This constitutional amendment could potentially reduce a source of funding for county BOEs and, therefore, could impact the salaries of school personnel or the availability of jobs in the school system. The Ethics Commission finds that the financial interest of the BOE employees in the fate of the amendment triggers the private gain restrictions under the Ethics Act. Hence, the restrictions against using public funds to advocate for the passage of a matter affecting the salaries of public employees' salaries apply.

³ The Ethics Act contains a de minimis exception which states: "[R]esources 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 Ethics Commission finds that a BOE may not use public resources to form, join, or participate in an advocacy group for or against the Property Tax Modernization Amendment.

5) May a county BOE use public funds to educate the public about the state constitutional amendments?

Based upon Advisory Opinions 2010-23 and 2012-22, the Ethics Commission holds that BOEs may use public funds and resources to educate the public about the Amendments.

6) May county BOEs use public funds to advocate for the passage or defeat of the proposed state constitutional amendments?

The same analysis applies to this question as to the permissibility of using BOE resources to form, join, or participate in an advocacy group.

The Ethics Commission finds that BOEs may, under the Ethics Act, use public resources to advocate for the passage or defeat of the “Education Accountability Amendment” because it does not directly affect the salaries of BOE employees.

The Ethics Commission finds that BOEs may not, under the Ethics Act, use public resources to advocate for the passage or defeat of the “Property Tax Modernization Amendment” because this Amendment implicates the private gain restrictions in the Ethics Act because it potentially impacts the salaries of BOE employees.⁴

Conclusion

The Ethics Commission has based its ruling on the plain language in the Ethics Act and its prior Advisory Opinions. Whether BOEs should use public resources to educate the public about constitutional amendments affecting county school systems or to advocate for or against the passage of constitutional amendments also involves policy questions outside the jurisdiction of the Ethics Commission. Further, any public agency seeking to

⁴ The Commission would note that a “board of education of a [county] is a corporation created by statute with functions of a public nature expressly given, and no other. It can exercise only such power as is expressly conferred or fairly arises by necessary implication, and only in the mode prescribed or authorized by the statute. *City of Bluefield v. Taylor*, 365 S.E.2d 51, 179 W. Va. 6 (1987) . See also *Napier v. Lincoln County Bd. of Educ.*, 551 S.E.2d 362, 209 W. Va. 719 (2001). A determination of whether a county board of education is authorized to expend public resources in support or opposition of a constitutional amendment by W. Va. Code §§ 18-5-5, 18-5-13 or any other statute other than the W. Va. Ethics Act, exceeds the authority of the W. Va. Ethics Commission. For a sobering look at the consequences of unauthorized expenditure of funds see *Smith v. Dorsey*, 599 So.2d 529 (MS 1992).

extend public funds must ensure that there is a law authorizing it to spend funds for the stated purpose. [Advisory Opinion 2018-02](#).⁵

Other states have addressed the questions at issue in this Advisory Opinion through legislation. The state of Ohio prohibits political subdivisions from expending funds to support or oppose the nomination or election of a public official or passage of a bond or levy. Ohio law also forbids political subdivisions from compensating their employees for time spent in political activities.⁶ Similarly, the State of Washington also forbids the use of facilities and other resources for such advocacy, though it specifically permits making statements or passing resolutions at meetings.⁷

Other laws and regulations, such as W. Va. Code §§ 18-5-1a(a)(3) and (4), may govern or restrict the political activities of BOE members. The Ethics Commission does not have jurisdiction to issue Advisory Opinions applying those provisions to a proposed course of action.⁸ The Ethics Commission's limited power to interpret W. Va. Code § 18-5-1a relates to determining whether an elected position held or sought would bar a BOE member from continuing to serve on a BOE. W. Va. Code §§ 18-5-1a(b).

A summary of the material holdings are:

BOE members and superintendents may advocate for the passage or defeat of proposed state constitutional amendments during a public board of education meeting;

BOE members and superintendents may, in their official or private capacities, advocate for the passage or defeat of proposed state constitutional amendments;

BOEs may, under the Ethics Act, use public resources to advocate for the passage or defeat of the “Education Accountability Amendment” because it does not directly affect the salaries of BOE employees.

BOEs may not, under the Ethics Act, use public resources to advocate for the passage or defeat of the “Property Tax Modernization Amendment” because this

⁵ The Commission notes that a “board of education of a [county] is a corporation created by statute with functions of a public nature expressly given, and no other. It can exercise only such power as is expressly conferred or fairly arises by necessary implication, and only in the mode prescribed or authorized by the statute. *City of Bluefield v. Taylor*, 365 S.E.2d 51, 179 W.Va. 6 (W. Va. 1987). See also *Napier v. Lincoln County Bd. of Educ.*, 551 S.E.2d 362, 209 W.Va. 719 (W. Va. 2001). The powers of BOEs granted by the Legislature are enumerated, in part, in W. Va. Code §§ 18-5-5 and 18-5-13, but the Ethics Commission lacks authority to determine if these Code provisions authorize BOEs to join political organizations or expend public funds on matters relating to ballot issues. For a sobering look at the consequences of unauthorized expenditure of funds see *Smith v. Dorsey*, 599 So.2d 529 (MS 1992)(finding that board members may be held personally liable for expenditure of board of education funds without statutory authority.)

⁶ Ohio Revised Code § 9.03

⁷ Revised Code of Washington § 42.17A.555

⁸ See [School Board Advisory Opinion 2022-01](#).

Amendment implicates the private gain restrictions in the Ethics Act because it potentially impacts the salaries of BOE employees.

BOEs may use public funds to educate the public about either the “Education Accountability Amendment” or the “Property Tax Modernization Amendment.”

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 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