



State of West Virginia
Office of the Attorney General

Patrick Morrissey
Attorney General

(304) 558-2021
Fax (304) 558-0140

June 6, 2018

Honorable Thomas J. Smith
Secretary of Transportation/
Commissioner of Highways
State Capitol Complex
Building 5, Room 110
Charleston, WV 25305

Dear Secretary Smith:

You have asked for an Opinion of the Attorney General about whether an individual employed by the Division of Highways (“DOH”) may also serve as a member of the Public Employees Insurance Agency (“PEIA”) Finance Board. This Opinion is being issued pursuant to West Virginia Code § 5-3-1, which provides that the Attorney General “shall give written opinions and advice upon questions of law . . . whenever required to do so, in writing, by . . . the commissioner of the division of highways” To the extent this Opinion relies on facts, it is based solely on the factual assertions provided in your correspondence with the Office of the Attorney General.

West Virginia Code Section 17-2A-5 governs eligibility for employment with DOH, providing that no one who “holds any public office” may be employed by DOH “in any . . . capacity.” Section 17-2A-5 further provides that in the event a DOH employee does “hold[] any public office,” that individual’s “position as employee . . . shall be immediately vacated.” You ask whether membership on the PEIA Finance Board—specifically, the position representing public employees established by West Virginia Code Section 5-16-4(b)(1)(B) (“public-employee representative”)—triggers Section 17-2A-5’s disqualification provision.

Your letter raises the following legal question:

Is the position on the PEIA Finance Board described in Section 5-16-4(b)(1)(B) a public office, such that an individual serving in this position is ineligible to become or remain employed by the Division of Highways?

For the reasons discussed below, we conclude that it is. Accordingly, an individual cannot become or remain employed by DOH while serving as the public-employee representative on the PEIA Finance Board.

Discussion

The West Virginia Supreme Court of Appeals has long characterized the question of whether a specific government position qualifies as a public office to be “simple but difficult.” *Hartigan v. Bd. of Regents of W. Va. Univ.*, 49 W. Va. 14, 38 S.E. 698, 701 (1901). The inquiry is fact-bound and statute-specific. See *City of Bridgeport v. Matheny*, 223 W. Va. 445, 449, 675 S.E.2d 921, 925 (2009) (“whether a position is a public office . . . may differ in accordance with the statutory or constitutional provisions under which a given position is being examined”); *State ex rel. Crosier v. Callaghan*, 160 W. Va. 353, 357, 236 S.E.2d 321, 324 (1977). Indeed, even when a position qualifies as a public office for purposes of one statutory or constitutional provision, the same may not be true for purposes of another. Compare Syl. pt. 2, *Carr v. Lambert*, 179 W. Va. 277, 367 S.E.2d 225 (1988) (partial overruling noted by *State ex rel. Riley v. Rudloff*, 212 W. Va. 767, 772, 575 S.E.2d 377, 382 (2002)) (assistant prosecuting attorney holds an “appointed public office” for purposes of eligibility requirements for county board of education), with Syl. pt. 4, *State v. Macri*, 199 W. Va. 696, 487 S.E.2d 891 (1996) (assistant prosecuting attorney is not a public officer for purposes of the citizenship requirement set forth in Article IV, § 4 of the West Virginia Constitution).

In *State ex rel. Carson v. Wood*, 154 W. Va. 397, 175 S.E.2d 482 (1970), the Supreme Court of Appeals set forth a five-factor framework to determine whether a position qualifies as a public office. The “criteria” underpinning these factors were first enunciated in a 1933 Attorney General Opinion, see *Carson*, 154 W. Va. at 411, 175 S.E.2d at 491 (quoting 35 W. Va. Op. Atty. Gen. 252, 1933 WL 29853 (July 27, 1933)), which, in turn, synthesized and elaborated on principles discussed in the Court’s 1923 decision in *State ex rel. Key v. Bond*, 94 W. Va. 255, 118 S.E. 276, 279 (1923). The *Carson* framework still guides this inquiry today. See *Cales v. Town of Meadow Bridge*, 239 W. Va. 288, 296, 800 S.E.2d 874, 882 (2017).

The five *Carson* factors are whether:

- 1) the position was created by law;
- 2) the position is designated as an office;
- 3) the qualifications for holding the position are set forth in the statute or other law establishing the position;
- 4) the duties, tenure, salary, bond, and oath of the position are prescribed or required; and
- 5) occupying the position makes one a representative of the sovereign.

Carson, 154 W. Va. at 411, 175 S.E.2d at 491. The 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”).

Factors one, three, and four are readily satisfied here. For factor one, members of the PEIA Finance Board generally—and the member who shall “represent the interests of public employees” specifically—fill positions expressly created by the Legislature. W. Va. Code § 5-16-4(a), (b)(1)(B). The third factor is satisfied because the statute establishing the PEIA Finance Board articulates specific qualifications for appointment. All members must be residents of West Virginia and may not be registered lobbyists, for example. *Id.* § 5-16-4(b)(2)-(3). The public-employee representative must additionally have been employed by a public body for three years prior to appointment, and must remain employed by a public body throughout his or her tenure. *Id.* § 5-16-4(b)(1)(B). As to the fourth factor, the statute expressly describes members’ duties and sets their tenure and compensation. *E.g.*, W. Va. Code § 5-16-5 (articulating the PEIA Finance Board’s “purpose, powers and duties”); *id.* § 5-16-4(a) (members are appointed for “terms of four years” but may serve until their successor is “appointed and qualified”); *id.* § 5-16-4(c) (members shall receive “the same compensation and expense reimbursement that is paid to members of the Legislature for their interim duties for each day or portion of a day engaged in the discharge of official duties”). It also appears that, although not statutorily required, PEIA Finance Board members execute a written oath kept on file with the Secretary of State. *See, e.g.*, Sept. 14, 2017 Oath of Finance Board Member Jason L. Myers, available at <http://apps.sos.wv.gov/adlaw/executivejournal/readpdf.aspx?DocId=85956>.

The second factor—whether the Legislature expressly designated the position as an office—is less clear-cut. The existence of this factor can be significant: in *Fraley v. Civil Service Commission*, for example, the Court held that a county coroner occupies public office despite the absence of other *Carson* factors where the authorizing statute provided that a coroner “shall hold his office during the pleasure of [the] commission.” 177 W. Va. 729, 733, 356 S.E.2d 483, 487 (1987) (citing W. Va. Code § 61-12-14 (1984)). The statute here is not so direct. The closest it comes to designating PEIA Finance Board members as officers is a provision stating that “no member may be removed *from office* by the Governor except for official misconduct, incompetence, neglect of duty, neglect of fiduciary duty or other specific responsibility imposed by this article or gross immorality” W. Va. Code § 5-15-4(b)(3) (emphasis added).

In *City of Bridgeport*, the Supreme Court of Appeals analyzed a similar provision. There, the Court explained that although the statute describing a police officer’s position contained “no specific designation . . . regarding whether police officers hold ‘office,’” it did provide for “a police officer’s removal from office for the failure to discharge any of the duties set forth in the statutory provision.” 223 W. Va. at 449, 675 S.E.2d at 925 (citing W. Va. Code § 8-14-3). Nevertheless, the Court stopped short of holding whether such language satisfies the second *Carson* factor; it based its decision instead on the presence of the remaining four factors and reiterated that there need not “be positive proof supportive of an ‘office’ as to all the various criteria.” *Id.* at 449-50, 675 S.E.2d at 925-26. The discussion in Section 5-15-4 about removal “from office” thus makes it likely—but not certain—that the second *Carson* factor is satisfied here.

The fifth factor is likely not satisfied. This factor asks whether occupying the position makes an individual a representative of the sovereign. The parameters of this factor depend on the degree of independent authority the position conveys. In *Key*, the Court held that the

Secretary of State’s “chief clerk” was not a public officer in part because she “exercise[d] no independent power or authority,” as illustrated by her lack of “authority to represent and bind the state in contractual relations with third persons.” 94 W. Va. 255, 118 S.E. at 280. This concept of power to bind the State appears again in *Cales*, which held that the fifth *Carson* factor was not satisfied where a member of a municipal sanitary board could not “bind or obligate” the town council that created the position. 239 W. Va. at 298, 800 S.E.2d at 884. Other cases describe this factor by considering whether the position is “subject to the supervision and policy direction” of other officials, *Christopher v. City of Fairmont*, 167 W. Va. 710, 714, 280 S.E.2d 284, 286 (1981), or whether it involves authority “regarding the enforcement of the laws of this State,” *City of Bridgeport*, 223 W. Va. at 450, 675 S.E.2d at 926.

The public-employee representative position likely does not meet the fifth *Carson* factor. On the one hand, the PEIA Finance Board is authorized to enter into binding contractual relationships with at least one party. W. Va. Code § 5-16-5(b) (requiring board to retain an actuary). Yet it does not appear that board members possess power more generally to “bind or obligate” the State. On the contrary, the vast majority of the Finance Board’s role is advisory—its proposals are submitted to and must ultimately be approved by the Governor and Legislature. See, e.g., *id.* § 5-16-5(b), (f). Without authority to enforce the laws or to promulgate policy absent prior approval from the executive and legislative branches, the fifth *Carson* factor is very likely not satisfied.

In sum, three or four of the *Carson* factors are satisfied here, and one is not. Although this issue poses a close question, we conclude that a court would likely find that the public-employee representative position is a public office.

To be sure, early cases described the missing fifth factor as “[t]he most important characteristic which distinguishes an office from an employment.” *Hartigan*, 49 W. Va. 14, 38 S.E. at 701 (internal quotation marks omitted). *Hartigan*, however, was decided over a century ago; in *Carson* and in cases since, our high court has emphasized that no one factor is dispositive. See, e.g., *City of Bridgeport*, 223 W. Va. at 449, 675 S.E.2d at 925; *Carson*, 154 W. Va. at 411, 175 S.E.2d at 491. This conclusion is also consistent with a 1961 Attorney General opinion addressing an almost identical question about which positions implicate Section 17-2A-5’s “public office” disqualification. Relying on the more restrictive, earlier precedents—that is, without the benefit of *Carson* and more recent cases—that opinion concluded that “any member of the state board of education or any other state board” “clearly” holds public office. 49 W. Va. Op. Atty. Gen. 249, 1961 WL 64759 (1961) (emphasis added). Accordingly, it concluded that members of state boards “are excluded from accepting employment with the State Road Commission”—the statutory predecessor to DOH, see W. Va. Code § 17-2A-1—“in any capacity.”

A recent opinion from this Office further supports this analysis. There, we explained that the Court’s opinion in *Cales* “suggests that . . . members of governmental boards a[re] either officers or employees.” W. Va. Op. Atty. Gen., 2017 WL 3224718, at *2 (July 18, 2017). With this officer-employee dichotomy in mind, the statutory provision making PEIA Finance Board members removable only for cause, W. Va. Code § 5-16-4(b)(3), suggests that the Legislature

intended to place board members on the officer side of this line. Typically, “members of boards” are exempt from the heightened job-security provisions in the civil service statutes, and thus are akin to at-will employees. *See* W. Va. Code § 29-6-4(c)(5); *see also* *Roach v. Reg’l Jail Auth.*, 198 W. Va. 694, 699, 482 S.E.2d 679, 684 (1996) (“Employees holding positions *statutorily exempt* from coverage under the classified service, such as the Appellant, are deemed ‘at-will’ employees” (emphasis in original)). By limiting the situations in which PEIA Finance Board members may be removed, the Legislature could be viewed as choosing to shift the balance away from this default, employee-like status. Combined with the analysis above, this indicia of legislative intent further supports our conclusion that the public-employee representative position is a public office for purposes of Section 17-2A-5.

Finally, because the public-employee representative occupies public office, it follows that an individual serving in this capacity may not be employed by DOH. The text of Section 17-2A-5 is plain: “[N]o person may be . . . employed in any . . . capacity or employment by [DOH] when he . . . holds any public office.” The statute provides no exceptions, and the Supreme Court of Appeals confirmed this straightforward reading in *Fraley*. 177 W. Va. at 734, 356 S.E.2d at 488 (“Under West Virginia Code § 17-2A-5, a person who holds public office shall not be employed by the Department of Highways.”). Further, the statute provides that if a DOH employee should “become[] a candidate for or hold[] any public office,” that employee’s position “shall be immediately vacated.” W. Va. Code § 17-2A-5. Thus, an individual may not serve as the public-employee representative on the PEIA Finance Board while becoming or remaining employed by DOH.

Sincerely,



Patrick Morrissey
Attorney General

Lindsay See
Solicitor General

Zachary Aaron Viglianco
Assistant Attorney General