



State of West Virginia
Office of the Attorney General

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July 18, 2017

Honorable Pat Lefebure
Wood County Prosecuting Attorney
Donald F. Black Courthouse Annex
317 Market Street
Parkersburg, WV 26101

Dear Prosecutor Lefebure:

You have asked for an Opinion of the Attorney General concerning the scope and applicability of West Virginia Code § 8-33-3, which governs, *inter alia*, the membership of municipal and county building commissions. This Opinion is being issued pursuant to West Virginia Code § 5-3-2, which provides that the Attorney General may “consult with and advise the several prosecuting attorneys in matters relating to the official duties of their office” To the extent this Opinion relies on facts, it is based upon the factual assertions set forth in your correspondence with the Office of the Attorney General.

In your letter, you ask about the effect of a prohibition in West Virginia Code § 8-33-3 on the current members of the Wood County Building Commission. That provision states, in pertinent part, that “no member of [a building commission] shall hold any office (other than the office of notary public) or employment under the United States of America, the state of West Virginia, any county or political subdivision thereof, or any political party.” You explain that the three current members of the Wood County Building Commission are “members of other boards,” including the “Parkersburg Planning Commission, [the] Wood County Sheriff’s Civil Service Commission, [the] Wood County Recreation Commission, and the West Virginia Industrial Council.”

Your letter raises the following legal question:

Does West Virginia Code § 8-33-3 prevent the identified individuals, who serve on other State, county, or municipal boards, from serving as members of a building commission?

We conclude that West Virginia Code § 8-33-3 prohibits the identified individuals from serving as members of the Wood County Building Commission. Under the plain statutory language, an individual cannot serve on a building commission if he or she either serves as a government employee or holds a federal, state, or local office (other than notary public). Notably, this prohibition sweeps more broadly than similar statutory prohibitions considered in previous Supreme Court of Appeals cases, in which individuals were barred from serving on certain boards if they otherwise occupied public office. *See, e.g., City of Bridgeport v. Matheny*, 223 W. Va. 445, 675 S.E.2d 925 (2009); *Carr v. Lambert*, 179 W. Va. 277, 367 S.E.2d 225 (1988). We believe the high court would find the language of West Virginia Code § 8-33-3, which includes *both* public office *and* employment, to clearly cover the identified individuals.

We are guided by a recent case addressing the status of an individual on a municipal board. In *Cales v. Town of Meadow Bridge*, --- S.E.2d ---, 2017 WL 2415300 (May 30, 2017), the Court considered whether a member of a municipal sanitary board is a public officer for purposes of the procedural protections against removal set forth in West Virginia Code § 6-6-7. Applying a multi-factor test from *State ex rel. Carson v. Wood*, 154 W. Va. 397, 175 S.E.2d 482 (1970), “for determining whether a position is an office or mere employment,” the Court found that the petitioner “fell short of establishing that the position was an ‘office.’” *Cales*, 2017 WL 2415300, at *8. Among other points, the Court stressed that being a member of the sanitary board did not make the petitioner “a representative of the sovereign.” *Id.* at *10.

This recent case suggests that the Supreme Court of Appeals views members of governmental boards as either officers or employees. That is the binary question that *Carson* answers. As the court explained, the *Carson* case “recognized that there is a legal distinction between a ‘public officer’ and a ‘public employee,’” and “announced [a] test for determining whether a position is an office or a mere employment.” *Cales*, 2017 WL 2415300, at *8; *see also Carson*, 154 W. Va. at 410-11, 175 S.E.2d at 490-91 (setting forth “the criteria to be considered in determining whether a position is an office or a mere employment”). So in choosing to apply the *Carson* test to discern the status of the board member in *Cales*, the Supreme Court of Appeals appears to have determined that individuals serving on a State, county, or municipal board fall into one of two categories: public officers or public employees.

For the purpose of this Opinion, this lesson from *Cales* is largely dispositive. According to your letter, all three identified individuals are “members of other boards.” And if members of a governmental board are either officers or employees, then all three individuals fall within the prohibitory language of West Virginia Code § 8-33-3. Because the prohibition broadly covers both public officers and public employees, it is irrelevant how exactly the *Carson* analysis would come out. It is sufficient that the reasoning in *Cales* suggests the Supreme Court of Appeals would find these individuals to fall within one category or the other.

This conclusion is bolstered by the fact that the individuals, as members of the identified boards, appear clearly not to be public agents or independent contractors. The Supreme Court of Appeals has suggested that state actors can fall into four categories: officials, agents, employees, and independent contractors. *Cf. Syl., Brady v. Smith*, 139 W. Va. 259, 79 S.E.2d 851 (1954) (noting that the State Road Commissioner can act “through his officers, agents and employees, or

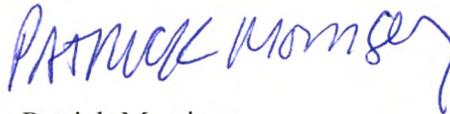
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through the instrumentality of an independent contractor”). The identified individuals do not appear to be agents, because agents have only “temporary” and “intermittent” duties, *see* Syl., *State ex rel. Key v. Bond*, 94 W. Va. 255, 118 S.E. 276 (1923), whereas all the identified boards have fixed tenures and ongoing duties, *see* W. Va. Code §§ 8A-2-3, -11 (planning commission); W. Va. Code §§ 7-14-3, -6 (sheriff’s civil service commission); W. Va. Code §§ 7-11-2, -3 (recreation commission); W. Va. Code § 23-2C-5 (West Virginia Industrial Council). Nor is it plausible to suggest that members of a governmental board constitute independent contractors not subject to government control. That leaves two possible categories—officials or employees—which, again, are both covered by the broad prohibition set forth in West Virginia Code § 8-33-3.

Sincerely,



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