State of West Virginia
Office of the Attorney General

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The Honorable Ralph A. Lorenzetti Jr.
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Dear Prosecutor Lorenzetti:

You have asked for an Opinion of the Attorney General about several requirements and procedures pertinent to the appointment of a new county commissioner after one has resigned. 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 solely on the factual assertions set forth in your correspondence with the Office of Attorney General. The questions you asked in the letter have been narrowed by further discussions with your office.

In your letter, you explain that a member of the five-member Jefferson County Commission has resigned. The resignation was tendered late in the day on June 29, 2016, and was accepted by the remaining four Commissioners at a regular meeting of the Commission on June 30, 2016. The Commissioner who resigned was a Republican, and his seat was up for re-election in 2020.

Your letter raises a number of legal issues, which are addressed in turn below:

(1) Is there a legal prohibition against someone switching parties in order to be considered for appointment to the vacated seat on the Commission? If there is no such prohibition, is there a cutoff date after which a person may not switch parties for the purposes of the appointment?

(2) When is the effective date of the resigning Commissioner's resignation for purposes of starting the thirty-day clock for appointments by the Commission?

(3) Must the newly appointed Commissioner be from the same magisterial district as the resigning Commissioner?

(4) When will the newly appointed Commissioner's term end?

Question One: Is there a legal prohibition against someone switching parties in order to be considered for appointment to the vacated seat on the Commission? If there is no such prohibition, is there a cutoff date after which a person may not switch parties for the purposes of the appointment?

The West Virginia Legislature has specifically addressed the issue of individuals switching political parties in order to be eligible for *election* to a seat on a county commission. West Virginia Code § 3-5-7 requires candidates running for election to submit a form, affirming information about their candidacy, to the clerk of the county commission. Information required on this form includes a statement that the candidate has not recently switched political parties:

> For partisan elections, the name of the candidate's political party and a statement that the candidate: (A) Is a member of and affiliated with that political party as evidenced by the candidate's current registration as a voter affiliated with that party; and (B) has not been registered as a voter affiliated with any other political party for a period of sixty days before the date of filing the announcement.

W. Va. Code § 3-5-7. The West Virginia Supreme Court of Appeals has upheld this statute, finding that it was "necessary to accomplish the compelling governmental interest in preserving the integrity of the political process, promoting party stability, and avoiding voter confusion." Syl. Pt. 4, *State ex rel Billing v. City of Point Pleasant*, 194 W. Va. 301, 460 S.E. 2d 436 (1995).

The Legislature has not, however, adopted a similar statute applicable to the *appointments* process. For "[a]ny vacancy in the office of county commissioner," West Virginia Code § 3-10-7(a) provides that "[p]ersons appointed shall be of the same political party as the officeholder vacating the office." Unlike in West Virginia Code § 3-5-7, there is no further requirement or statement regarding the appointed person's political party registration. Accordingly, we believe the best answer is that there is no legal prohibition on switching parties for purposes of *appointment* to a county commission. It is a long-standing canon of statutory construction that "[t]he Legislature is presumed to know existing laws relating to the same subject, and to understand the situation with which it undertakes to deal." *Harbert* v. *Harrison Cnty. Court*, 129 W. Va. 54, 75, 39 S.E.2d 177, 191 (1946). Sections 3-10-7 and 3-5-7 are contained within the same chapter of the West Virginia Code. We must give meaning to the fact that the Legislature included a prohibition against party-switching for purposes of *election* but not for purposes of *appointment*. *See State ex rel. Riffle v. Ranson*, 195 W. Va. 121, 128, 464 S.E.2d 763, 770 (1995) ("If the Legislature explicitly limits application of a doctrine or rule to one specific factual situation and omits to apply the doctrine to any other situation, courts should assume the omission was intentional"). This is consistent with a previous Opinion of this Office,

in which we found that a candidate could switch his party affiliation in order to be considered for a county sheriff position in Jefferson County. W. Va. Op. Att'y Gen., 2013 WL 1287949 (Mar. 4, 2013).

We also do not find in the law a cutoff date for a person switching parties for the purpose of appointment. The statute is silent on this point, and no case law speaks directly to this issue. Because the Legislature has not prescribed a cutoff date for individuals to switch parties to be considered for appointment, we see no basis for imposing one other than the practical limit that an individual must have switched parties before he or she is selected by the County Commission to fill the vacancy. Of course, as you note, the Commission is required by statute to fill the vacancy within thirty days. W. Va. Code § 3-10-7(a).

Question Two: When is the effective date of the resigning Commissioner's resignation for purposes of starting the thirty-day clock for appointments by the Commission?

To answer this question, we begin with the relevant statutory text. West Virginia Code § 3-10-7(a) provides that "[a]ny vacancy in the office of the county commissioner . . . shall be filled by the county commission of the county . . . . within thirty days of the date the vacancy first occurred." We are aware of no cases of the West Virginia Supreme Court of Appeals or opinions of this Office that have interpreted this provision with respect to the question you ask.

Our initial task thus is to "determine whether the language at issue is ambiguous." *Bd. of Trustees of Firemen's Pension & Relief Fund of City of Fairmont v. City of Fairmont*, 215 W. Va. 366, 370, 599 S.E.2d 789, 793 (2004); *see also State ex rel. Hall v. Schlaegel*, 202 W. Va. 93, 96, 502 S.E.2d 190, 193 (1998) ("As with all issues of statutory construction, we must first determine whether the language at issue presents any ambiguity."). That is true where a statutory provision "is susceptible of two *reasonable* constructions." *Firemen's Pension & Relief Fund*, 215 W. Va. at 370, 599 S.E.2d at 793 (emphasis added); *Lawson v. Cnty. Comm'n of Mercer Cnty.*, 199 W. Va. 77, 81, 483 S.E.2d 77, 81 (1996) (finding ambiguity where a "statute can be read by reasonable persons to have different meanings"). Thus, "'[m]ere informality in phraseology or clumsiness of expression does not make it ambiguous, if the language imports one meaning or intention with reasonable certainty.'" *Jessee v. Aycoth*, 202 W. Va. 215, 218, 503 S.E.2d 528, 531 (1998) (quoting Syl. Pt. 13, *State v. Harden*, 62 W. Va. 313, 58 S.E. 715 (1907)); *see also State v. Chapman*, No. 13-0111, 2013 WL 5676630, at *4 (W. Va. Oct. 18, 2013) ("[a] statute is not ambiguous simply because different interpretations are conceivable" (internal quotations omitted)).

As to the effective date for starting the thirty-day clock, we believe "the language imports one meaning or intention with reasonable certainty." *Jessee*, 202 W. Va. at 218, 503 S.E.2d at 531. Based on the ordinary understanding of the word "vacancy" and the Legislature's use of the phrase "first occurred," we believe that the thirty days should begin to run from the date the Commissioner tendered his resignation.

Under the ordinary meaning of the word "vacancy," we believe a vacancy occurs as soon as an individual formally submits his or her resignation from the office. According to Black's Law Dictionary, a vacancy is "[a]n unoccupied office. . . . [that] does not occur until the officer is officially removed." *Vacancy*, Black's Law Dictionary (10th ed. 2014). Because a Commissioner is elected to office by the voters—and not put in office by an individual, board, or commission that arguably could refuse his resignation—we believe that a Commissioner can "officially remove[]" him or herself from the office simply be tendering his or her resignation. In this case, therefore, the vacancy occurred for purposes of the thirty-day period as soon as the Commissioner submitted his letter. *Cf. State ex rel. Biafore v. Tomlin*, 236 W. Va. 528, 782 S.E.2d 223, 226 (2016) (noting that Senator's decision to resign effective January 3, 2016, "created the vacancy"). The Commission's decision to accept his resignation formally acknowledged his departure, but we do not believe it had any legal effect because we find no law that suggests the Commission could have refused his resignation.*

This understanding is bolstered by the statute's use of the phrase "first occurred." The provision requires not simply that the vacancy be filled within thirty days, but that it be filled "within thirty days of the date the vacancy *first occurred*." W. Va. Code § 3-10-7(a) (emphasis added). The inclusion of the word "first" compels the conclusion that if there were any doubt as to which of several events created the vacancy, the first of those should be considered to have created the vacancy and triggered the thirty day clock. Thus, while it is reasonable to suggest that the vacancy did not begin until a Commission accepts a resignation letter, we believe the statute makes clear that the vacancy began when the Commissioner submitted his resignation letter, as that is the date on which the vacancy "first occurred."

Question Three: Must the newly appointed Commissioner be from the same magisterial district as the resigning commissioner?

As you note, we have previously issued an Opinion stating that appointed county commissioners need not be from the same magisterial district as the resigning commissioner. W. Va. Att'y Gen. Op., 2013 WL 3790635 (May 20, 2013). In that Opinion, we explained that while *elected* county commissioners must come from different magisterial districts, *appointed* commissioners need not. Citing longstanding principles of statutory construction, we explained that "the conspicuous absence of any residency requirement for an appointed—rather than elected—county commissioner must be interpreted as an intentional omission" by the Legislature. *Id.* at *3. As there have been no major shifts in the law since the issuance of that letter, we affirm that opinion here.

* In contrast, until an amendment this year by the Legislature, a declared candidate for public office could not always unilaterally remove him or herself from the ballot. Prior to this year's amendment, if a successful primary election candidate wished to be removed from the general election ballot for "extenuating personal circumstances," he or she needed to apply in writing to the State Election Commission for permission to be removed from the ballot. *See State ex rel. McDavid v. Tenant*, No. 14-0939, 2014 WL 4922641 at *2 (Oct. 1, 2014). This year's amendment by the Legislature specifically removed that requirement, making it possible for a successful primary candidate to remove him or herself from the general election ballot without seeking permission. W. Va. Code § 3-5-19(a)(6).

Question Four: When will the newly appointed Commissioner's term end?

The Legislature has provided specific rules for determining the term of office for an appointed county commissioner. West Virginia Code § 3-10-1(b) provides generally that "[t]he term that [an] appointee holds [an] office shall depend on when the vacancy occurs," and sets forth certain principles. In turn, West Virginia Code § 3-10-7(d) provides the following exception for vacancies in the office of county commissioner:

> Section one of this article shall be followed with respect to any election needed to fill a vacancy, except that if the vacancy occurs after the primary cutoff date but not later than the general cutoff date, candidates to fill the vacancy shall be nominated by the county executive committee in the manner provided in section nineteen, article five of this chapter, as in the case of filling vacancies in nominations, and the names of the persons, so nominated and certified to the clerk of the county commission of the county, shall be placed upon the ballot to be voted at the next general election.

W. Va. Code § 3-10-7(d).

Whether to follow the provisions in West Virginia Code § 3-10-1 or West Virginia Code § 3-10-7(d) turns on the meaning of the terms "primary cutoff date" and "general cutoff date." The Code defines "general cutoff date" as "the eighty-fourth day before the general election that immediately precedes the general election where the office would be on the ballot for selection if there were not a vacancy." W. Va. Code § 3-10-1(a)(1). The "primary cutoff date" is defined as "the eighty-fourth day before the primary election that immediately precedes the general cutoff date."

Based on the facts you have provided, the provisions of West Virginia Code § 3-10-1 govern this circumstance. In your letter, you state that the now-vacant seat was originally filled in 2014 and, before its vacation, would have been up for re-election in 2020. Both the primary and general cutoff dates are thus in 2020, which means that the vacancy has occurred *before* the primary cutoff date and does not trigger the exception in West Virginia Code § 3-10-7(d).

Under West Virginia Code § 3-10-1, the appointed Commissioner must be replaced by an official selected through the primary and general elections in 2018. The statute provides that "[i]f the vacancy occurs on or before the primary cutoff date, then the office shall be filled at the following regular primary and subsequent general election pursuant to this article and the appointee shall hold the office until a qualified replacement is elected and certified at that general election." W. Va. Code § 3-10-1(b)(2). The next primary and general election will not occur until 2018. By statute, "the Governor, or other person granted authority by this article,

shall issue a proclamation stating that the office will appear on" the ballot for those elections. *Id.* § 3-10-1(c)(3). After the election is held, "[t]he elected replacement shall hold the office until the end of the original term of office" in January 2021. *Id.* § 3-10-1(b)(2).

Sincerely,

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Elbert Lin
Solicitor General