State of West Virginia
Office of the Attorney General

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April, 30, 2013

The Honorable Dwayne C. Vandevender
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Office of the Prosecuting Attorney of Webster County, West Virginia
137 South Main St.
Webster Springs, WV 26288

Dear Prosecutor Vandevender,

You have asked for an Opinion of the Attorney General pertaining to certain budget line items proposed by the Webster County Commission ("Commission"). 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." It is based on the factual assertions set forth in your letter dated March 26, 2013, to the Commission and your subsequent letter dated April 19, 2013, to the Attorney General's Office.

You state that you were asked by an unidentified elected official to give a legal opinion to the Commission regarding the necessity of two of its proposed expenditures: (1) providing $20,000 to the Webster County Health Department "in lieu of hiring a sanitarian"; and (2) paying for certain legal advertisements in two local papers, the Webster Echo and Webster Republican. In your letter dated March 26, 2013, you opined that under West Virginia law, the Commission is not obligated "to provide a local sanitarian or health inspector [or] to provide any specific or minimal amount of funding for the local Health Department." You further proposed that the $20,000 the Commission allocated to the Health Department be reduced to $1,000, and that the Commission seek a special levy at the next election to provide additional funding for the local Health Department. With respect to the necessity of placing certain legal advertisements in both papers, you observed that the Webster Echo and Webster Republican have the same owner and for two weeks were very similar in content. On this basis, you concluded that the papers cannot be considered "two qualified newspapers of opposite politics" under West Virginia law. You further advised that the Commission "may reduce any line items for such legal advertising by 50%."

Your letters raise a number of questions, each addressed in turn below:

(1) Is the Commission required to provide funding to the local Health Department for the hiring of a sanitarian or health inspector? (2) What amount of funding, if any, is the Commission required to give the local Health Department? (3) Are the Webster Echo and Webster Republican "two qualified newspapers of opposite politics" in the same publication area such that the Commission is obligated to place certain legal advertisements in both papers?

Question One: Is the Commission required to provide funding to the local Health Department for the hiring of a sanitarian or health inspector?

The West Virginia Code specifically provides that "[a] county commission *shall* create, establish and maintain a county board of health if no other local board of health organized under this article is established and responsible for public health in the service area." W. Va. Code § 16-2-3 (emphasis added). In the event that a board is created, Section 16-2-14 provides that the county commission "*shall* provide financial support for the operation of the local health department" and further provides that funds for this support "may" (1) be raised through the levying of a county tax, (2) come from the county's general funds, or (3) be paid from appropriations made for the department of health and human resources:

> The appointing authorities for the local boards of health *shall provide financial support* for the operation of the local health department. The county commission of any county or the governing body of any municipality in which a local board of health is established pursuant to the provisions of this article, or the county commission of any county or the governing body of any municipality who is a participating member of a combined local board of health *may levy a county or municipal tax* to provide funds for the local board of health: Provided, That the tax may not exceed three cents on each one hundred dollars of assessed evaluation of the taxable property in the levying county or municipality, according to the latest assessment.
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> The county commission of any county or the governing body of any municipality in which a local board of health is established pursuant to the provisions of this article, or the county commission of any county or the governing body of any municipality who is a participating member of a combined local board of healthy *may appropriate and spend money from the county or municipal general funds* for public health purposes and to pay the expenses of the operation of the local board of health services and facilities.
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> The commissioner and the secretary *may pay over and contribute to any board of health* created and

> maintained pursuant to the provisions of this article the sum or sums of money that may be available from funds included in *appropriations made for the department of health and human resources.* The commissioner may withhold all or part of any funds until a local board of health submits an acceptable plan to correct the deficiencies in the local board's program plan.

W. Va. Code § 16-2-14 (emphases added).

The statutes thus provide some express guidance regarding the Commission's obligations to the local Health Department. By using the word "shall," the statute requires a county commission to provide "financial support" to any local health board that it creates. *See State v. Allen*, 539 S.E.2d 87, 96 (W. Va. 1999) ("Generally, 'shall' commands a mandatory connotation and denotes that the described behavior is directory, rather than discretionary."). However, as reflected in the use of the word "may," a county commission retains some discretion with respect to the source of the funds used for this purpose. *See Frye v. Frye*, 619 S.E.2d 187, 194 (W. Va. 2005) (use of the word "may" in statute evidences legislature's discretionary intent).

But no statute speaks expressly to whether a county commission must provide funding to the local health board for the hiring of a sanitarian or health inspector. Although a county commission must provide "financial support" to any local health board that it creates, the West Virginia Code does not specify what the money must support or mandate a county commission's funding of specific positions within the local health board. Nor does the Code prohibit the funding of any specific positions.

In the absence of a specific directive regarding or prohibiting the funding of particular positions, the reasonable conclusion is that the Commission may in its discretion provide funding to the local Health Department for the hiring of a sanitarian or health inspector. The Legislature's general mandate that a county commission "financial[ly] support" a local health board cannot be said to impose a specific duty on the Commission to hire a sanitarian or health inspector. Nevertheless, assuming that the county commission obtains the funding from a proper source, as set forth in Section 16-2-14,[1] a county commission that wishes to provide financial support in the form of funding for a specific position within a local health board could permissibly do so.

Question Two: What amount of funding, if any, is the Commission required to provide to the local Health Department?

You opine in your March 26, 2013, letter that the Commission need not "provide any specific or minimal funding for the local Health Department." You have proposed that the Commission give $1,000 to the local Health Department so that it is "in compliance with the requirement to provide financial support."

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[1] To the extent your March 26, 2013, letter to the Commission suggests that the Commission is *required* to levy a tax to support the local Health Department, this suggestion conflicts with the plain language of West Virginia Code Section 16-2-14, which additionally permits the Commission to use the county's general funds to support the local Health Department.

There is no clear requirement that a county commission fund a local health board at any particular level. As discussed above, the West Virginia Code states only generally that a county commission must provide "financial support" to a local health board it created and does not identify a specific amount of funding necessary to meet that requirement. There are likewise no West Virginia judicial decisions addressing the sufficiency of the sum required from a county commission to comply with the statutory mandate of "financial support."

It is also apparent that the Legislature contemplated that a county commission would not necessarily be the sole source of funding for a local health board. Local health boards are expressly authorized by statute to accept State and federal funding. *See* W. Va. Code § 16-2-11(b)(4) (authorizing local health boards to accept money or property from "any federal, state or local governmental agency or from any private source"); *see also id.* § 16-2-14 (addressing "state funding"). Furthermore, the statute caps the amount of tax that a county may levy to support a local health board at 0.03% of the "assessed evaluation of the taxable property in the levying county." *Id.*

The Commission is obligated, however, to provide a minimal level of funding. Basic principles of statutory construction suggest that the support must be greater than a nominal sum. To allow a county commission to provide a local health board some nominal sum, such as $1.00, could hardly be considered "support" within the plain meaning of that word. *See State ex rel. Johnson v. Robinson*, 251 S.E.2d 505, 508 (W. Va. 1979) ("It is a well known rule of statutory construction that the Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning."). Such a reading would also be at odds with the instruction that a county commission "shall create, establish *and maintain* a county board of health if no other local health board" exists. W. Va. Code § 16-2-3 (emphasis added); *see Martin v. Randolph County Bd. of Educ.*, 465 S.E.2d 399, 414-15 (W. Va. 1995) ("[W]e have a deep reluctance to interpret a statutory provision so as to render superfluous other provisions of the same enactment.").

As presented, there are insufficient facts to reach an opinion as to whether the $1,000 that you propose the Commission allocate to the local health board falls within the acceptable range of financial support. The absence of any specific requirement suggests that the Legislature contemplated a case-by-case analysis. *See Harbert v. Harrison Cnty. Court*, 39 S.E.2d 177, 191 (W. Va. 1946) (Legislature is presumed "to understand the situation with which it undertakes to deal"). A more fulsome understanding of the circumstances in Webster County and the needs of the local Health Department are required to form an opinion.

Question Three: Are the Webster Echo and Webster Republican "two qualified newspapers of opposite politics" in the same publication area such that the Commission is obligated to place certain legal advertisements in both papers?

Background

West Virginia law requires the publication of certain legal advertisements in "two qualified newspapers of opposite politics published in the publication area" if two such newspapers exist:

> A Class I-0 legal advertisement shall be published one time, a Class II-0 legal advertisement shall be published once a week for two successive weeks, and a Class III-0 legal advertisement shall be published once a week for three successive weeks, *in two qualified newspapers of opposite politics published in the publication area;* or if two qualified newspapers of opposite politics are not published in the publication area or if two qualified newspapers of opposite politics published in the publication area will not publish the legal advertisement at the rates specified in section three of this article, the legal advertisement shall be published in one qualified newspaper published in the publication area[.]

W. Va. Code § 59-3-2(b) (emphasis added). As our Supreme Court of Appeals has recognized, the requirement that legal advertisements be made in papers of opposite politics flows from the Legislature's desire to have notices "reach the greatest number of people possible." *Wolfe v. Jackson County Court*, 193 S.E.2d 556, 557 (W. Va. 1937).

There are a number of requirements for a newspaper to be deemed "qualified" for purposes of accepting legal advertisements. It must be a paper: (1) bearing a title or name and consisting of not less than four pages without a cover; (2) being a newspaper to which the general public resorts for passing events of a political, religious, commercial and social nature, and for current happenings, announcements, miscellaneous reading matters, advertisements and other notices; (3) being issued regularly, that is, as frequently as once a week, for at least 50 weeks during the calendar year; (4) being published regularly for at least one year immediately prior to the date on which a legal advertisement is delivered for publication; (5) being generally circulated at a defined place within the publication area; and (6) giving basis for a reasonable belief that publication of a legal advertisement in that newspaper will give effective notice to the residents of the publication area. W. Va. Code § 59-3-1. The publisher of a qualified newspaper must annually file an affidavit with the Secretary of State that sets forth sufficient facts to demonstrate that the newspaper meets these criteria, as well as the average annual bona fide circulation of the newspaper. *Id.* § 59-3-3(d).

You have advised the Commission that you believe that the Webster Echo and Webster Republican are not "two qualified papers of opposite politics" and that it "may reduce [budget] line items for such legal advertising by 50% since we will now only be paying one fee." In support of these conclusions, you represent that: (a) in the two weeks of papers you reviewed, the content of the articles in the two newspapers was identical with the exception of the name on the front of the papers and "the last page of the second section"; (b) advertisements for both papers can be sent to the same

email address; (c) both papers are owned by the same company; (d) the papers are registered with West Virginia's Secretary of State at the same physical address; (e) you believe that both papers are published from the same location; (f) the papers are being mailed with the same bulk mailing address; and (g) the newspapers have the same writers with the assistant editor for one paper also serving as the editor for the other paper.

Although not recited in your letter, the Secretary of State lists the Webster Echo and Webster Republican as "qualified newspapers" for Webster County in a publicly available list of qualified newspapers. West Virginia Secretary of State, *List of Certified Newspapers 2012-2013*, available at http://www.sos.wv.gov/elections/Documents/Qualified%Newspapers/2012-2013.pdf (last visited April 30, 2013). This list further identifies the Webster Echo as a "Democratic" paper with a circulation of 3,004, and describes the Webster Republican as a "Republican" paper with a circulation of 1,006. Both papers are listed as being published weekly and have filed the required affidavits with the Secretary of State.

Analysis

The facts recited in your letter do not call into question the two newspapers' status as "qualified papers." None of your facts dispute the length, frequency of publication, or purpose for which the paper is read. Nor do your facts suggest that either paper is a new publication, is not circulated at a defined price, or will not provide effective notice to residents of the publication area.

The facts you present likewise do not call into question whether the two papers are of opposite politics, which the papers themselves reported to the Secretary of State in their certifying affidavits. Nearly all of your observations relate to the fact that the two papers have the same ownership and appear to be registered at, published from, and mailed from the same address. But there is no statutory requirement that papers of opposite politics be owned by separate entities or individuals, or be published in different locations. Indeed, as reflected in the Secretary of State's listing and as you acknowledge, it is undisputed that the Charleston Gazette and the Charleston Daily Mail are qualified papers of opposite politics that are owned by the same entity and registered at the same address. There are other such papers on the list, too.[2]

The Supreme Court of Appeals has only once before second-guessed a paper's representation of its political affiliation in the context of a statutory requirement that newspapers be "of opposite politics." In *Wolfe*, a once-Republican paper announced a change in politics and "posed as a Democratic newspaper." 193 S.E. at 559. The Court found it incredible that a long-time Republican paper "published in a Republican community and county, with all the prestige which years of party service had built up, should ... suddenly and without change as to controlling ownership or

[2] To the extent your March 26, 2013, letter to the Commission suggests that papers owned by the same company must publish legal advertisements in both papers for one fee, this suggestion appears to have no statutory basis. West Virginia Code Section 59-3-3 sets the permissible fees and makes no mention of any requirement that papers of opposing politics with the same ownership charge only a single fee.

editorship, transfer its political allegiance to a party so weak in comparative strength as [was] the Democratic Party in that county." *Id.* at 558. The motive must have been "to place the [newspaper] in a position where it would qualify in the matter of securing official publications." *Id.* Under those specific circumstances, the Court determined that it was duty-bound to "consider all the surrounding circumstances." *Id.* at 559. Ultimately, even though the paper made "occasional" attempts to "discuss public questions from a Democratic viewpoint" and included "a few pictures of prominent Democrats," the Court found the newspaper "not entitled to be classified as a paper opposite in politics to the regular Republican newspaper" in the county. *Id.* at 559.

These special circumstances do not exist here. The most unusual fact you represent is that the newspapers have the same writers with the assistant editor for one paper also serving as the editor for the other paper. That fact, standing alone, is not comparable to the circumstances the Supreme Court faced in *Wolfe*. If there were other facts that offered a reason to question the political bona fides of these papers, they could support a different opinion. But *Wolfe* suggests that in most circumstances, including this case as you have presented it, a paper's representation of its political affiliation for purposes of accepting legal advertising under West Virginia Code § 59-3-2 should not be second-guessed.

Very truly yours,

Patrick Morrisey

PATRICK MORRISEY
ATTORNEY GENERAL