PATRICK MORRISEY
ATTORNEY GENERAL

May 20, 2013

The Honorable Eugene M. Simmons
Prosecuting Attorney
Office of the Prosecuting Attorney of Pocahontas County, West Virginia
900 Tenth Avenue
Marlinton, WV 24954

Dear Prosecutor Simmons,

You have asked for an Opinion of the Attorney General pertaining to the appointment of a county commissioner in the event of a vacancy. 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 letter dated May 16, 2013, to the Attorney General's Office. In that letter, you suggest that one of the three seats on the Pocahontas County Commission ("Commission") may soon be vacant.

Your letter raises a number of legal questions, each addressed in turn below:

> *(1) May a new commissioner to fill a vacancy on the Commission be selected by the remaining two commissioners? (2) If so, must the new commissioner be selected from the district from which the previous commissioner was serving? (3) Must the new commissioner be from the same political party as the previous commissioner?*

Question One: May a new commissioner to fill a vacancy on the Commission be selected by the remaining two commissioners?

A county commissioner is an elected office defined by the Constitution of West Virginia. The Constitution establishes that each county commission shall be composed of three commissioners, two of whom shall constitute a quorum for the transaction of business. Const. art. IX, § 9; *see also* W. Va. Code § 7-1-1(b) ("A county commission shall consist of three

commissioners as provided in section nine, article IX of the Constitution of the State of West Virginia, any two of whom shall constitute a quorum for the transaction of business."). The commissioners are to be elected "by the voters of the county, and hold their office for a term of six years," but "no two of said commissioners shall be elected from the same magisterial district." Const. art. IX, § 10.[1]

The Constitution, however, expressly leaves to the Legislature the power to determine how vacancies are to be filled. "When vacancies occur prior to any general election" for a state or county officer, those vacancies "shall be filled by appointments, *in such manner as may be prescribed herein, or by general law*." Const. art. IV, § 7 (emphasis added); *see also* Const. art. IV, § 8 ("The Legislature, in cases not provided for in this constitution, shall prescribe, by general laws, the terms of officer, powers, duties and compensation of all public officers and agents, and the manner in which they shall be elected, appointed and removed."). No provision in the Constitution today addresses how vacancies on a county commission shall be filled, thus leaving the issue to be determined by "general law" promulgated by the Legislature.[2]

Pursuant to this authority, the Legislature has enacted a statutory provision that speaks to the filling of vacancies on county commissions. Article 10 of chapter 3 of the West Virginia Code addresses generally the filling of vacancies, and section 7 addresses specifically vacancies on county commissions:

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[1] The Constitution also provides that the voters in a county may, through certain procedures, "alter[] or modify[] [the] county commission and establish[] in lieu thereof another tribunal for the transaction of the business required to be performed by such county commission." Const. art. IX, § 13; *see also* Const. art. IX, § 11 (providing that "existing tribunals as have been heretofore established by the Legislature to act as to police and fiscal matters in lieu of county commissions in certain counties shall remain and continue as now constituted"). Some county commissions, therefore, may have more than three members. The Legislature has by statute recognized a "county council" as a specific alternative to county commissions and applied equally to such councils the rules that govern county commissions. W. Va. Code § 7-1-1(e) ("Throughout this chapter and the code, the term 'county commission' or any reference to a county commission shall include all county councils created in lieu of the county commission.").

[2] Before the Judicial Reorganization Amendment of 1974, section thirty of article VIII of the West Virginia Constitution provided that "[v]acancies in the office of commissioner, clerk of the county court and justices of the peace, shall be filled by the county court of the county until the next general election." *State ex rel. Neal v. Barron*, 146 W. Va. 602, 605 (1961). Among other things, the Judicial Reorganization Amendment renamed county courts as county commissions and eliminated this provision. *See* Const. art. IX, § 9 ("The office of the county court ... is hereby continued in all respects as heretofore constituted, but from and after the effective date of this amendment shall be designated as the county commission ... .").

> Any vacancy in the office of the county commissioner or clerk of county commission shall be filled by the county commission of the county, unless the number of vacancies in a county commission deprive that body of a quorum, in which case the Governor of the state shall fill any vacancy in the county commission necessary to create a quorum thereof. Persons appointed shall be of the same political party as the officeholder vacating the office and shall continue in office until the next general election is certified, or until the completion of the term if the term ends on the thirty-first day of December following the next general election: *Provided*, That in the event a quorum of the county commission cannot agree upon a person to fill a vacancy in the office of county commissioner within thirty days of the date the vacancy first occurred, the county executive committee of the vacating county commissioner's political party shall select and name a person to fill the vacancy from the membership of the vacating county commissioner's political party.

W. Va. Code § 3-10-7.[3]

This provision makes clear that a single vacancy on the Commission can (and indeed must) be filled by the two remaining commissioners unless they cannot agree. Under the statute, a vacancy on a county commission "shall be filled" by the county commission, provided that there is a quorum. Under the Constitution, the two remaining commissioners constitute a quorum. But if the two commissioners cannot agree upon a replacement within thirty days of the vacancy, "the county executive committee of the vacating county commissioner's political party shall select and name a person to fill the vacancy from the membership of the vacating county commissioner's political party."

Question Two: Must the new commissioner be selected from the district from which the previous commissioner was serving?

It is clear from the Constitution that *elected* county commissioners must be from different magisterial districts. The Constitution expressly states that "no two of said commissioners shall be *elected from* the same magisterial district." Const. art. IX, § 10 (emphasis added). It further sets forth a detailed procedure for resolving "any election" in which "two or more persons residing in the same district ... receive[d] the greatest number of votes cast." *Id.* In that circumstance, "only the one of such persons receiving the highest number [of votes] shall be

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[3] This section and those around it were recently amended by a bill passed during the Regular Session of the 81st Legislature. Senate Bill No. 527 passed the Legislature on April 13, 2013, and was signed by the Governor on May 3, 2013. The amendments do not take effect until July 12, 2013, and are therefore not addressed in this Opinion.

declared elected." *Id.* If there is another seat open, "the person living in another district, who ... receive[d] the next highest number of votes, shall be declared elected." *Id.*

The West Virginia Code similarly emphasizes in several provisions the residency requirement of *elected* county commissioners. West Virginia Code § 3-10-7 elaborates upon the above-described constitutional procedure for resolving an "election" in which two seats are open and the two candidates with the highest votes reside in the same magisterial district.[4] West Virginia Code § 6-5-4 provides that a county commissioner "shall, during his continuance in office, reside in the county or district for which he was elected."

Most prominently, West Virginia Code § 7-1-1b was enacted four years ago to clarify the residency requirements for "candidate[s] for county commission" *elections*. In that provision, the Legislature expressly found that: (1) "[t]here is confusion concerning when a *candidate* for county commission must be a resident of the magisterial district he or she wants to represent"; (2) "[i]t is imperative that this issue be permanently resolved at the time of filing to ensure the citizens have choice *on the ballot*"; (3) "[i]t is essential the citizens know they are *voting* for a person who is qualified to be a candidate"; and (4) "[w]ith the expense of *holding an election*, tax payer moneys should not be wasted of officials who could never serve." W. Va. Code § 7-1-1b(a) (emphases added). The provision sets forth two bright-line tests for residency. A candidate for the office of county commissioner "shall be a resident from the magisterial district *for which he or she is seeking election*" either by the last day to file a certificate of announcement for the election or, in the circumstance where an individual must be appointed as a candidate for an election, at the time of that appointment. *Id.* § 7-1-1b(b) (emphasis added); *see also id.* § 3-5-7 (describing certificates of announcement); *id.* § 3-5-19 (describing appointment of candidates for an election where there is a vacancy in nomination).

By contrast, however, there is no reference to residency in the statutory language that relates to the temporary filling of a vacancy on a county commission. As discussed above, West Virginia Code § 3-10-7 states only that "[a]ny vacancy ... shall be filled by the county commission," provided that there is a quorum and that the remaining commissioners do not disagree. The provision expressly requires that "[p]ersons appointed shall be of the same political party as the officeholder vacating the office," but it makes no mention of any residency requirement. *Id.* Unlike the statutory and constitutional provisions relating to *elected* county commissioners, nothing in the discussion of *appointed* county commissioners says anything about the individual's district of residence.

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[4] As the Code explains, such a circumstance will ordinarily arise where an election for a seat with an unexpired term is held at the same time as the election for a seat with a full term. Section 3-10-7 requires that the candidate with the greatest number of votes be declared elected for the full term seat. Then, "[t]he candidate with the next highest number of votes for the unexpired term *residing in a different magisterial district* shall be seated for the unexpired term."

Under longstanding principles of statutory construction, the conspicuous absence of any residency requirement for an appointed—rather than elected—county commissioner must be interpreted as an intentional omission. The law clearly requires that elected county commissioners must be from different magisterial districts. But a new commissioner appointed to fill a vacancy need not be selected from the same district as the commissioner being replaced.

First, the "familiar maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies." *Martin v. Hamblet*, 737 S.E.2d 80, 84 (W. Va. 2012). This is not a situation where the Legislature has simply neglected to set forth any requirements for the appointment of a county commissioner. To the contrary, the statute expressly sets forth one—and only one—qualification for an appointed commissioner: he must be from the same political party as the officeholder vacating the office. The Legislature's decision to identify this single requirement implies the exclusion of any other.

Second, the Supreme Court of Appeals has made clear 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 (1946). It cannot be ignored that the residency requirement is discussed only in the context of *elected* county commissioners. As noted in a previous Opinion from this Office, it must be presumed that the Legislature sought to provide separate requirements for *election* to an office than for *appointment* to fill a vacancy. *See* --- W. Va. Op. Atty. Gen. ---, 2013 WL 1287949 (Mar. 4, 2013) ("Section 3-5-7 says nothing about qualifications for people seeking *appointment* to fill a vacancy; it only speaks to the situation in which a person is seeking *election* to an office."); *see also Burkhart v. Sine*, 200 W. Va. 328, 332 (1997) (focusing on and interpreting the phrase "elected from" in article IX, section 10 of the Constitution).

This reading of the statute is bolstered further by the constitutional and statutory provisions relating to school board membership, which are phrased more broadly. Whereas the Constitution provides that no two county commissioners "shall be *elected from* the same magisterial district," Const. art. IX, § 10 (emphasis added), it states more expansively with respect to district school boards that "[n]o more than two of the members of such board may be residents of the same magisterial district within any school district," Const. art. XII, § 6. The omission of the phrase "elected from" must be given meaning. *Cf. Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 312-13 (1995) ("[W]e have a deep reluctance to interpret a statutory provision so as to render superfluous other provisions of the same enactment."). Similarly, West Virginia Code § 3-5-6 provides that no more than two members of a county board of education "may be elected or serve from the same magisterial district." The phrase "or serve" is a significant addition that does not appear in any of the statutory or constitutional language relating to the residency of county commissioners. *See State ex rel. Johnson v. Robinson*, 162 W.Va. 579, 582 (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.").

Question Three: Must the new commissioner be from the same political party as the previous commissioner?

The plain terms of West Virginia Code § 3-10-7 require that a commissioner appointed to fill a vacancy be from the same political party as the commissioner he replaces. The statute twice makes the point. It expressly requires that "[p]ersons appointed shall be of the same political party as the officeholder vacating the office." W. Va. Code § 3-10-7. Furthermore, it provides that where the remaining commissioners cannot agree on a replacement within thirty days, "the county executive committee of the vacating county commissioner's political party shall select and name a person to fill the vacancy *from the membership of the vacating county commissioner's political party*." *Id.* (emphasis added).

Sincerely,

Patrick Morrisey
Attorney General