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May 10, 2024

Matthew L. Harvey, Esq.
Jefferson County Prosecuting Attorney
120 South George Street
Charles Town, WV 25414

Re: County Commission Vacancy Inquiry

Prosecutor Harvey,

I write in response to your letter dated May 8, 2024, seeking guidance from the Office of the West Virginia Secretary of State regarding various statutes concerning the filling of vacancies on County Commission. Your questions are below in bold, and the Office's responses follow respectively.

1. The Commissioners were removed and the resultant vacancies occurred pursuant to the removal statute (West Virginia Code 6-6-7) by Order of the Circuit Court dated May 1, 2024.

a) What is the correct procedure for the Commission to fill the vacancies under this section?

Once a vacancy in office is created by removal, the Commission generally has three procedural options: (1) fill the vacancy immediately but within 30 days of the date of the vacancy by temporary appointment under W. Va. Code § 6-6-7(g); (2) if an appeal is filed, fill the vacancy temporarily and within 30 days of the date of the vacancy under W. Va. Code § 6-6-7(h); or (3) if no appeal is filed, fill the vacancy permanently under W. Va. Code § 3-10-7.

b) What are the requirements for the replacement Commissioners under 6-6-7, for example must they be of a particular political party or reside in a particular district of the County?

The temporary appointment provisions in W. Va. Code § 6-6-7 make no mention of political party affiliation or residency as a qualification for temporary appointees. In contrast, the permanent appointment provisions in W. Va. Code § 3-10-7 do include party affiliation as a qualification for eligibility.

Therefore, consistent with the canons of statutory construction, because political affiliation is expressly listed as a requirement for the permanent appointment, but not the temporary appointment, party affiliation and residence are likely not requirements for temporary appointees.

This conclusion is supported by at least one Attorney General Opinion, which was issued March 4, 2013,¹ finding that a residency requirement for *election* to county commission did not apply to an *appointment* to a vacancy for the same position because the Legislature intentionally omitted such requirement in the vacancy statute.

c) When does the time frame for appointment under 6-6-7 begin?

Pursuant to W. Va. Code § 2-2-1(d),² the 30-day timeframe begins the day after the vacancy occurred. As the Order in this matter was entered on May 1, 2024, day 1 of the 30-day timeframe is May 2, 2024, which makes the deadline for appointment May 31, 2024.

d) Do the Commissioners appointed under this section serve for 30 days pursuant to 6-6-7 (h)?

Yes, temporary appointees serve up to 30 days unless an appeal is filed, in which case the temporary appointees serve until either (1) the Order is suspended by the three-judge panel, or (2) until the Supreme Court issues a ruling. W. Va. Code § 6-6-7(h) provides in relevant part:

An appeal from an order of such three-judge court removing or refusing to remove any person from office pursuant to this section may be taken to the Supreme Court of Appeals within thirty days from the date of entry of the order from which the appeal is taken. . . . From the date of any order of the three-judge court removing an officer under this section until the expiration of thirty days thereafter, and, if an appeal be taken, until the date of suspension of such order, if suspended by the three-judge court and if not suspended, until the final adjudication of the matter by the Supreme Court of Appeals, the officer, commission or body having power to fill a vacancy in such office may fill the same by a temporary appointment until a final decision of the matter, and when a final decision is made by the Supreme Court of Appeals shall fill the vacancy in the manner provided by law for such office.

e) Is the appointment of a temporary Commissioner pursuant to 6-6-7 (h) permissive, since the statute uses the word “may”?

Yes.

¹See [https://ago.wv.gov/publicresources/Attorney%20General%20Opinions/Documents/Opinion%20of%20the%20Attorney%20General%27s%20Office%20Regarding%20the%20Process%20for%20Filling%20a%20Vacancy%20on%200a%20County%20Commission%20\(May%202020,%202013\).PDF](https://ago.wv.gov/publicresources/Attorney%20General%20Opinions/Documents/Opinion%20of%20the%20Attorney%20General%27s%20Office%20Regarding%20the%20Process%20for%20Filling%20a%20Vacancy%20on%200a%20County%20Commission%20(May%202020,%202013).PDF) (last visited May 9, 2024).

² W. Va. Code § 2-2-1(d) provides in part, “In computing any period of time prescribed by any applicable provision of this code . . . the day of the act, event, default or omission from which the applicable period begins to run is not included. . . .”

- 2. Assuming that the persons appointed pursuant to West Virginia Code 6-6-7 serve for 30 days, and there is no appeal of the removal decision, then is the next step to appoint Commissioners pursuant to the procedures laid out in the statute governing replacement of Commissioners (West Virginia Code 3-10-7)?**

If no appeal is filed, the permanent appointees must be appointed within 30 days of the date of the vacancy—the same timeframe as making the temporary appointments.

- a) Does an appointment of a temporary Commissioner under 6-6-7 toll the requirement to appoint a new Commissioner within 30 days pursuant to 3-10-7(b)?**

Those two statutes do not contemplate a tolling effect on temporary appointments. Therefore, no, a temporary appointment does not toll the permanent appointment timeframe, and both must be made within 30 days of the date of the vacancy.

- b) If the appointment of a new Commissioner under 6-6-7 does toll the 30 day requirement for the Commission to appoint a new Commissioner under 3-10-7(b), does the 30 day requirement under 3-10-7(b) begin on the day the temporary appointment period ceases, i.e., 30 days from the date of the removal?**

N/a. see answer to 2.a.

- 3. It is possible that one or both of the removed Commissioners may file an appeal of the removal with the West Virginia Supreme Court of Appeals.**

The statute does not provide guidance. Under normal circumstances in the law, yes, one or both parties receiving an adverse ruling at a trial court may appeal.

- a) What effect would an appeal have on the Commissioners who had been temporarily appointed pursuant to West Virginia code 6-6-7(h)?**

See answer to 1.d.

- b) In the alternative, what effect would an appeal have on Commissioners who have been appointed pursuant to West Virginia code 3-10-7?**

The law does not provide guidance. It is logical that an appeal would not affect the permanent appointees unless the lower court suspends its ruling.

- c) **In the alternative, if one of the removed Commissioners files an appeal and the other one does not, would the Commission finalize the non-appealed position and the matter be handled as any vacancy would be handled pursuant to 3- 10 -7?**

Yes.

4. **One of the removed Commissioners has changed her party affiliation from the Republican Party to the Mountain Party. It appears that she changed her party affiliation prior to the date the removal order was entered.**

- a) **Does this mean that the new Commissioner who would be appointed to that seat must come from the Mountain Party if an appointment is made pursuant to West Virginia Code 3-10-7?**

Yes.

- b) **If the Commission does not agree as to whom to appoint from the Mountain Party, then does the Mountain Party follow the same executive Committee procedures described in 3-10-7 (b)?**

Yes.

- c) **If the county Mountain Party does not have an operative executive Committee as described in 3-10-7 (b), what is the procedure for the Commission to follow?**

Per W. Va. Code § 3-10-7, if the Commission does not make an appointment within 30 days of the vacancy, the authority to nominate a list of individuals shifts to the County Executive Committee of the political party of the vacating member.

In the case of a County Executive Committee that does not have sufficient members to make the appointment, the party of that Committee must follow state law and its party rules to constitute a County Executive Committee, which would then meet and nominate a list of three potential appointees to the Commission.

Therefore, the Commission's obligation to appoint is not triggered until a lawfully constituted County Executive Committee submits a list of three names, at which point the Commission has 15 days to make a selection and follow the process in W. Va. Code § 3-10-7.

5. With regard to elections:

- a) **What procedure must the newly appointed Commissioners utilize in relationship to the upcoming November elections?**

Pursuant to W. Va. Code § 3-10-7(g), it's the role of county executive committees, not the Commission, to submit names of candidates to be nominated for placement on the General Election ballot. The procedure is detailed in that section, and the cross-referenced section, of Code.

b) Is the cutoff date for these newly appointed Commissioners the date specified by West Virginia Code 3-10-1(a)(1)?

Clarifying, the General Cutoff Date for when nominees must be selected by the county executive committees to be placed the General Election ballot is provided in W. Va. Code §§ 3-5-19 and 3-10-1.

c) If the new Commissioners are appointed prior to the cutoff date, do they need to run for their seat in this year's General election?

Pursuant to W. Va. Code §§ 3-10-1 and 3-10-7(g), given the number of years remaining on the terms of the vacating members and the timing of the creation of the vacancies, which are prior to the General Cutoff Date, the appointees to the County Commission are able to serve only until the General Election results are certified and the successors are elected and certified.

Therefore, for an election to the unexpired terms of the vacating Commissioners on the General Election ballot, appointees to the Commission have no control over whether they are able to run for the seat to which they were appointed. Rather, only persons nominated by the county executive committees will run for the unexpired terms of the removed Commissioners on the General Elections ballot.

d) What procedure does the Commission have to follow if the new Commissioners are appointed prior to the cutoff date?

See answer 5.c.

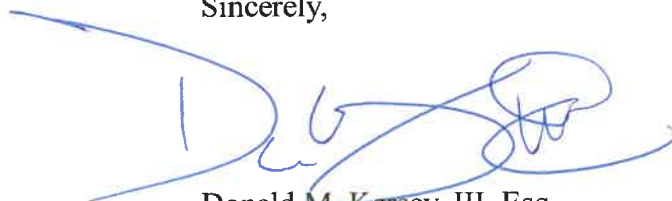
e) Is the County Commission responsible under West Virginia Code 3-10-7(f) to issue the proclamation required by 3-10-1(c)(3)?

No, because given the timing of the vacancy, pursuant to W. Va, Code § 3-10-7(g), nominations to the General Election ballot are made by the county executive committees, and no special candidate filing period is necessary.

f) Do you have any other general instructions related to appointments or elections for the two vacant positions?

No.

Sincerely,

A handwritten signature in blue ink, appearing to read 'DK Kersey III', is written over a horizontal line.

Donald M. Kersey, III, Esq.
Chief Deputy Secretary of State, Chief of Staf