State of West Virginia
Office of the Attorney General

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The Honorable Rachel Romano
Harrison County Prosecuting Attorney
301 West Main Street
Clarksburg, WV 26301

Dear Prosecutor Romano:

You have asked for an Opinion of the Attorney General about how to determine if a magisterial district seat for a county commissioner position is considered "open." This Opinion is being issued pursuant to West Virginia Code Section 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 the Attorney General.

In your letter, you explain that the Harrison County Commission has asked which magisterial district is "open" for the next election where a current commissioner filed paperwork to stand for election while a resident of one district, but currently lives in another district where he moved prior to the general election in which he was elected.

Your letter raises the following legal question:

> *For purposes of the requirement in Article IX, § 10 of the West Virginia Constitution that "no two [county] commissioners shall be elected from the same magisterial district," is a commissioner "elected from" the district where that commissioner lived at the time he or she filed paperwork to stand for election, or the district where he or she moved after filing but before the general election?*

We conclude that the "open" magisterial district in the next election is the former. The Supreme Court of Appeals has interpreted Article IX, Section 10 to mean that a county commissioner serves the county where he or she resided at the time of the general election, even

if the commissioner resided in a different district at the time he or she filed pre-election candidacy paperwork. *Burkhart v. Sine*, 200 W. Va. 328, 332, 489 S.E.2d 485, 489 (1997).

Discussion

The West Virginia Supreme Court of Appeals has held that "the question as to when the conditions of eligibility to office must exist" is determined first by the "the language used in constitutional or statutory provisions relating to the qualifications necessary for the office." *State ex rel. Dostert v. Riggleman,* 155 W. Va. 808, 812, 187 S.E.2d 591, 593 (1972). The primary qualifications for county commissioners are established by Article IX, Section 10 of the West Virginia Constitution, which provides that "commissioners shall 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." W. Va. Const. art. IX, § 10. West Virginia Code Section 3-5-4 underscores that "[c]andidates for the office of commissioner of the county commission shall be nominated and elected in accordance with the provisions of section ten, article nine of the Constitution of the state of West Virginia." W. Va. Code § 3-5-4(b)(1).

The constitutional limitation that "no two commissioners shall be *elected from* the same magisterial district," W. Va. Const. art. IX, § 10 (emphasis added), is determinative. Our supreme court has explained that a candidate is "elected from" the district "in which that person resides on the day that person is elected to serve on the County Commission, that is, the date of the general election." Syl. pt. 3, *Burkhart*, 200 W. Va. at 329, 187 S.E.2d at 486. In *Burkhart*, an elected county commissioner lived in and filed for election in one district, but due to subsequent redistricting actually resided in a different district by the time of the general election. *Id.* at 330, 489 S.E.2d at 487. During this commissioner's term, individuals from *both* of the two districts filed to run as candidates in the next election—which raised the question which district was "open" for purposes of Article IX, Section 10. The court concluded that the current commissioner had been "elected from" the district in which he lived at the time of the election—and not the district where he had originally filed his candidate paperwork—thereby disqualifying any other candidate from running for that district during his tenure. *Id.* at 332, 489 S.E.2d at 489. Moreover, the fact that the commissioner moved back into the original district during his term did not alter the analysis—once "elected from" a district, "a candidate carries that residence with him or her throughout the entire term." *Id.*

The same reasoning applies to your question. You explain that a current commissioner filed pre-election paperwork while residing in one district, but moved into a different magisterial district prior to the general election in which he was elected. *Burkhart* instructs that the commissioner was "elected from" that second district, and no other commissioner may be "elected from" that district until the completion of the first commissioner's term. 200 W. Va. at 332-34, 489 S.E.2d at 489-91.

A 2012 memorandum decision confirms this result. *See Buckner v. Vinciquerra*, 2012 WL 3055418 (W. Va. May 25, 2012). The Legislature enacted West Virginia Code § 7-1-1b in 2009, after the Supreme Court of Appeals's decision in *Burkhart*, to resolve "confusion concerning when a candidate for county commission must be a resident of the magisterial district he or she wants to represent." W. Va. Code § 7-1-1b(a)(1). Under this statute, a candidate for

county commissioner "shall be a resident from the magisterial district for which he or she is seeking election" by either "the last day to file a certificate of announcement" or "the time of his or her appointment by the county executive committee or the chairperson of the county executive commission." *Id.* § 7-1-1b(b)(1)-(2). In *Buckner*, a would-be candidate resided in an open district before the filing deadline, but moved to a district where a current commissioner resided before the general election. The candidate argued that the move did not disqualify him for the open seat because in enacting Section 7-1-1b, "the Legislature intended to supercede" *Burkhart* and "change the criterion for residency from the date of the general election to the last date to file a certificate of candidacy." *Buckner*, 2012 WL 3055418, at *2. The court rejected that argument, concluding instead that Section 7-1-1b "specified a residency requirement that is *in addition to* the requirement in Article IX, Section 10" because "a candidate must always meet the requirements of the Constitution." *Id.* The court thus doubled-down on *Burkhart*'s rationale, finding the candidate's original residency irrelevant because at the time "a new county commissioner was being elected," the candidate "resided in a district in which a sitting commissioner already resided." *Id.*

Indeed, the only time the Supreme Court of Appeals declined to apply *Burkhart* was in the 2013 decision in *Veltri v. Parker*, 232 W. Va. 1, 750 S.E.2d 116 (2013), where the court held that the circuit court improperly relied on *Burkhart* to invalidate the results of an election. The concern in that case, however, was that the challenger failed to use the appropriate legal process to bring a *post-election* challenge; *Burkhart* involved a *pre-election* mandamus challenge, and the court concluded that mandamus is not an appropriate remedy after an election has taken place. *Id.* at 7, 750 S.E.2d at 122. *Veltri* thus does not call *Burkhart*'s holding into question when it comes to assessing an open district for a future election—that is, a duly elected county commissioner is "elected from" the magisterial district where he or she resided on the date of the general election.

Sincerely,

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Lindsay See
Solicitor General

Thomas T. Lampman
Assistant Attorney General