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July 6, 2021

Honorable Mac Warner  
Secretary of State  
State Capitol Complex  
Building 1, Room 157k  
Charleston, WV 25305

Dear Secretary Warner:

You have asked for an Opinion of the Attorney General about whether West Virginia law sets specific hours of operation for municipal clerks' and recorders' offices. This Opinion is being issued pursuant to West Virginia Code Section 5-3-1, which provides that the Attorney General "shall give written opinions and advice upon questions of law . . . whenever required to do so, in writing, by . . . the Secretary of State . . . ." To the extent this Opinion relies on facts, it is based solely on the factual assertions provided in your correspondence with the Office of the Attorney General.

In your request, you point to a recently modified provision of West Virginia law that establishes how and when election officials process certificates of candidacy. This provision—Section 3-5-7(c)—requires county clerks offices to remain open "from 9:00 a.m. until 12:00 p.m." on the last day for candidates to file to run for elected office. W. Va. Code § 3-5-7(c). This provision also requires "the office of the Secretary of State" to remain open "from 9:00 a.m. until 11:59 p.m." on this day. *Id.*

Your request seeks clarification as to which of these requirements, if either, apply to municipal elections. As a general matter, the provisions of Chapter Three "referring more particularly to primary elections and general elections" also govern municipal primary and regular elections—provided such laws "can be applied" and are not contrary to a municipal "charter provision or ordinance." W. Va. Code § 8-5-14. And more specifically, "provisions of general law" addressing "the method and time for the filing of certificates of candidacy" "apply to municipal elections" "so far as applicable," unless a municipal charter provides otherwise. W. Va. Code § 8-5-6.

Your request thus raises the following legal question:

*Do Section 3-5-7(c)'s requirements for filing offices to remain open until particular times on the last day of political filing periods apply to municipal elections?*

We conclude that these requirements do not apply to municipal elections.

### ***Discussion***

Section 8-5-6 provides that, “[e]xcept as otherwise provided in the charter of any municipality, the provisions of general law with respect to the method and time for the filing of certificates of candidacy, . . . *so far as applicable*, shall apply to municipal elections.” W. Va. Code § 8-5-6 (emphasis added). Similarly, Section 8-5-14 incorporates the “provisions of chapter three” of the West Virginia Code that address “primary and general elections” to also “govern the conduct of municipal primary and regular municipal elections,” “*so far as [the provisions] can be applied* and so far as not otherwise provided by charter provision or ordinance.” W. Va. Code § 8-5-14 (emphasis added).

The Supreme Court of Appeals of West Virginia has not addressed the question in your request. Nevertheless, we conclude that a court interpreting these two gap-filling statutes would likely focus on the functionally interchangeable phrases “so far as applicable” and “so far as [the provisions] can be applied.” *See* “Applicable,” Oxford English Dictionary 2d ed. 575 (defining “applicable” as “capable of being applied”). As a matter of practicality, Section 3-5-7(c)’s directives concerning hours of operation cannot be “applied” to municipal elections because the statute requires different hours for county clerks and the Secretary of State. Municipal elections officers have no way to determine which of these conflicting requirements would bind them—and thus they have no way to apply Section 3-5-7(c).

Other provisions of West Virginia election law support this conclusion by providing contrasting examples of the type of statutory requirements that *can* be applied to municipal elections. *First*, many provisions of Chapter Three provide a single directive—they do not distinguish between county and state elections—and in those instances there is no impediment to applying the requirements to municipal elections, as well. For example, Section 3-5-7(d) requires all certificates of candidacy to be notarized, to contain a candidate’s “legal name” and “county of residence,” and to certify that the candidate is a legally qualified voter in their county and magisterial district. W. Va. Code § 3-5-7(d). There are no complexities or contradictions in this instance that prevent a municipal election officer from applying the requirements pursuant to the gap-filling statutes discussed above.

*Second*, where the Code contains different sets of requirements for different types of elections, the Code frequently provides clear direction which standards apply in the municipal context. Chapter Three, for example, provides a variety of requirements for political party executive committees at both the state and county levels. *See, e.g.*, W. Va. Code § 3-1-9. Similar to the situation posed by Section 3-5-7(c), nothing in the statutory text answers whether municipal



executive committees should assume the powers and duties of a state executive committee or a county executive committee. The Legislature expressly resolved this ambiguity, however, in Section 8-5-14: “[M]unicipal executive committees shall exercise similar functions and be governed by the same laws in regard to municipal primary elections and regular municipal elections as county executive committees.” W. Va. Code § 8-5-14. In other words, the Code contains a separate provision expressly resolving the “state or county?” question. There is no analogous provision for Section 3-5-7(c).

Another way the Legislature resolves confusion from multiple sets of rules is by creating a third set specifically for municipal elections. Candidates seeking statewide or legislative office file their certificates of announcement with the Secretary of State’s office, for example, whereas certificates for county-level candidates are filed with county clerks. W. Va. Code § 3-5-7(b)(1)-(2). Here too, absent additional guidance it would be unclear where municipal candidates would file their certificates. But the next subsection resolves that question by providing that candidates in municipal elections must file their certificates of candidacy with the “recorder or city clerk.” W. Va. Code § 3-5-7(b)(3).

Section 3-5-7(c)’s hours-of-operation requirement falls in neither category—and thus there is no way to resolve the ambiguities inherent in attempting to “apply” the provision to municipal elections. Neither Section 8-5-6 nor 8-5-14 contains a framework to determine whether municipal clerks’ and recorders’ offices would be required to keep the hours of operation set for county clerks’ offices (9:00 a.m. until 12:00 p.m.) or for the Secretary of State’s office (9:00 a.m. until 11:59 p.m.). And while other provisions of Section 8-5-14 call for the duties of “county executive committees” to be used as a template for the duties of “municipal executive committees,” they are no help in resolving the question you pose because certificates of candidacy are filed with election officials, not executive committees. W. Va. Code §§ 3-5-7(b)(2), 8-5-14.

Moreover, the fact that the Legislature expressly stated which set of conflicting requirements applies to municipal elections in some parts of the Code, but did not do so for Section 3-5-7(c), further supports the conclusion that Section 3-5-7(c) falls outside the gap-filling provisions’ scope. Where the Legislature speaks directly to an issue in some provisions of a statutory scheme and omits that reference in others, courts presume the omission was intentional. *See Lester v. Summerfield*, 180 W. Va. 572, 575, 378 S.E.2d 293, 296 (1989). Here, the system of law governing certificates of announcement for municipal candidates—indeed, the other provision of Section 3-5-7 itself that references a “recorder or city clerk” directly—reflects that the Legislature knew how to regulate municipalities in contexts like these. *See, e.g.*, W. Va. Code § 3-5-7(b)(3). The fact that Section 3-5-7(c) neither sets hours of operations for municipal offices nor specifies that municipal offices should follow the county requirements is a strong indicator that the Legislature did not intend to regulate municipal elections in this way.

Finally, there is nothing unusual about an interpretation that leaves certain aspects of municipal elections outside the Code’s reach because the gap-filling provisions themselves recognize a presumption that many aspects of municipal election law are left to local governance—not state. *See* W. Va. Code § 8-5-6 (gap-filling provision applies only to matters not “otherwise

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provided in the charter of any municipality”); *id.* § 8-5-14 (incorporating Chapter Three only where “not otherwise provided by charter provision or ordinance”). We thus conclude that neither Section 8-5-6 nor Section 8-5-14 requires municipal elections officers to adhere to Section 3-5-7(c)’s hours-of-operations provisions because they cannot be “applied” to city clerks or recorders. Instead, this is an area where local charters and ordinances control.

Sincerely,



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