



STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

(304) 558-2021
FAX: (304) 558-0140

August 24, 2010

The Honorable Joe Manchin III
Governor
State Capitol
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305

Dear Governor Manchin:

This office is in receipt of your request for an Opinion of the Attorney General relative to the special primary election to be held on August 28, 2010. As you observe, the Legislature enacted H.B. 201 (2010 2nd Ex. Sess.), *codified at* W. Va. Code § 30-10-4a, which directs the Governor to proclaim a special primary and a special general election to elect a successor to the late Senator Robert C. Byrd. The special primary election is to be held on August 28, 2010, W. Va. Code § 30-10-4a(b)(2)(A), which is a Saturday.

At the outset, we reiterate as we have previously recognized in issuing opinions "that the question presented comes to us in the abstract. Inasmuch as we render opinions in the abstract without memoranda or argument representing diverse points of view, we are constrained to approach matters conservatively. Courts may construe facts and argument differently and apply them to the law in a fashion not contemplated by an abstract opinion. Unless and until that occurs, however, our formal opinion has the force and effect of law." 65 W. Va. Op. Att'y Gen. No. 16 (Jan. 11, 1994).

You pose three questions:

- A. Will Saturday, August 28, 2010, be a legal holiday for State employees?
- B. If Saturday, August 28, 2010, is a legal holiday for all State employees, will it be observed the preceding Friday?
- C. If Saturday, August 28, 2010, is a legal holiday, will all State employees receive credit for the holiday or just those scheduled to work on Saturday, August 28, 2010?

Our short answers to your questions are that (1) Saturday, August 28, 2010, is a legal holiday for State employees; (2) the Saturday, August 28, 2010, holiday is not transferred to Friday, August 27, 2010; and (3) employees scheduled to work on Saturday, August 28, 2010, are entitled

to three hours of paid leave time to vote as long as these employees properly request such time. We now elaborate on our conclusions.

A. Saturday, August 28, 2010, is a legal holiday for State employees.

“Legal holidays are generally created either by legislative enactments or by gubernatorial or presidential proclamations authorized by general legislation.” Syl. Pt. 1, *Pullano v. City of Bluefield*, 176 W. Va. 198, 342 S.E.2d 164 (1986). The West Virginia Legislature has enacted West Virginia Code § 2-2-1 that addresses the issue of legal holidays. Specifically, West Virginia Code § 2-2-1(a)(13) provides that “[a]ny day on which a general, primary or special election is held is a holiday throughout the state, a political subdivision of the state, a district or an incorporated city, town or village in which the election is conducted[.]” “When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.” Syl. Pt. 5, *State v. General Daniel Morgan Post*, 144 W. Va. 137, 107 S.E.2d 353 (1959). More succinctly, “[w]here the statutory language is clear and unambiguous, it should be applied as written.” *State ex rel. Corp. of Charles Town v. Sanders*, 224 W. Va. 630, 633, 687 S.E.2d 568, 571 (2009) (per curiam). Applying the clear and unambiguous language of West Virginia Code § 2-2-1(a)(13), we conclude that Saturday, August 28, 2010, is a legal holiday in light of West Virginia Code § 30-10-4a(2)(A)’s designation of that day as a special primary election day.

B. Saturday, August 28, 2010, is the legal holiday and the holiday is not transferred to the preceding Friday.

West Virginia Code § 2-2-1(b) provides a weekend transfer rule; that is, if a legal holiday falls on a Saturday, the holiday is transferred to the preceding Friday, and if the holiday falls on a Sunday, the following Monday becomes the holiday. This transfer, though, does not apply the “subdivision (13), subsection (a)” of West Virginia Code § 2-2-1. Subsection a of subdivision thirteen (13) of West Virginia Code § 2-2-1 is the subsection that creates special election days as legal holidays.

We are compelled to observe here that the Division of Personnel Administrative Rule dealing with holidays and implementing West Virginia Code § 2-2-1 does not contain language exempting election days from the weekend transfer rule. *See* W. Va. C.S.R. § 143-1-14 (2007). In dealing with legislative rules, the Supreme Court of Appeals has held “[t]he court first must ask whether the Legislature has directly spoken to the precise question at issue. If the intention of the Legislature is clear, that is the end of the matter, and the agency’s position only can be upheld if it conforms to the Legislature’s intent.” Syl. Pt. 3, in part, *Appalachian Power Co. v. State Tax Dep’t*, 195 W. Va. 573, 466 S.E.2d 424 (1995). Only recently the West Virginia Supreme Court of Appeals has explained that a legislative rule cannot trump the legislative intent embodied in a clear and unambiguous statute. “[A] rule must always submit to the legislative intent expressed in the controlling or substantive statute which the rule is promulgated to implement.” *Harrison v. Commissioner*,

No. 34970, slip op. at 13 (W. Va. June 3, 2010). Thus, the absence of the weekend transfer rule in the Code of State Rules is of no moment here since the controlling authority is the statute not the administrative rule.

The clear and unambiguous language of West Virginia Code § 2-2-1 in light of West Virginia Code § 30-10-4a, leads to the unassailable conclusion that the special primary election holiday of Saturday, August 28, 2010, is not transferred to the preceding Friday.

C. On an election day, State employees who are working are entitled to “ample and convenient time and opportunity” to vote.

Because the special primary election to replace Senator Byrd will occur on a Saturday, most State employees will not be working and they will simply be unaffected because, as to them, the Saturday has no real significance. For those that are working, however, the Division of Personnel has implemented a legislative rule to protect the employees’ fundamental, constitutional right to vote. *Bartlett v. Strickland*, 129 S. Ct. 1231, 1240 (2009) (plurality opinion) (observing that “the right to vote [is] one of the most fundamental rights of our citizens.”).

An appointing authority¹ shall, if necessary, allow any employee required to work on any election day ample and convenient time and opportunity to cast his or her vote. Upon receipt of a written request at least three work days prior to an election, an appointing authority shall give any employee who has less than three hours of time away from work during hours polling places are open, up to three hours of paid time off between the opening and closing of the polls, to vote. The appointing

¹An “appointing authority” is “a person or group of persons authorized by an agency to make appointments to positions in the classified or classified-exempt service.” W. Va. Code § 29-6-2(c). *See also* W. Va. C.S.R. § 143-1-3.8 (2007) (“Appointing Authority: The executive or administrative head of an agency who is authorized by statute to appoint employees in the classified or classified-exempt service. By written notification to the Director of Personnel, the appointing authority may delegate specific powers authorized by this rule to persons who satisfy the definition of employee as established in this rule.”).

authority shall schedule such time off to avoid impairment or disruption of essential services and operations.

W. Va. C.S.R. § 143-1-14.1(f) (2007) (footnote added).² We observe that this section uses the word “shall,” which is generally mandatory. Syl. Pt. 1, *Nelson v. West Virginia Public Employees Ins. Bd.*, 171 W. Va. 445, 300 S.E.2d 86 (1982); Syl. Pt. 2, *Terry v. Sencindiver*, 153 W. Va. 651, 171 S.E.2d 480 (1969).³ The appointing authority is obligated, therefore, to provide to an employee who must work on Saturday, August 28, 2010, up to three hours of paid time off between the opening and closing of the polls, to vote as long as the employee (1) has less than three hours of time away from work when the polls are open; (2) asks for time off to vote; (3) in writing; (4) to the appointing authority or the appointing authority’s designate; (5) within three working days before the election.

In summary, we conclude that (1) Saturday, August 28, 2010, is a legal holiday for State employees; (2) the Saturday, August 28, 2010, holiday is not transferred to Friday, August 27, 2010; and (3) employees scheduled to work on Saturday, August 28, 2010, are entitled to three hours of paid leave time to vote if they satisfy the procedural criteria spelled out in West Virginia C.S.R. § 143-1-14.1(f) (2007).

Thank you for the opportunity to render an opinion on this matter.

Very truly yours,

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

By



SCOTT E. JOHNSON

Assistant

²Because the Legislature has not spoken to the precise process to implement a State employee’s right to vote on an election day on which the employee must work, any Division of Personnel Legislative Rule which implements this process in a reasonable manner should be upheld. See *Appalachian Power Co.*, 195 W. Va. at 590, 466 S.E.2d at 441 (citations and footnote omitted) (observing that if a statute is not clear or is ambiguous a court “must examine the defendants’ interpretation to see how it relates to the statute and to determine whether the defendants’ interpretation . . . is reasonable . . . this examination involves a high degree of respect for the [agency’s] role.”). We believe the three-hour rule and its attendant procedural requirements are reasonable.

³Statutes and administrative rules are governed by identical rules of construction *Snider v. Fox*, 218 W. Va. 663, 667, 627 S.E.2d 353, 357 (2006).