Dear Prosecuting Attorney Davis:

You have asked for an Opinion of the Attorney General about the proper procedure for filling a vacancy in the Weirton Fire Department for the position of fire chief. 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 in your correspondence with the Office of the Attorney General and communications with the City of Weirton related to your request.

In 2002, the Weirton City Council “create[d] a single combination fire department, consisting of both paid and volunteer fire fighters.” *Weirton Heights Volunteer Fire Dep’t, Inc. v. State Fire Comm’n*, 218 W. Va. 668, 669, 628 S.E.2d 98, 99 (2005). The Weirton Fire Department currently has a vacancy for the chief position. Because this is a paid firefighter position, filling the vacancy is governed by West Virginia Code Chapter 8, Article 15, Part IV. *See* W. Va. Code § 8-15-11(a). The open fire chief position in Weirton must therefore be filled, “so far as practicable, by promotions from among individuals holding positions in the next lower grade in the department.” *Id.* § 8-15-22. But “no individual shall be eligible for promotion from the lower grade to the next higher grade until such individual shall have completed at least two years of continuous service in the next lower grade.” *Id.*

At the Weirton Fire Department there is only one captain—the grade below chief—who satisfies the time-in-service requirement. That captain, however, declined a promotion to fire chief. Your letter thus asks what alternate procedures the Weirton Fire Civil Service Commission (“Commission”) must follow when filling the chief vacancy.
Your letter raises the following legal questions:

1. **Must the Commission fill the position of chief through the appointment process outlined in West Virginia Code § 8-15-20?**

2. **If the chief position must be filled through the appointment process, which requires a competitive examination, who is eligible to take the examination?**

We conclude that the Commission must fill the position of chief through the statutory appointment process and that the examination for the position must be open to all individuals who meet the statutory requirements for appointment.

**Discussion**

The civil service provisions governing paid firefighters are mandatory and cannot be waived. W. Va. Code § 8-15-11(b); see also Cawley v. Bd. of Trustees of Firemen’s Pension or Relief Fund of City of Beckley, 138 W. Va. 571, 581-82, 76 S.E.2d 683, 689 (1953). These provisions provide that, whenever possible, a vacancy in a paid firefighting department must be filled by promotion. W. Va. Code § 8-15-22. But as explained above, the only individual eligible for promotion to chief has declined the promotion. There are only three other ways to fill a vacancy in a paid fire department: appointment, reinstatement, or reduction in grade. Id. § 8-15-11(b). As fire chief is the highest grade in the department, it cannot be filled by reduction in grade. Similarly, a reinstated firefighter must take the lowest grade in the department. See id. § 8-15-17(f). The only avenue to fill the vacancy is therefore appointment. Id. § 8-15-20(a); see also 50 W. Va. Op. Att’y Gen. 535, 536 (1963).

When filling a position by appointment, the Commission must certify the “three individuals . . . who received the highest averages at preceding competitive examinations held under the civil service provisions of this article within a period of three years next preceding the date of the prospective appointment.” W. Va. Code § 8-15-20(a). Here, over the past three years only one individual took the fire chief exam—the captain who declined promotion to chief.

There are no exceptions to the statutory framework for filling a vacancy like this, nor to the requirement that an individual is eligible for appointment only after passing the exam. Thus—and consistent with the conclusion of a 1963 Opinion issued by this Office—the only way to fill the fire chief vacancy under these circumstances is to administer a new fire chief exam to expand the pool of individuals qualified for appointment to the open role. See 50 W. Va. Op. Att’y Gen. at 537. The answer to your first question is thus yes; the Commission must fill the chief vacancy by appointing an individual under Section 8-15-20 after administering a new competitive exam.

Your second question asks who is eligible to sit for the new fire chief exam. The Code provides that “[a]ll competitive examinations shall be open to all applicants who have fulfilled the preliminary requirements specified in the other civil service provisions of this article.” W. Va. Code § 8-15-18. There are two mandatory requirements for individuals who are not currently members of the Weirton Fire Department: The applicant must have completed an apprenticeship...
In sum, the Weirton Fire Civil Service Commission must fill the position of fire chief through the appointment process outlined in West Virginia Code § 8-15-20. The Commission may appoint a provisional chief for up to three months without making the fire chief examination. Finally, this analysis describes the procedure for permanently filling the fire chief vacancy. We recognize that because our State and Nation are engaging in “social distancing” to help stop the spread of severe acute respiratory syndrome coronavirus 2 (“COVID-19”), it may be difficult to quickly administer a chief exam under Section 8-15-20. The City of Weirton may thus consider appointing a provisional chief because the COVID-19 situation almost certainly constitutes an “urgent reason[]” under the statute. See W. Va. Code § 8-15-21. Under this Code section, the appointing entity may allow one qualified individual of its choice to sit for the competitive chief exam (rather than administering it to all interested and qualified individuals), and if that individual passes the exam, he or she may be appointed provisional chief. Id. Any individual appointed under this provision may serve up to three months. See id.

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In sum, the Weirton Fire Civil Service Commission must fill the position of fire chief through the appointment process outlined in West Virginia Code § 8-15-20. The Commission may appoint a provisional chief for up to three months without making the fire chief examination...
generally open, but must give all individuals who meet the statutory requirements the opportunity to sit for the exam before making a permanent appointment.

Sincerely,

Patrick Morrisey
Attorney General

Lindsay See
Solicitor General

John M. Masslon II
Assistant Solicitor General