



State of West Virginia
Office of the Attorney General

Patrick Morrissey
Attorney General

(304) 558-2021
Fax (304) 558-0140

May 23, 2016

The Honorable Lisa A. Hopkins
West Virginia State Auditor
1900 Kanawha Blvd., East
State Capitol, Bldg. 1, Suite W-100
Charleston, WV 25305

Dear Auditor Hopkins:

You have asked for an Opinion of the Attorney General regarding whether an individual who previously held a position in state government categorized for "arrears pay" status must be converted to "current pay" status because that individual has been appointed to fill a vacancy in an elected office. This Opinion is being issued pursuant to West Virginia Code § 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 auditor." To the extent this Opinion relies on facts, it is based solely upon the factual assertions set forth in your correspondence with the Attorney General's Office.

In your letter, you explain that you were appointed to fill the unexpired term of State Auditor Glen B. Gainer III. *See* W. Va. Code §§ 3-10-1, 3-10-3. You explain that your previous position as General Counsel to the State Auditor was categorized as "arrears pay" status, but that elected officers historically have been treated as "current pay" employees. Your question is whether your salary payment must be converted from "arrears pay" to "current pay."

Your letter raises the following specific legal question:

Must an individual appointed to fill the unexpired term of an elected official be paid on a current basis?

The relevant statutory provision is West Virginia Code § 6-7-1. In pertinent part, the provision reads:

All full-time and part-time salaried and hourly officials, officers and employees of the state, state institutions of higher education and the Higher Education Policy Commission shall be paid at least twice per month, and under the same procedures and in the same manner as the State Auditor currently pays agencies: *Provided*, That on and after July 1, 2002, all new officials, officers and employees of the state, a state institution of higher education and the Higher Education Policy Commission, statutory officials, contract educators with higher education and any exempt official who does not earn annual and sick leave, except elected officials, shall be paid one pay cycle in arrears. . . . *Provided*,

however, That, after July 1, 2014, all state employees paid on a current basis will be converted to payment in arrears. . . . Nothing contained in this section is intended to increase or diminish the salary or wages of any official, officer or employee.

W. Va. Code § 6-7-1. The West Virginia Supreme Court of Appeals has interpreted this provision only once and has never addressed the question you pose. *See State ex rel. Graney v. Sims*, 144 W. Va. 72, 105 S.E.2d 886 (1958). There are also no previous Opinions of the Attorney General addressing your question.

We read Section 6-7-1 to establish a default rule, subject to two significant exemptions, for the payment of certain persons by the State. The default rule is that “officials, officers and employees of the state, state institutions of higher education and the Higher Education Policy Commission” “shall be paid at least twice per month” and under the procedures of the State Auditor that were “current[.]” at the time that statutory language was written. *See* Syl. pt. 5, *State v. Bostic*, 229 W. Va. 513, 729 S.E.2d 835 (2012) (“It is well established that the word ‘shall,’ in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation.” (internal quotations omitted)). The statute then creates two exemptions from that default rule. First, those officials and officers who took office after July 1, 2002—with the notable exception of some or all “elected officials”—must “be paid one cycle in arrears.” Second, all “state employees” must also be paid “in arrears.”

Under this reading, we believe that the State must pay on an “arrears basis” any individual recently appointed to fill the unexpired term of an elected office. With only one exception, the statutory text requires that any official or officer who took office after July 1, 2002, and all state employees regardless of date of hire, must be paid in arrears. The only exception is for “elected officials,” but we do not believe that exception applies to a person appointed to an elected office. In the West Virginia Code, the Legislature refers to such an appointed person not as an “elected official,” but rather as an “appointee.” For example, West Virginia Code § 3-10-1 provides that if a vacancy in the office of the State Auditor occurs after the primary cutoff date, “then th[e] appointee shall hold the office until the end of the term of office.” Longstanding principles of statutory interpretation require that we give meaning to the Legislature’s specific choice of every word. *See, e.g., Osborne v. United States*, 211 W. Va. 667, 673, 567 S.E.2d 677, 683 (2002) (“[i]t is presumed the legislature had a purpose in the use of every word, phrase and clause found in a statute and intended the terms so used to be effective”); *cf. W. Va. Att’y Gen. Op.*, 2013 WL 1287949 at *2 (Mar. 4, 2013) (distinguishing between qualifications required for election and those required for appointment).

Sincerely,



Patrick Morrissey
Attorney General

Elbert Lin
Solicitor General

Erica N. Peterson
Assistant Attorney General