



State of West Virginia
Office of the Attorney General

Patrick Morrissey
Attorney General

January 5, 2016

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

The Honorable William P. Cole III
President of the Senate
Building 1, Room 229M
1900 Kanawha Boulevard, East
Charleston, WV 25305

Dear President Cole:

You have asked for an Opinion of the Attorney General regarding the filling of a vacancy created by the resignation of a State Senator who was elected as a member of one political party but was affiliated with another political party at the time of his or her resignation. This Opinion is being issued pursuant to West Virginia Code § 5-3-1, which provides that the Attorney General shall “render to the president of the Senate and/or the speaker of the House of Delegates a written opinion or advice upon any questions submitted to the attorney general by them or either of them whenever he or she is requested in writing so to do.” 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 suggest that West Virginia law designates the political party of the State Senator at the time of resignation as the state party responsible for submitting a list of potential replacements to the Governor. You point to West Virginia Code § 3-10-5, which is entitled “Vacancies in the State Legislature.” In particular, you note that subsection (a) states that the “party executive committee of the party with which the person holding office immediately preceding the vacancy was affiliated” would be responsible for submitting a list of three potential replacements to the Governor. Based on this language, you believe that the responsible political party is the one to which the State Senator belonged at the time of his or her resignation.

Your letter raises the following legal question:

Which political party is responsible for submitting a list of potential replacements to the Governor to fill a vacancy created by the resignation of a State Senator who was elected to office as a member of one political party but was affiliated with another political party at the time of his or her resignation?

As you note, the relevant statutory provision is West Virginia Code § 3-10-5. In its entirety, the provision reads:

(a) Any vacancy in the office of State Senator or member of the House of Delegates shall be filled by appointment by the Governor, from a list of three legally qualified persons submitted *by the party executive committee of the party with which the person holding the office immediately preceding the vacancy was affiliated*. The list of qualified persons to fill the vacancy shall be submitted to the Governor within fifteen days after the vacancy occurs and the Governor shall duly make his or her appointment to fill the vacancy from the list of legally qualified persons within five days after the list is received. If the list is not submitted to the Governor within the fifteen-day period, the Governor shall appoint within five days thereafter a legally qualified person of *the same political party as the person vacating the office*.

(b) In the case of a member of the House of Delegates, the list shall be submitted by the party executive committee of the delegate district in which the vacating member resided at the time of his or her election or appointment. The appointment to fill a vacancy in the House of Delegates is for the unexpired term.

(c) In the case of a State Senator, *the list shall be submitted by the party executive committee of the state senatorial district in which the vacating senator resided at the time of his or her election or appointment*. The appointment to fill a vacancy in the State Senate is for the unexpired term, unless section one of this article requires a subsequent election to fill the remainder of the term, which shall follow the procedure set forth in section one of this article.

W. Va. Code § 3-10-5 (emphases added). We are aware of no cases of the West Virginia Supreme Court of Appeals that have interpreted this statutory provision. The provision is mentioned in several previous Attorney General Opinions, but none of those addresses the question you pose. *See* 2013 WL 1287948 (Jan. 13, 2013); 63 W. Va. Op. Att’y Gen. No. 19 (Nov. 6, 1989); 53 W. Va. Op. Att’y Gen. 93 (Sept. 12, 1968).

Our first task is to “determine whether the language at issue is ambiguous.” *Bd. of Trustees of Firemen’s Pension & Relief Fund of City of Fairmont v. City of Fairmont*, 215 W. Va. 366, 370, 599 S.E.2d 789, 793 (2004); *see also State ex rel. Hall v. Schlaegel*, 202 W. Va. 93, 96, 502 S.E.2d 190, 193 (1998) (“As with all issues of statutory construction, we must first determine whether the language at issue presents any ambiguity.”). That is true where a statutory provision “is susceptible of two *reasonable* constructions.” *Firemen’s Pension & Relief Fund*, 215 W. Va. at 370, 599 S.E.2d at 793 (emphasis added); *Lawson v. Cnty. Comm’n of Mercer Cnty.*, 199 W. Va. 77, 81, 483 S.E.2d 77, 81 (1996) (finding ambiguity where a “statute can be read by reasonable persons to have different meanings”). Thus, “[m]ere informality in phraseology or clumsiness of expression does not make it ambiguous, if the language imports one meaning or intention with reasonable certainty.” *Jessee v. Aycoth*, 202

W. Va. 215, 218, 503 S.E.2d 528, 531 (1998) (quoting Syl. Pt. 13, *State v. Harden*, 62 W. Va. 313, 58 S.E. 715 (1907)). Similarly, “[t]he fact that parties disagree about the meaning of a statute does not itself create ambiguity or obscure meaning.” *T. Weston, Inc. v. Mineral Cnty.*, 219 W. Va. 564, 568, 638 S.E.2d 167, 171 (2006) (citation omitted); *see also State v. Chapman*, No. 13-0111, 2013 WL 5676630, at *4 (W. Va. Oct. 18, 2013) (“[a] statute is not ambiguous simply because different interpretations are conceivable” (internal quotations omitted)).

With respect to the question you ask, we do not find the statute to be ambiguous, as we believe “the language imports one meaning or intention with reasonable certainty.” *Jessee*, 202 W. Va. at 218, 503 S.E.2d at 531. Heeding the instruction of our Supreme Court of Appeals to read statutory language “in context,” *In re Estate of Lewis*, 217 W. Va. 48, 53, 614 S.E.2d 695, 700 (2005), and not to focus on “any single part, provision, section, sentence, phrase or word,” Syl. Pt. 5, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 217 S.E.2d 907 (1975), our conclusion is informed by three sentences in the statute. *First*, “[a]ny vacancy in the office of State Senator . . . shall be filled by appointment by the Governor, from a list of three legally qualified persons submitted by the party executive committee of the party with which the person holding the office immediately preceding the vacancy was affiliated.” W. Va. Code § 3-10-5(a) (emphasis added). *Second*, “[i]f the list is not submitted to the Governor within the fifteen-day period, the Governor shall appoint within five days thereafter a legally qualified person of the same political party as the person vacating the office.” *Id.* (emphasis added). *Third*, “the list shall be submitted by the party executive committee of the state senatorial district in which the vacating senator resided at the time of his or her election or appointment.” *Id.* § 3-10-5(c) (emphasis added). As explained in detail below, these three sentences together convey “with reasonable certainty” that the political party responsible for the list of potential replacements is the one to which the State Senator belonged at the time of his or her resignation. *Jessee*, 202 W. Va. at 218, 503 S.E.2d at 531.

Standing alone, the first sentence is arguably ambiguous. That sentence in subsection (a) states that the list of potential replacements is to come from the party executive committee “of the party” with which “the person holding the office immediately preceding the vacancy was affiliated.” W. Va. Code § 3-10-5(a). We believe this language suggests that the appropriate political party should be determined by identifying the party affiliation of the vacating senator at the time “immediately preceding the vacancy.” Without more context, however, we recognize that the phrase “was affiliated” might be understood one of two ways: to refer to the senator’s party affiliation at the time of election or appointment, or to the senator’s party affiliation at the time of the vacancy.

But the second sentence—which follows later in subsection (a)—makes clear that the Legislature intended for a vacated Senate seat to remain of the same political party that it was at the time of the vacancy. When a list of potential replacements is not timely submitted to the Governor by the responsible political party, the Governor is restricted to appointing a person “of the same political party as the person vacating the office.” *Id.* By using the word “vacating”—a present participle—the statute refers unambiguously to the political party of the person at the time of vacancy. *See Merriam Webster Online, Present Participle*,

webster.com/dictionary/present%20participle (last visited Jan. 4, 2016) (defining “present participle” as “a participle that typically expresses present action in relation to the time expressed by the finite verb in its clause”). For example, if an announcer referred to “the hat worn by the person hitting the ball,” the announcer would clearly be referring to the hat worn by the person in the act of hitting the ball, not to the hat worn by that person months or years earlier. This sentence thus plainly limits the Governor, in the absence of a timely-submitted list of potential replacements, to appointing a replacement from the political party with which the previous senator was affiliated at the time of the vacancy. It would make no sense for a different rule to apply to determining the political party responsible for submitting the list of potential replacements.

Were there any remaining doubt, the third sentence provides yet more context confirming the Legislature’s intent for a replacement senator to come from the political party with which the vacating senator was affiliated at the time of the vacancy. In contrast to the first sentence, this sentence from subsection (c) addresses not the *identity* of the responsible political party but the *location* of the specific party executive committee responsible for the list, and it expressly qualifies that location as “the senatorial district” in which the vacating senator resided at “the time of his or her election or appointment.” W. Va. Code § 3-10-5(c).¹ This sentence shows that the Legislature knew how to (and did) specify “the time of . . . election or appointment” when it saw fit to do so. *Id.* The Legislature specifically did not include that same qualifier when referring to the vacating senator’s party affiliation in subsection (a), and our Supreme Court of Appeals has made clear that “we are obliged not to add to statutes something the Legislature purposely omitted.” *Banker v. Banker*, 196 W. Va. 535, 546–47, 474 S.E.2d 465, 476–77 (1996).

In sum, reading the statute in its entirety, as we must, we find that the statute can only be reasonably understood to refer to a vacating senator’s party affiliation at the time of the vacancy. The statute is therefore unambiguous as to the question you pose, and “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).

¹ This geographical qualifier on the appropriate party committee has come into play previously in circumstances where there has been redistricting since an election or appointment. When current Agriculture Commissioner Helmick resigned his seat in the State Senate, it was undisputed under subsection (a) that the Democratic party would submit the list of potential replacements, but it was subsection (c) that dictated which county committees of the Democratic party would participate in compiling the list. Though there had been redistricting since then-Senator Helmick took office, the plain terms of subsection (c) required that the potential replacements be selected from the old senatorial district from which Helmick had been elected. Marla Pisciotto, WV Senate awaits Helmick's replacement, *State Journal* (Jan. 4, 2013, 5:10 PM), <http://www.statejournal.com/story/20507029/wv-senate-awaits-helmicks-replacement> (last updated Feb. 3, 2013, 5:10 PM). Subsection (c) might also be relevant were a senator to resign after having moved out of his or her district.

Our conclusion is bolstered by a review of the statutory history. Prior to an amendment in 2010, West Virginia Code § 3-10-5 consisted only of a single paragraph first enacted in 1963. Ch. 64, Acts of the Legislature, 1963, at 377. In pertinent part, it read:

Any vacancy in the office of State Senator or member of the House of Delegates shall be filled by appointment by the Governor, in each instance from a list of three legally qualified persons submitted by the party executive committee of the delegate district in the case of a member of the House of Delegates, and by the party executive committee of the state senatorial district in the case of a state senator, of the party with which the person holding the office immediately preceding the vacancy was affiliated, and of the county or state senatorial district, respectively, in which he resided at the time of his election or appointment.

W. Va. Code § 3-10-5 (1963). Like today's version of the statute, the pre-2010 version provided that the list of potential replacements was to be submitted by the party executive committee "of the party with which the person holding the office immediately preceding the vacancy was affiliated," and "of the . . . state senatorial district . . . in which [that person] resided at the time of his election or appointment." Though the pre-2010 statute included a reference to "the time of . . . election or appointment," that reference did not qualify the party affiliation language. In 2010, the Legislature essentially broke this paragraph into the three subsections that exist today, but did not change the substance. *See* Ch. 78, Acts of the Legislature, 2010, at 950.² This statutory history confirms that the Legislature has knowingly chosen not to tie the replacement candidate to the former senator's party affiliation at the time of his or her election or appointment.

We also find support in a review of the laws of other States, which shows that our State's law is very different from those that have been construed to require vacancies to be filled by the party at the time of election or appointment. Some States have laws that expressly provide that the party at the time of election fills a vacancy.³ In other States, where courts have read that requirement into their states' laws, the laws have been truly ambiguous, referring without any

² An electronic version is available at: http://www.legis.state.wv.us/Bill_Status/bills_history.cfm?INPUT=557&year=2010&sessiontype=RS.

³ *See, e.g.*, Nev. Const. art. IV, § 12 ("In case of the death or resignation of any member of the legislature, either senator or assemblyman, the county commissioners of the county from which such member was elected shall appoint a person *of the same political party as the party which elected such senator or assemblyman* to fill such vacancy" (emphasis added)); Md. Const. art. III, § 13 ("the Governor shall appoint a person to fill such vacancy from a person whose name shall be submitted to him in writing, within thirty days after the occurrence of the vacancy, by the Central Committee of the political party, if any, with which the Delegate or Senator, so vacating, *had been affiliated, at the time of the last election or appointment of the vacating Senator or Delegate*" (emphasis added)); N.J. Const. art. IV, § 4, ¶ 1 ("the vacancy shall be filled within 35 days by the members of the county committee *of the political party of which the incumbent was the nominee* from the municipalities or districts or units thereof which comprise the legislative district" (emphasis added)); Ind. Code § 3-13-5-1(b) ("A vacancy in a legislative office that was last held by a person *elected or selected as a candidate of a political party* described by IC 3-8-4-10 shall be filled by the state committee of the political party." (emphasis added)).

other context or elaboration to “the party” or “the political party” of the previous official.⁴ In contrast, our statute expressly references “the time of . . . election or appointment” but does not apply that qualifier to the vacating official’s party affiliation, and also provides ample other context that makes clear that the party at the time of the vacancy fills the vacancy.

Sincerely,



Patrick Morrisey
Attorney General

Elbert Lin
Solicitor General

Erica N. Peterson
Assistant Attorney General

⁴ See *Richards v. Bd. of Cnty. Comm'rs of Sweetwater Cnty.*, 6 P.3d 1251 (Wyo. 2000) (interpreting statute that referred simply to “the political party to which the member whose office is vacant belonged”); *Wilson v. Sebelius*, 72 P.3d 553 (Kan. 2003) (interpreting statute that referred only to “the party”).