



State of West Virginia
Office of the Attorney General

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November 12, 2015

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Honorable Raymond K. LaMora III
Tucker County Prosecuting Attorney
211 First Street, Suite 207
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Dear Prosecutor LaMora:

You have asked for an Opinion of the Attorney General with regard to a county commission's power over an emergency ambulance authority created by the commission. 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 upon the factual assertions set forth in your correspondence with the Office of the Attorney General.

Your letter raises a number of legal issues, which are addressed in turn below:

(1) Can a county commission dissolve an ambulance authority board, and if so, what is the procedure to do so? (2) Can a county commission keep the authority intact, but remove all board members and appoint a new board? (3) Can the three county commissioners, along with two additional members, serve as board members of the ambulance authority?

Question 1: Can a County Commission Dissolve an Ambulance Authority Board, and if so, What Is the Procedure To Do So?

A county commission is granted by statute the power and discretion to create an ambulance authority board. Under West Virginia Code § 7-15-4, the Legislature imposed on county commissions a qualified duty to provide emergency ambulance services where such services are not otherwise available. The statute gives county commissions wide discretion to choose how such services are to be provided, including through the establishment of an emergency ambulance authority. Specifically, "[t]he county commission may provide the service directly through its agents, servants and employees; or through private enterprise; or by its designees; or by contracting with individuals, groups, associations, corporations or otherwise;

or it may cause such services to be provided by an authority, as provided for in this article.” W. Va. Code § 7-15-4 (emphasis added).

The West Virginia Supreme Court of Appeals has held that the power to create ordinarily implies the power to destroy. In *Hatfield v. Mingo Cnty. Court*, 92 S.E. 245 (1917), the Supreme Court of Appeals held in the syllabus that “[a]ny body or tribunal having power to create a public office has implied power to abolish it, in the absence of a limitation imposed by the authority conferring the power, or a prohibition in some law to which the creating body or tribunal is subject.” There, the Legislature had empowered county courts (the predecessors of county commissions) to create the office of sealer of weights and measures, and to appoint an individual to that office for a term of four years. The Mingo County Court created such a position on January 13, 1916, but abolished the office roughly a year later. The Supreme Court of Appeals rejected a petition by the officeholder seeking to compel payment of his salary, reasoning that the Legislature had impliedly delegated to the county court the power to abolish the office at any time. Though it is nearly a century old, *Hatfield* has been cited approvingly by both the Supreme Court of Appeals and this Office. See, e.g., *Baker v. Civil Serv. Comm’n*, 161 W. Va. 666, 673, 245 S.E.2d 908, 912 (1978); *State ex rel. Musick v. Londeree*, 145 W. Va. 369, 375, 115 S.E.2d 96, 100 (1960); 50 W. Va. Att’y Gen. Op. 726, 1964 WL 72553, *2 (1964).

We believe that a county commission’s power to dissolve an ambulance authority is similarly implicit in its delegated power to create such an authority. As in *Hatfield*, the statute grants to county commissions the power to create an ambulance authority and includes no “limitation” on its power to abolish that authority. The statute provides that any ambulance authority “shall constitute a public corporation, and as such, shall have perpetual existence.” W. Va. Code § 7-15-4. But that is a term of art that simply means that ambulance authorities have no defined period of existence or expiration, and therefore exist until dissolved. See 18 Am. Jur. 2d *Corporations* § 71. It does not mean that ambulance authorities, as public corporations, may never be dissolved. See Andrew A. Schwartz, *The Perpetual Corporation*, 80 Geo. Wash. L. Rev. 764, 775 (2012) (describing “the term ‘perpetual existence’ as ‘misleading’ because it apparently means nothing more than that ‘the corporation lasts until dissolved’”).

As to the proper procedure for abolishing an ambulance authority, we advise that a county commission follow the same procedure required for creating such an authority. In *Hatfield*, the office that had been created by an order of the county court was “abolished by another order.” 92 S.E. at 246. Here, the law provides that an ambulance authority “shall be created upon the adoption, by the governing body of each participating government, acting individually, of an appropriate ordinance or order.” W. Va. Code § 7-15-4.¹ Following *Hatfield*, we believe that “an appropriate ordinance or order” is similarly required to abolish an ambulance authority.

¹ A “participating government” is defined in West Virginia Code § 7-15-3 as “any municipality or county establishing or participating in an emergency ambulance service authority.”

Question 2: Can a County Commission Keep the Authority Intact, But Remove All Board Members and Appoint a New Board?

By statute, members of an ambulance authority's board are appointed to fixed terms, and there is no provision permitting a county commission to unilaterally remove such board members from office. Under West Virginia Code § 7-15-5, initial appointments are to be made by the participating governments such that a third of the board members have a one-year term, a third have a two-year term, and a third have a three-year term. As those initial appointments expire, "the successor to fill the vacancy created by such expired term shall be appointed for a term of three years." W. Va. Code § 7-15-5. The participating governments are also granted authority to fill mid-term vacancies: "If any member of the board dies, resigns or for any other reason ceases to be a member of the board, the governing body of the participating government which such member represented shall appoint another individual to fill the unexpired portion of the term of such member." *Id.* There is no language in the statute authorizing a participating government to unilaterally remove a board member, for cause or otherwise, before the end of his or her statutory term. In comparison, other statutory provisions throughout Chapter 7 expressly give county commissions the unilateral authority both to appoint and remove members of an office, board, or authority.²

Under settled case law from the Supreme Court of Appeals, it is clear that the county commission lacks the power itself to remove all board members and appoint a new board. In *Helmick v. Tucker Cnty. Court*, 64 S.E. 17 (1909), the high court considered "the power of a county court to remove from office summarily, before the expiration of his term, a road surveyor appointed by it." The court rejected that claimed authority, holding that "it is clear that by fixing his tenure of office the Legislature has left the county court without any such implied power." *Id.* at 18. In contrast, the Supreme Court of Appeals later held that "[w]here a statute conferring the power to appoint fixes *no definite term of office*, but provides that the tenure shall be at the pleasure of the appointing body, the implied power to remove such appointee may be exercised at [the appointing body's] discretion." Syl., *Barbor v. Cnty. Court of Mercer Cnty.*, 85 W. Va. 359, 101 S.E. 721 (1920) (emphasis added). Again, though these cases are each roughly a century old, they have been approvingly cited by the Supreme Court of Appeals. See, e.g., *Wilhelm v. W. Va. Lottery*, 198 W. Va. 92, 94, 479 S.E.2d 602, 604 (1996) (citing *Barbor*);

² See, e.g., W. Va. Code § 7-3-15 ("Any trustee [for a hospital, clinic or long-term care facility] may be removed by the county commission for incompetency, neglect of duty or malfeasance in office after an opportunity to be heard at a public hearing before the county commission."); *id.* § 7-4-3 ("Any counsel so employed may be removed at the pleasure of the county commission."); *id.* § 7-12-3 ("The county commission may at any time remove any member of the [county development] board by an order duly entered of record and may appoint a successor member for any member so removed."); *id.* § 7-14-3 ("The county commission may at any time remove a [civil service] commissioner for good cause. . . .") (for deputy sheriffs); *id.* § 7-14b-3 ("The county commission may at any time remove a [civil service] commissioner for good cause. . . .") (for correctional officers); *id.* § 7-16-3 ("The county commission may at any time remove any member of the [county solid waste] authority by an order duly entered of record and may appoint a successor.")

Schwartz v. Cnty. Court of Hancock Cnty., 136 W. Va. 626, 642-43, 68 S.E.2d 64, 73 (1951) (citing *Helmick*).

Thus, while the Emergency Ambulance Service Act confers the authority on county commissions to abolish an ambulance authority entirely, it does not provide those commissions with power themselves to remove individual board members. As the Supreme Court of Appeals explained in *Hatfield*, there is an important difference between abolishing an office entirely and removing the officeholder but continuing the office. 92 S.E. at 246. The statutory prescription of a defined term “does not impliedly or otherwise deny or withhold the power of abolition.” *Id.* But it does “operate” where “the appointing body shall see fit to maintain the office permanently or for a longer period than [the prescribed term].” *Id.*

This does not mean that a county commission is necessarily wholly without power to cause a mid-term expulsion or removal of an authority’s board member. West Virginia Code § 6-6-7 establishes a procedure for the removal of “[a]ny person holding any county, school district or municipal office,” in the event of “official misconduct, malfeasance in office, incompetence, neglect of duty or gross immorality or for any of the causes or on any of the grounds provided by any other statute.” W. Va. Code § 6-6-7(a). Under that procedure, a county commission may file charges “in the form of a petition duly verified by at least one of the persons bringing the same” with a circuit court. *Id.* § 6-6-7(c). Those charges are then heard by a three-judge court specially convened by the Supreme Court of Appeals. *Id.* A county commission may be able to seek to remove an authority’s board member under this procedure.

Question 3: Can the Three County Commissioners, Along with Two Additional Members, Serve as Board Members of the Ambulance Authority?

Finally, you ask whether the three county commissioners in Tucker County could serve on the five-member board of the ambulance authority. In your letter, you note that West Virginia Code § 7-15-5 specifically provides that “[a]ny individual who is a resident of, or member of the governing body of any participating government entity is eligible to serve as a member of the board.” But you inquire whether the fact that “the Tucker County Commission provides significant financial backing to the Tucker County Ambulance Authority” would create a conflict.

The West Virginia Ethics Commission addressed this question in a 2013 Advisory Opinion, finding it permissible for a county commissioner to serve on an ambulance authority board. W. Va. Ethics Comm’n, Advisory Op. No. 2012-47 (January 10, 2013). A county commission “ask[ed] whether it constitute[d] a conflict of interest for a County Commissioner to serve as a voting member of a County Ambulance Authority.” *Id.* at 1. As you do here, the requesting commission there specifically noted that it “provides significant funding to the County Ambulance Authority.” *Id.* Nevertheless, the Ethics Commission concluded that “[t]here is nothing in the Ethics Act or W. Va. Code § 61-10-15 which prohibits a Member of a County Commission from serving” on an ambulance authority board. *Id.* at 2. The Ethics Commission went on to further conclude that “there is nothing in the Ethics Act which prohibits

County Commissioners from voting on matters which affect a county board on which they serve.” *Id.* Because county boards, like an ambulance authority board, are “subunits of the county government,” county commissioners “do not, for purposes of the voting provisions in the Ethics Act, have a financial relationship which prohibits them, in their capacity as county commissioners, from voting on matters affecting the boards.” *Id.* at 3.³ That is true, the Ethics Commission concluded, “even if [county commissioners] receive nominal compensation for their service on a county board.” *Id.*⁴

The Ethics Commission left open the question whether the common-law doctrine against self-appointment has any applicability here, but we believe that it does not. As this Office has previously noted, “[w]hen a statute confers the appointing power, and does not expressly authorize self-appointment, the appointment of some other than self is always contemplated.” 41 W. Va. Att’y Gen. Op. 209, 1946 WL 25944, *1 (1946). We do not believe that doctrine is relevant here because the statute *does* “expressly authorize self-appointment.” *Id.* The statute specifically provides that “[a]ny individual who is a resident of, or member of the governing body of any participating government entity is eligible to serve as a member of the board.” W. Va. Code § 7-15-5.

Sincerely,



Patrick Morrisey
Attorney General

Elbert Lin
Solicitor General

Julie Warren
Assistant Attorney General

³ In a separate Advisory Opinion, the Ethics Commission has concluded that a full-time employee of a county ambulance authority is prohibited under West Virginia Code § 61-10-15 from serving as a county commissioner. W. Va. Ethics Comm’n, Advisory Op. No. 2013-41 (October 3, 2013.)

⁴ Under West Virginia Code § 7-15-6, each member of an ambulance authority board is eligible to receive up to twenty dollars for each meeting actually attended, not to exceed six hundred dollars in a fiscal year.