



State of West Virginia
Office of the Attorney General

Patrick Morrissey
Attorney General

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

April 2, 2020

The Honorable James W. Davis, Jr.
Hancock County Prosecuting Attorney
1114 Ridge Avenue
New Cumberland, WV 26047

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

and certification program, *id.* § 8-15A-2, and must meet certain age requirements, *id.* § 8-15-17(d). In addition to these mandatory requirements, the Commission has discretion to allow only those individuals who have passed a medical examination to sit for the written test. *Id.* § 8-15-20(a). The Commission may also decline to administer the chief exam to those addicted to drugs or alcohol, those “guilty of any crime, or of infamous or notoriously disgraceful conduct,” those previously “dismissed from public service for delinquency or misconduct,” and those who fail to fully comply with the Commission’s rules and regulations. *Id.* § 8-15-19.

The statute does not allow for additional restrictions on who may sit for the chief exam. Section 8-15-18 states that 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 (emphases added). The word “shall” is mandatory. *See* syl. pt. 1, *Nelson v. W. Va. Pub. Employees Ins. Bd.*, 171 W. Va. 445, 300 S.E.2d 86 (1982). And by emphasizing that the exam shall be available to all applicants who meet other statutory requirements, the Legislature underscored that it did not give individual appointing bodies discretion to set additional requirements. Further, the *expressio unius est exclusio alterius* canon of interpretation, or “the express mention of one thing implies the exclusion of another,” confirms that by specifying certain requirements the Legislature did not intend for the Commission to add more. *See* syl. pt. 4, *Christopher J. v. Ames*, 241 W. Va. 822, 828 S.E.2d 884 (2019) (citation omitted). As such, the answer to your second question is that all individuals who satisfy the statutory requirements to sit for a competitive examination may take the fire chief exam.

Our conclusions on these two questions are consistent with the 1963 Opinion of this Office. In that situation, as here, there was no one eligible for promotion nor had anyone passed the requisite exam during the preceding three years. This Office advised that the relevant position must be filled by competitive examination open to all who met the statutory requirements. 50 W. Va. Op. Att’y Gen. at 538-39. Although some of the statutes have changed over the past 57 years, none of those amendments alter our answers when faced with a similar situation here.

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.*

* * *

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

Hon. James W. Davis Jr.
Page 4

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,

A handwritten signature in black ink that reads "Patrick Morrissey". The signature is written in a cursive style with a long, sweeping tail on the final letter.

Patrick Morrissey
Attorney General

Lindsay See
Solicitor General

John M. Masslon II
Assistant Solicitor General