



State of West Virginia
Office of the Attorney General

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February 4, 2020

The Honorable John L. Bord
Taylor County Prosecuting Attorney
214 West Main Street
Grafton, WV 26354

Dear Prosecutor Bord:

You have asked for an Opinion of the Attorney General about whether a county sheriff is required to appoint a deputy as a humane officer. 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.

In your letter, you explain that the Taylor County Commission has asked for an interpretation of West Virginia Code § 7-10-1, which requires a sheriff of a county to appoint a county humane officer every year. As you represent in your letter, the Taylor County sheriff has not appointed a deputy to this role on the basis that the role of humane officer falls “under the umbrella of his official duties,” and thus a sheriff can perform the role personally instead of designating a deputy.

Your letter raises the following legal question:

Does West Virginia Code § 7-10-1 require sheriffs to appoint one of their deputies to be a humane officer, or does it permit sheriffs to act directly as humane officers?

We conclude that the plain language of the statute instructs that a sheriff must appoint a deputy as the county humane officer. The statute’s mandatory language does not allow room for

a sheriff to fulfill this role personally except in limited circumstances involving small counties, and with the county commission's approval.

Discussion

West Virginia Code § 7-10-1 contains the Legislature's direction about the role of county humane officer, and limits a county sheriff's discretion to fill that role personally. The statute commands that

The sheriff of each county of this state *shall* annually designate, by a record made in the office of the clerk of the county commission, one of his or her deputies to act as humane officer of the county; or, if the county commission and sheriff agree, the county dog warden may be designated to act as the humane officer or as an additional humane officer.

(emphasis added).

The primary object of statutory interpretation is “to ascertain and give effect to the intent of the Legislature.” *State ex rel. Judicial Investigation Comm'n v. Putnam Cty. Bd. of Ballot Comm'rs*, 237 W. Va. 99, 108, 785 S.E.2d 805, 814 (2016) (citation omitted). In service of that goal, where the “text, given its plain meaning, answers the interpretive question, the language must prevail.” *Id.* (citation omitted). Here, Section 7-10-1 states that the Sheriff “shall” designate as county humane officer “one of his or her deputies” or (with county commission approval) “the county dog warden.” W. Va. Code § 7-10-1. The term “shall” is construed as “mandatory” absent any “contrariwise intent on the part of the Legislature.” *Terry v. Sencindiver*, 153 W. Va. 651, 657, 171 S.E.2d 480, 483 (1969). Nothing counters that general meaning here, so under the statute a sheriff must appoint a deputy or the county dog warden to be the humane officer.

The plain language of the statute thus does not give sheriffs discretion to appoint themselves as county humane officers. Nor are we aware of any other statute that might provide a basis for a sheriff to act personally in this capacity, outside of the limited exception discussed below. Indeed, the contrast between Section 7-10-1's mandatory language and other statutes describing sheriffs' authority confirms this reading. Section 7-8-2, for instance, states that the “sheriff of every county shall be the keeper of the jail thereof, but he may, with the assent of the county commission, appoint a jailer of the said county”—and this appointed jailer “may be a deputy sheriff.” W. Va. Code § 7-8-2(a). This statute both expressly includes “keeper of the jail” as part of a sheriff's duties and provides a discretionary mechanism to appoint a deputy sheriff to the post instead. Both factors are missing from Section 7-10-1.

One potential exception to the requirement to designate a separate county humane officer exists for sheriffs of small counties. A sheriff in a county in “which there are four or fewer deputies . . . need not devote his full time to the services or duties of his office as sheriff or his employment as deputy sheriff”—in contrast to a sheriff “in any county in which there are more than four deputies,” who must devote “his full time to the performance of the services or duties required by law of such sheriff.” W. Va. Code § 6-3-1(a)(5). Therefore, assuming no

restrictions on holding dual offices apply to these roles (a question that is beyond the scope of your request), a county commission could appoint a sheriff in a small county to another part-time position such as county dog warden. *Id.* § 19-20-6(a). Under those circumstances, the sheriff and county commission could then jointly exercise the option under Section 7-10-1 to designate the dog warden—in this case, the sheriff—to be county humane officer as well.

Finally, we recognize that although the Legislature has “general authority” over the appointment of deputy sheriffs, *Hall v. Protan*, 158 W. Va. 276, 282, 210 S.E.2d 475, 479 (1974) (interpreting W. Va. Const. art. IX, §§ 1, 3, 6), the Legislature may not “curtail” or “transfer the inherent functions of a constitutional office”—like sheriff—to another office. Syl. pt. 3, *State ex. rel. McGraw v. Burton*, 212 W. Va. 23, 569 S.E.2d 99 (2002). The constitutionality of Section 7-10-1 is outside the scope of your request; nevertheless, we note that the concern about transferring inherent functions of the office of sheriff is likely not implicated here. Our Supreme Court has not addressed whether the function of humane officer is part of the core functions of a sheriff, but at least one other state supreme court has long distinguished these roles. *See Eldidge v. O’Connell*, 114 Me. 457 (Me. 1916). Further, our high court has approved applying the civil service laws to sheriff deputies even though hiring and firing decisions are closely tied to a sheriff’s inherent functions. *Hall*, 158 W. Va. at 281, S.E.2d at 479 (holding that sheriffs are not “constitutionally immune from the operation of civil service laws”). In light of *Hall*’s holding, there is likely no constitutional infirmity in Section 7-10-1 either.

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In sum, sheriffs generally must appoint another person—one of their deputies or the county dog warden—to be the humane officer of a county, rather than directly filling the role themselves.

Sincerely,



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