



State of West Virginia
Office of the Attorney General

Patrick Morrissey
Attorney General

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

July 9, 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 scoring the Weirton Fire Department fire chief examination. 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.” When this Opinion relies on facts, it depends 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. You previously asked whether the Weirton Fire Civil Service Commission (“Commission”) must fill the vacancy by appointment instead, and if so, who may take the qualifying examination. We advised that the Commission must fill the position of fire chief through the appointment process and that anyone who meets the statutory requirements may take the exam. Opinion of the

Attorney General on the Procedure for Filling a Fire Chief Vacancy, 2020 WL 1855825, *1, *3 (W. Va. A.G. Apr. 2, 2020). In this second request you ask additional questions related to scoring the exam.*

Your current request thus raises two legal questions:

1. *Must the Commission add five points to passing scores of veterans who take the fire chief exam?*
2. *May the Commission add one point to passing scores for each year an applicant has served in the Weirton Fire Department?*

We conclude that the five-point veteran preference applies to all positions filled by appointment, and therefore must be added to all veterans' passing scores on this exam. Experience points, by contrast, may not be added under current precedent, but are an appropriate factor to consider when choosing among the applicants with the three highest scores.

Discussion

Question 1: Veteran-Preference Points Apply To Fire Chief Appointments

As explained in our previous Opinion, under these circumstances the only statutory option to fill the vacant fire chief position is appointment. *See* W. Va. Code § 8-15-11(b) (listing options of promotion, appointment, reinstatement, or reduction in grade). The appointment process, in turn, requires choosing the next fire chief from “the three individuals on the eligible list who received the highest averages at preceding competitive [fire chief] examinations.” *Id.* § 8-15-20(a). And for positions like fire chief that are “filled under civil service,” “a preference of five points in addition to the regular numerical score received on [the] examination shall be awarded to all veterans having qualified for appointment by making a minimum passing grade.” *Id.* § 6-13-1. Your request asks whether the Commission is required to add five points to the passing scores of veterans under this Code provision when determining the three highest scores.

Whether veteran-preference points must be added to passing scores for the fire chief exam is a question of statutory interpretation. “The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.” Syl. pt. 1, *Smith v. State Workmen’s Comp. Comm’r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). And the best evidence of legislative intent is the statutory text. If that text, “given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed.” *Appalachian Power Co. v. State Tax Dep’t*, 195 W. Va. 573, 587, 466 S.E.2d 424, 438 (1995).

* Your request also raised two additional questions; the City of Weirton advised that one is now moot, and we decline to opine on the other at this stage because it only might arise in the future and resolution would likely depend on the facts as they may develop in that instance.

Here the language of Section 6-13-1 is plain and unambiguous: Assuming that a veteran sitting for the exam “mak[es] a minimum passing grade,” five veteran-preference points “shall be awarded” and added to that base score. The word “shall” is mandatory. Syl. pt. 3, *State v. A.D.*, 242 W. Va. 536, 836 S.E.2d 503 (2019). Thus, five points must be added to the scores of all veterans that receive a passing score for purposes of determining the three individuals eligible for appointment.

There is little precedent interpreting this provision, but an Education and State Employees Grievance Board decision supports this conclusion: The Board held that veteran-preference points must be added when a position is filled by appointment and noted different rules apply when a position is filled by promotion. *Marascio v. Dep’t of Transp., Div. of Hwys.*, 2007 WL 960121, *3 (Feb. 16, 2007); *see also* 49 W. Va. Op. Att’y Gen. 264, 265 (1961) (explaining that the Legislature does not use the terms “appointment” and “promotion” interchangeably).

The City of Weirton’s concern about potentially “double-awarding” preference points to individuals who received veteran preference when hired into the Weirton Fire Department does not change the statutory analysis. The statute is clear that “all” veterans who pass the exam are entitled to the five-point bump. W. Va. Code § 6-13-1. Further, as we explained in our April 2 Opinion, the fire chief exam is open to anyone who satisfies the statutory requirements—even those who are not current members of the Weirton Fire Department. There is no textual support for awarding veteran-preference points to those applying to the Weirton Fire Department for the first time but not current members of the department, and reading an implicit distinction into the statute would result in less favorable treatment for currently employed veterans. The veteran-preference points must therefore be awarded to all veterans who receive passing scores on the fire chief exam.

Question 2: Experience Points May Not Be Added To Exam Scores Under Current Precedent

Your second question asks whether one point may be added to passing exam scores for every year the applicant has served with the Weirton Fire Department. Under current precedent, the answer is no. Nevertheless, a recent Supreme Court of Appeals decision in the analogous police officer appointment contexts suggests that the Court may be open to revisiting this precedent in the future.

Almost 30 years ago, the Court examined the role of experience points in Section 8-15-20. *Meek v. Pugh*, 186 W. Va. 609, 611, 413 S.E.2d 666, 668 (1991). In *Meek*, the Court contrasted appointment under Section 8-15-20 with promotion under Section 8-15-22. It explained that only two factors are used under Section 8-15-22 to determine who receives a promotion—the score on the promotion exam and experience points. *Id.* at 611, 413 S.E.2d at 668. The Court then explained that under Section 8-15-20, experience may not be considered when deciding who is eligible for appointment. *See id.*

The relevant language of the two statutes has not changed since *Meek*. Section 8-15-20 still does not reference experience. Rather, as noted above, the exam score—after being adjusted as required by other Code provisions—determines the three individuals from whom the final

appointment may be made. To be sure, the appointing authority may consider any lawful factors at *that* stage when choosing from the pool of three, including experience. See *Legg v. Smith*, 181 W. Va. 796, 799 n.5, 384 S.E.2d 833, 836 n.5 (1989). But *Meek*'s holding that experience points may not be added to the exam scores themselves remains good law.

We note that if this question were presented to the Court again now, however, it might reach a different result. Last year, the Court expanded the power of police civil service commissions to issue regulations on factors that may be considered when appointing or promoting police officers. The Court held "that the provisions of the police civil service act" do not "exclude all other selection requirements for police officers." *Burner v. Martinsburg Police Civil Serv. Comm'n*, 241 W. Va. 677, 683, 827 S.E.2d 622, 628 (2019) (quoting *Morgan v. City of Wheeling*, 205 W. Va. 34, 39-40, 516 S.E.2d 48, 53-54 (1999)). The Court thus blessed awarding education points as "a discretionary factor developed by the Commission pursuant to the authority bestowed upon it by the Police Civil Service Act." *Id.*

The Court frequently analogizes the provisions of Article 14 of Chapter 8 at issue in *Burner* with those relevant here of Article 15 of Chapter 8. See *Meek*, 186 W. Va. at 612, 413 S.E.2d at 669 ("The statutes governing employment and promotion of paid fire departments are similar to the statutes governing paid police departments."). And just as police civil service commissions may promulgate rules adopting discretionary factors that are "not inconsistent with the express provisions of the Act" nor based on "personal or political whim," *Burner*, 241 W. Va. at 683, 827 S.E.2d at 628 (emphasis removed; citation omitted), the Court might conclude that adding experience points to firefighter appointment exams pursuant to a lawfully issued Commission rule would not be inconsistent with the express provisions of Article 15 nor based on mere whim. Thus, if the Court were presented with the issue you raise (and determined that principles of *stare decisis* allow reconsideration), it might well extend its decision in *Burner* to conclude that the factors enumerated in Section 8-15-20 are not exclusive. To date, however, the Court has not approved adding experience points to firefighter appointment exam scores.

Sincerely,



Patrick Morrissey
Attorney General

Lindsay See
Solicitor General

John M. Masslon II
Assistant Solicitor General