



State of West Virginia
Office of the Attorney General

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The Honorable Mac Warner
West Virginia Secretary of State
State Capitol Building 1, Room 157-K
1900 Kanawha Blvd. East
Charleston, WV 25305

Dear Secretary Warner:

You have asked for an Opinion of the Attorney General concerning the authority of the Secretary of State (“the Secretary”) to issue emergency rules related to the upcoming primary election in response to widespread public-health concerns. This Opinion is being issued pursuant to West Virginia Code § 5-3-1, which provides that the Attorney General “shall give written opinions and advise upon questions of law . . . whenever required to do so, in writing, by . . . the Secretary of State.” 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 in the March 16, 2020 proclamation by Governor James C. Justice II declaring a state of emergency.

Your letter describes the consequences that the spread of COVID-19 (“coronavirus”) may have on the upcoming statewide primary election, which is scheduled for May 12, 2020. Your request describes several ways that the spread of coronavirus—or the fear thereof—could affect your office’s ability to protect voters’ rights and public safety, while maintaining public confidence in the integrity of the election process. Your request identifies provisions of the West Virginia Code that address emergency and disaster response, and asks what authority these provisions grant the Secretary when determining how best to administer a primary election in the event of a viral epidemic.

Your letter raises two primary legal questions:

- (1) *Do the Secretary's emergency rulemaking powers apply in the context of an epidemic like the spread of coronavirus, and if so how is this authority invoked?*
- (2) *What is the extent of the Secretary's authority under these provisions?*

With respect to the first question, we conclude that Section 3-1A-6(e) of the West Virginia Code, which governs emergency election procedures, can apply in the face of an actual or imminent viral epidemic in the State. This provision can be invoked by declaration of the Governor or by order of the Chief Judge of an affected judicial circuit; the Governor's March 16 declaration satisfies the statutory standard. With respect to the second question, we conclude that Section 3-1A-6(e) grants the Secretary broad emergency powers outside the ordinary rulemaking process where necessary to promote voter access and public confidence in the election process, but that any emergency rules may not contradict the specific requirements governing elections already set forth in the Code.

Discussion

Most provisions of law controlling the conduct of elections in West Virginia are set forth in Chapter Three of the West Virginia Code. Among other things, Chapter Three prescribes the date and time of elections, the timeframes for registering to vote, and the circumstances in which individuals may cast absentee ballots in person or by mail. W. Va. Code §§ 3-1-31, 3-5-1; 3-1-3, 3-1-3a; 3-3-1.

The Secretary is the "chief election officer" of the State, W. Va. Code § 3-1A-6(a), and as such has many powers and responsibilities related to the administration of Chapter Three. With respect to rulemaking, the Secretary may consult with the State Election Commission to "promulgate legislative rules . . . as may be necessary to standardize and make effective the provisions of [Chapter Three]." *Id.* The Secretary also has power to promulgate "emergency rules" in certain circumstances. *See, e.g., id.* §§ 3-1-48(i) (Secretary may issue emergency rules to effectuate the State's access to federal grants under the Help America Vote Act); 3-12-14(a)(3) (Secretary may issue emergency rules to effectuate the public financing program for Supreme Court of Appeals elections). Most relevant to your request, Section 3-1A-6(e) also provides emergency rulemaking powers in the event of a natural disaster, war, or similar exigent circumstance:

- (1) The Secretary shall also have the power, after consultation with the Secretary of the Department of Military Affairs and Public Safety, to implement emergency procedures and rules to ensure that all eligible voters have the opportunity to cast a valid ballot and to uphold the integrity of an election in the

event of natural disaster as declared by the Governor of this state, terrorist attack, war or general emergency, if any of which occur during or immediately preceding an election.

(2) For purposes of this subsection, a “general emergency” means circumstances preventing the casting of ballots in one or more voting precincts. The chief judge of the circuit court of the county where the casting of ballots is being prevented must declare by order that a general emergency exists.

W. Va. Code § 3-1A-6(e).

The Secretary’s emergency authority under Section 3-1A-6(e) differs from ordinary rulemaking power in four respects. *First*, this authority may be invoked in four specific circumstances during or immediately before an election: a “natural disaster as declared by the Governor of this state, terrorist attack, war or general emergency.” W. Va. Code § 3-1A-6(e)(1). *Second*, the Secretary consults with the Secretary of the Department of Military Affairs and Public Safety, rather than the Board of Elections, before implementing rules pursuant to Section 3-1A-6. *Id.* *Third*, these rules take effect immediately: The Secretary is empowered to “implement” election rules as “emergency rules,” which are not subject to pre-approval by the Legislature, in contrast to ordinary rules. *Id.*; *see also id.* § 29A-3-15(a). *Fourth*, instead of general rules that are issued to “standardize and make effective” Chapter Three’s provisions, rules issued under Section 3-1A-6(e) must advance the twin goals of “ensur[ing] that all eligible voters have the opportunity to cast a valid ballot” and “uphold[ing] the integrity of an election.” *Id.* § 3-1A-6(a), (e)(1).

I. Section 3-1A-6(e) Applies In Response To Public-Health Concerns After Declaration Of The Governor Or Order Of The Chief Judges Of The Judicial Circuits Where Affected Precincts Are Located.

Your first question concerns the first of these four distinctions. Your letter asks whether Section 3-1A-6(e) can apply in the context of a threatened public-health crisis (as opposed to an attack or a natural disaster like a flood), and the mechanisms by which it can be invoked. We conclude that the proclamation declaring a state of emergency issued by Governor Justice on March 16, 2020 is sufficient to trigger Section 3-1A-6(e), and note that the Secretary’s authority could also be invoked by an order from the Chief Judge of each judicial circuit affected by the threat of an epidemic.

The first basis for invoking Section 3-1A-6 is “in the event [that] a natural disaster [is] declared by the Governor.” W. Va. Code § 3-1A-6(e)(1). The West Virginia Code does not contain a specific procedure for declaring a “natural disaster.” Rather, the Governor may declare a general state of emergency or a state of preparedness “if a natural or man-made disaster of major proportions has actually occurred or is imminent within the state.” *Id.* § 15-5-6(a). This

statute expressly includes an “epidemic” as one form of “disaster” for which the Governor may make an emergency declaration. *Id.* § 15-5-2(h). As Section 3-1A-6(e) and the emergency-declaration provisions “relate to the same persons or things [and] have a common purpose,” we “regard[] [them] in *pari materia* to assure recognition and implementation of the legislative intent.” *Miller v. Wood*, 229 W. Va. 545, 552, 729 S.E.2d 867, 874 (2012). Thus, a state of emergency declared on the basis of an “actual[]” or “imminent,” naturally occurring “epidemic,”

W. Va. Code § 15-5-6(a) would satisfy Section 3-1A-6(e)’s requirement of a “natural disaster” “declared by the Governor,” *id.* § 3-1A-6(e)(1).

Here, the Governor’s March 16 proclamation found that “the COVID-19 epidemic constitutes a disaster under section two, article five, chapter fifteen of the Code of West Virginia,” and declared a state of emergency in all 55 counties. STATE OF WEST VIRGINIA, EXEC. DEP’T, A PROCLAMATION BY THE GOVERNOR 1-2 (Mar. 16, 2020), *available at* <https://governor.wv.gov/Documents/2020%20Proclamations/State-of-Emergency-March-16-2020.pdf>. This disaster is plainly “natural” as every indication shows it is not man-made, and rather arose and spreads through natural processes. Regardless, an epidemic like that at issue here is a valid statutory basis for the Governor to declare an emergency, and because there is no separate statutory mechanism to declare a “natural disaster,” it seems clear that the Legislature intended the Secretary to be able to implement emergency election rules in response to a state of emergency. We thus conclude that the Governor’s March 16 declaration declaring that a state of emergency exists because of the coronavirus epidemic is a sufficient basis to trigger the Secretary’s powers under Section 3-1A-6(e).

Section 3-1A-6(e) would also independently apply in any counties where the chief judge of the relevant circuit court, as described in West Virginia Code Section 51-2-1(a), issues an order finding a “general emergency” because “circumstances [are] preventing the casting of ballots in one or more voting precincts” within the circuit. W. Va. Code § 3-1A-6(e)(1)-(2). Public-health related travel restrictions or advisories would almost certainly satisfy this standard. Your letter also asks what procedures would govern seeking an order declaring a “general emergency.” The West Virginia Code and circuit court rules do not require a specific process for issuing such an order, but based on similar contexts, the chief judge could issue this order *sua sponte* or at the Secretary’s request. Chief judges are free to make similar determinations *sua sponte*, for example, when “weather or other emergency conditions in that county prevent the general transaction of court business in that county.” *Id.* § 2-2-2(b); *see also id.* § 3-10-3(b) (chief judge of a circuit is “responsible for” issuing an order and proclamation of special elections to fill judicial vacancies). Nevertheless, we note that orders declaring a general emergency must be issued by each of West Virginia’s thirty-one judicial circuits; no provision of the Code or West Virginia Constitution provides authority for the Supreme Court of Appeals to declare a statewide emergency (outside the context of court administration), and such an order could create tension with the Governor’s power to do so under Section 15-5-6.

II. Section 3-1A-6(e) Authorizes Emergency Election Rules To Ensure Eligible Voters Have The Opportunity To Vote And To Uphold Election Integrity, Provided They Do Not Contradict Clear Statutory Requirements.

Your second question asks about the scope of the Secretary's powers under Section 3-1A-6(e), including whether they include the ability to implement emergency election rules that are "beyond or different than those in current" election laws. We conclude that the statute provides authority to issue broad, flexible rules without following the ordinary rulemaking procedures where those rules are consistent with Chapter Three or speak to an issue on which the statute is silent. Section 3-1A-6(e) does not, however, authorize rules that contradict a clear statutory command.

The Secretary's general power to promulgate legislative rules is limited to rules that are "necessary to standardize and make effective the provisions of [Chapter Three]." W. Va. Code § 3-1A-6(a). The Secretary's power to implement emergency election rules is broader, extending beyond what is merely "necessary" to implement the specific directives of Chapter Three to include rules designed to "ensure that all eligible voters have the opportunity to cast a valid ballot and to uphold the integrity of an election." *Id.* § 3-1A-6(e)(1). Omitting the narrowing focus on "the provisions of [Chapter Three]" indicates that the Legislature intended to grant more latitude under Section 3-1A-6(e) to implement emergency election rules than for ordinary election rules. See *Christopher J. v. Ames*, 241 W. Va. 822, 831, 828 S.E.2d 884, 893 (2019) ("As the United States Supreme Court has recognized, when the Legislature includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that the Legislature acts intentionally and purposely in the disparate inclusion or exclusion." (Quotation and alterations omitted)); see also *Gibson v. Northfield Ins. Co.*, 219 W. Va. 40, 47, 631 S.E.2d 598, 605 (2005) ("Explicit direction for something in one provision, and its absence in a parallel provision, implies an intent to negate it in the second context." (Quotation and alterations omitted)).

This broad power to implement emergency election rules is subject to two important limitations. *First*, the Legislature may validly delegate rulemaking power only where it defines "clear public policy objectives or guidelines." *Fairmont Gen. Hosp., Inc. v. United Hosp. Ctr., Inc.*, 218 W. Va. 360, 367, 624 S.E.2d 797, 804 (2005) (citing W. Va. Const. art. VI, § 1). Here, the Legislature's policy objectives for emergency election rules include "ensur[ing] that all eligible voters have the opportunity to cast a valid ballot" and "uphold[ing] the integrity of [the] election." W. Va. Code § 3-1A-6(e)(1). Any rules issued pursuant to Section 3-1A-6(e) thus must be in furtherance of these goals. *Second*, it is a foundational tenet of regulatory rulemaking that "[w]here a statute contains clear and unambiguous language, an agency's rules or regulations must give that language the same clear and unambiguous force and effect that the language commands in the statute." Syl. pt. 4, *Maikotter v. Univ. of West Virginia Bd. of Trustees/West Virginia Univ.*, 206 W. Va. 691, 527 S.E.2d 802 (1999). Thus, the Secretary

cannot implement emergency election rules that violate or alter clear statutory requirements in Chapter Three.

Any emergency election rule the Secretary implements must therefore operate within the boundaries of Chapter Three and advance the twin goals of promoting eligible voters' ability to vote and ensuring election integrity. These guidelines leave a number of options open to the Secretary under Section 3-1A-6(e) when preparing for the upcoming primary election—especially because Chapter Three is “construed in favor of enfranchisement, not disenfranchisement,” so any ambiguity when implementing Chapter Three during a state of emergency would likely be resolved in favor of broader access for eligible voters. *State ex rel. Bowling v. Greenbrier Cty. Comm'n*, 212 W. Va. 647, 649, 575 S.E.2d 257, 259 (2002) (citing *State ex rel. Sowards v. Cty. Comm'n of Lincoln Cty.*, 196 W.Va. 739, 750, 474 S.E.2d 919, 930 (1996)).

One option almost certainly available to the Secretary, for example, would be allowing broader access to absentee, by mail voting in the 2020 primary election. Chapter Three makes individuals eligible to vote absentee by mail if they are “confined to a specific location and prevented from voting in person throughout the period of voting in person” due to “illness . . . or other medical reason.” W. Va. Code § 3-3-1(b)(1)(A). The statute does not specifically define “other medical reason,” which leaves room for the Secretary to issue an emergency rule interpreting this term for purposes of the upcoming primary election to encompass individuals subject to mandatory or voluntary quarantine, as well as those advised to limit travel or avoid locations—like polling places—with groups of people in close proximity. Under an emergency rule of that nature, all eligible voters could likely vote absentee by mail while the coronavirus epidemic affects or threatens the State by relying on state-wide or local advisories. A rule could also account for national directives, like the President's recent guidelines for mitigating the spread of coronavirus that call on everyone in the country to “avoid discretionary travel,” stay home whenever possible, and avoid gatherings of more than ten people. CTR. DISEASE CONTROL, THE PRESIDENT'S CORONAVIRUS GUIDELINES FOR AMERICA: 15 DAYS TO SLOW THE SPREAD 2 (Mar. 16, 2020), available at https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf. An emergency rule interpreting the statutory grounds for eligibility to vote absentee by mail that is tailored to the coronavirus epidemic would be consistent with Chapter Three, and would also advance the Secretary's duty under Section 3-1A-6(e) to help “ensure all eligible voters have an opportunity to cast a valid ballot.”

While the Governor's declaration of emergency remains in place, we thus conclude that the Secretary may take emergency measures like the example above that help ensure voter access and election integrity in the primary election, as long as those measures do not conflict with the clear, unambiguous text of Chapter Three. Section 3-1A-6(e) is designed to provide broad and flexible authority to respond to serious public-health concerns like the coronavirus epidemic. The Secretary has full authority to invoke those powers now and while the state of emergency persists.

Finally, although this Opinion Letter addresses the Secretary's emergency powers, we also note that the Governor has separate and more extensive authority under a state of emergency. West Virginia Code § 15-5-6(c)(7), for instance, gives the Governor power "[t]o suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business . . . if strict compliance therewith would in any way prevent, hinder or delay necessary action in coping with the emergency." Similarly, West Virginia Code § 15-5-6(c)(6) provides authority "[t]o control ingress and egress to and from a disaster area or an area where large-scale threat exists, the movement of persons within the area and the occupancy of premises therein." Arguably, these provisions could support an order from the Governor regarding safe election procedures—potentially including personnel at polling places or the date of the primary election—if necessary to address the emergency that the coronavirus epidemic poses for the State.

Sincerely,



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