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April 18, 2022

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

Dear Secretary Warner:

You have asked for an Opinion of the Attorney General concerning the selection process of community voting locations for early in-person voting. This Opinion is being issued pursuant to West Virginia Code § 5-3-1, which provides that the Attorney General “shall give written opinions ... upon questions of law, whenever required to do so, in writing, by ... any ... state officer, board or commission.” To the extent this Opinion relies on facts, it is based solely on the factual assertions set forth in your correspondence with the Office of the Attorney General.

Your request involves the interplay between West Virginia Code § 3-3-2a and West Virginia Code of State Rules § 153-13-1 *et seq.*, both of which relate to election administration and the selection of community locations for early in-person voting. In your correspondence you note that this statute and legislative rule have both undergone multiple amendments over the last several years. Your letter raises the following legal question:

*Following an amendment to West Virginia Code § 3-3-2a that removed a statutory requirement that the chairpersons of the county executive committees of the two major political parties agree to locations for early voting, do legislative rules that retain this requirement remain valid?*

We conclude that, in light of the 2011 amendment to West Virginia Code § 3-3-2a(b) removing the requirement that community locations for in-person early voting must be agreed to by the chairpersons of the county executive committees of the two major political parties, a reviewing court would likely set aside West Virginia Code of State Rules § 153-13-3.5, which addresses lack of consent by a chairperson. We further conclude, however, that other portions of the legislative rule retain full force and effect of law, including the location selection deadlines established in West Virginia Code of State Rules §§ 153-13-3.1 and -3.4.

### ***Background***

In 2009, the Legislature amended West Virginia Code § 3-3-2a to address certain early in-person voting procedures. Of relevance to the question at hand, it read:

The county commission may, with the approval of the county clerk or other official charged with the administration of elections, *and the written agreement of the chairpersons of the county executive committees of the two major political parties*, designate additional locations for early voting other than the county courthouse or courthouse annex.

W. Va. Code § 3-3-2a(b) (2009) (emphasis added). Additionally, West Virginia Code § 3-3-2a(c) (2009) directed the Secretary of State to “propose legislative and emergency rules ... necessary to implement the provisions of this section,” including “establishment of criteria to assure neutrality and security in the selection of additional locations.”

The Secretary of State followed that directive, and in 2010 promulgated West Virginia Code of State Rules § 153-13-1 *et seq.* to establish “criteria to assure neutrality and security in the selection process for early voting in person satellite precincts ... and deadlines for establishing such precincts.” *See* 153 C.S.R. § 13-1.1 (2010). Under that legislative rule, county clerks are required to submit to the county commission proposals for early voting community locations no less than 120 days prior to election day. *See id.* § 13-3.1. The clerk must submit with the proposal “a duly notarized written agreement from the chairperson of the county executive committee of each of the two major political parties” together with “the basis for neutrality of the proposal.” *See id.* §§ 13-3.3.a, 13-3.3.b. The county commission is required to either approve or disapprove the submitted proposal “no less than 90 days prior to election day.” *See id.* § 13-3.4. Finally, if an “agreement cannot be reached among the county commission, county clerk and the chairperson of the county executive committee of each of the two major political parties,” the proposal is void—or in other words, each of those four people or entities have veto power. *Id.* § 13-3.5.

In 2011, the Legislature amended West Virginia Code § 3-3-2a(b) again and removed the requirement that the two chairpersons must agree to community locations for in-person early voting. Following the 2011 amendments, West Virginia Code § 3-3-2a(b) read as follows:

The county commission may, with the approval of the county clerk or other official charged with the administration of elections,

designate community voting locations for early voting, other than the county courthouse or courthouse annex, *by a majority of the members of the county commission voting to adopt the same at a public meeting called for that purpose.*

(emphasis added). Rather than making the chairpersons of the county executive committees necessary parties for approving community voting locations for early voting, the Legislature provided that they could participate in the process by nominating locations for community voting instead. W. Va. Code § 3-3-2a(b)(3) (2011). The Legislature left in place the requirement that the Secretary of State establish rules with “criteria to assure neutrality and security in the selection of community voting locations.” *See* W. Va. Code § 3-3-2a(c) (2011).

Although West Virginia Code of State Rules § 153-13-1 *et seq.* was amended in 2019 and West Virginia Code § 3-3-2a was amended once more in 2020, none of these amendments altered the language above or are otherwise relevant to your request.

### *Discussion*

Because “[l]egislative rules have the force of law,” “only an unambiguous conflicting statute, contradictory legislative history, a defect in the rulemaking process, evidence of bias or abuse of power, or some other startling revelation of fact” can upset “an agency’s legitimate rulemaking authority.” *Appalachian Power Co. v. State Tax Dep’t of W. Va.*, 195 W. Va. 573, 583, 589, 466 S.E.2d 424, 434, 440 (1995) (cleaned up). In that vein, our supreme court uses the federal test to determine how much latitude agencies have to interpret their governing statutes: “If the intention of the Legislature is clear, that is the end of the matter,” but “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” Syl. pts. 3 & 4, *id.* (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). This means that “clear” statutory “intent will trump any agency’s rule to the contrary”—and as a result, “clearcut evidence of an inconsistency” is enough to set aside an otherwise valid rule. *Id.* at 589, 588, 466 S.E.2d at 440, 439.

And while sometimes the Legislature can effectively acquiesce to an agency’s interpretation of a statute by adopting a legislative rule, the Supreme Court of Appeals recognizes acquiescence only in instances where the statute does not squarely address the issue at hand. *See W. Va. Health Care Cost Rev. Auth. v. Boone Mem’l Hosp.*, 196 W. Va. 326, 340, 472 S.E.2d 411, 425 (1996) (finding legislative acquiescence through adoption of legislative rule where statute was ambiguous); *Swiger v. UGI/AmeriGas, Inc.*, 216 W. Va. 756, 765, 613 S.E.2d 904, 913 (2005) (finding legislative acquiescence where statute was silent regarding parameters of agency regulation). And more generally, courts often hesitate to find legislative acquiescence because “[t]he failure of harried legislatures awash in statutes to modify or explain statutory details is as likely the result of inattention or overwork as it is of implicit legislative approval.” *Bailey v. SWCC*, 170 W. Va. 771, 777, 296 S.E.2d 901, 907 (1982), *overruled on other grounds by Fucillo v. Workers’ Comp. Cmm’r*, 180 W. Va. 595, 378 S.E.2d 637 (1988).

Your letter asks “whether the previous and current position taken by the Secretaries of State was in excess of our rule-making authority by keeping the material provisions of the Rule at Sections 3.1, 3.4, and 3.5 in place after the 2011 statutory amendment.” Turning first to the interplay between the rule at Section 3.5 and West Virginia Code § 3-3-2a(b), a plain reading of these provisions reveals that they are in conflict. Current Section 3-3-2a(b) expressly outlines who must agree to proposed early in-person voting locations: the county clerk and a “majority of the members of the county commission.” Yet the legislative rule adds the chairpersons of the major parties’ county executive committees to this list. Applying the principles of interpretation outlined above, we conclude that this portion of the rule conferring authority to veto a proposed community voting location on two additional people is in direct conflict with Section 3-3-2a(b).

*First*, Section 3-3-2a(b)’s history shows that there is no statutory gap for the Secretary of State to fill when it comes to authority to consent to or veto a proposed location. The Legislature—not once but twice—addressed this issue head-on. In the 2009 version of the statute, the Legislature expressly granted authority to agree to or reject a proposed location to the county commission, the county clerk, and the chairpersons of the county executive committees of the two major political parties (which, of course, led to the prior Secretary including that same list in West Virginia Code of State Rules § 153-13-1 *et seq.*). But in 2011, the Legislature chose to remove from the statute the chairpersons’ authority to approve a proposed location. The Legislature thus made clear its intent to determine which individuals’ consent is needed in the community location selection process. Both statutes list the entities and officials the Legislature selected by name, and when “a subsequent statute dealing with the same subject uses different language concerning that subject,” courts “*presume[]*” the Legislature intended to make that “change in the law.” *State v. Gen. Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 144, 107 S.E.2d 353, 358 (1959) (emphasis added).

*Second*, the fact the 2011 amendment gave the chairpersons a *different* role—nominating locations instead of approving them, W. Va. Code § 3-3-2a(b)(3)—underscores that the Legislature meant for their involvement to go that far and no further. Courts give effect “to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation.” Syl. pt. 2, *Smith v. State Workmen’s Comp. Cmm’r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). So here, what the Legislature said about the chairpersons’ role in one part of the statute confirms that its choice *not* to include the chairpersons in a related section was deliberate. See *Griffith v. Frontier W. Va., Inc.*, 228 W. Va. 277, 285, 719 S.E.2d 747, 754 (2011) (recognizing that the Legislature also provides guidance through statutory silence).

*Third*, the Legislature’s conferral of rule-making authority to “establish[ ] criteria to assure neutrality and security in the selection of community voting locations” does not change the result. See W. Va. Code § 3-3-2a(c) (2011). To be sure, in the face of statutory silence, including the chairpersons of the county executive committees in the process might well be a valid criterion of neutrality. But through statutory amendments, the Legislature made plain that affording the chairpersons this veto authority was no longer its intent. See Syl. pt. 5, *Appalachian Power Co.*, 195 W. Va. at 579, 466 S.E.2d at 430 (holding that a legislative rule “must faithfully reflect the intention of the legislature” (cleaned up)). In short, while advancing “neutrality” may have been a valid basis for a legislative rule before 2011, it isn’t anymore.

*Finally*, this is not a case of legislative acquiescence. True, the Legislature re-approved the legislative rule in 2019, even though the rule’s discussion of the county chairpersons conflicted with then-current law. But as explained above, our supreme court does not credit legislative acquiescence unless a statute is ambiguous—and even then only rarely. *E.g.*, *In re Sorsby*, 210 W. Va. 708, 559 S.E.2d 45 (2001). Here, Section 3-3-2a(b)’s “text, given its plain meaning, answers the interpretative question.” *Appalachian Power Co.*, 195 W. Va. at 587, 466 S.E.2d at 438. And recall that the Legislature amended the relevant statute again in 2020, *after* the last time it approved the legislative rule. Any claim of legislative acquiescence thus might well be defeated by appeal to the “ordinary canon[] of interpretation” that “the statute last in time prevails as the most recent expression of the legislative will.” *Boone Mem’l Hosp.*, 196 W. Va. at 336, 472 S.E.2d at 421; *see also, e.g., In re Sorsby*, 210 W. Va. at 714, 559 S.E.2d at 511 (looking to date of most recent statutory modification as evidence of most recent legislative intent); *Joseph Spiedel Grocery Co. v. Warder*, 49 S.E.2d 534, 536 (1904) (looking to date of last statutory amendment as evidence of legislative intent when interpreting entirety of statute).

In sum, West Virginia Code of State Rules § 153-13-3.5 creates additional veto authority that the Legislature removed from the operative statute in 2011. A reviewing court would almost certainly find that the rule and statute conflict—and in that case, the statute would control.

Nevertheless, we also note that *other* aspects of the legislative rule do not raise the same problem. Turning next to West Virginia Code of State Rules §§ 153-13-3.1 and -3.4, a plain reading of these provisions reveals no conflict with the statute. These portions of the rule establish the deadlines for county clerks to submit early voting community location proposals to the county commission and for county commissions to either approve or disapprove them. Because West Virginia Code § 3-3-2a is silent on deadlines it follows that timeframes are appropriate “gap-filling” questions the Legislature delegated to the Secretary of State. *See, e.g., Appalachian Power Co.*, 195 W. Va. at 589, 466 S.E.2d at 440 (authorizing agency “to fill the gap” in a way that comports with Legislature’s “unambiguously expressed intent” (cleaned up)). In this instance, this is precisely what the Secretary has done.

Our conclusion on the chairperson veto provision is no barrier to enforcing these (and other) aspects of the same rule. The State Administrative Procedures Act provides that unless “a legislative rule specif[ies] that the provisions thereof shall not be severable,” the default is that “if any provision of any rule section or amendment thereto is held to be unconstitutional or void, the remaining provisions of the rule shall remain valid.” W. Va. Code § 29A-3-18. Because there are no non-severability provisions to contend with here, we expect that a reviewing court would deem Section 3.5 severable from the remaining portions of the legislative rule.

We therefore conclude that although West Virginia Code of State Rules § 153-13-3.5 conflicts with the governing statute insofar as it vests the chairpersons of the county executive committees with veto power over proposed early voting locations, that defect does not extend to the rest of the Secretary of State’s rules governing early in-person voting locations. What steps your office might take next in this situation are beyond the scope of this Opinion, particularly as legislative rules retain the force and effect of law unless repealed or invalidated by a court. But

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we are confident in the Secretary's commitment to the rule of law and to ensuring an orderly and fair election process as you move forward.

Sincerely,



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Solicitor General

Virginia Payne  
Deputy Attorney General