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January 31, 2013

The Honorable Ralph A. Lorenzetti, Jr.  
Prosecuting Attorney  
Office of the Prosecuting Attorney of Jefferson County, West Virginia  
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Charles Town, WV 25414

Dear Prosecutor Lorenzetti,

You have asked for an Opinion of the Attorney General pertaining to the recent resignation of the Sheriff of Jefferson County, West Virginia (the "Sheriff"), and the resulting vacancy in that office. This Opinion is being issued pursuant to West Virginia Code Section 5-3-2.

This Opinion is based solely on the factual assertions stated in your letter of January 18, 2013. On January 11, 2013, the Sheriff resigned from his office, which he had been elected to serve in November 2012 for a four-year term, leaving an unexpired term of more than one year. *See* W. Va. Code § 3-1-17 (providing four-year term in office of sheriff). The County Commission of Jefferson County, West Virginia (the Commission"), now faces the responsibility of complying with those portions of West Virginia law that govern the appointment of a Sheriff and the timing of when to hold an election to fill that position.

Your letter raised five specific questions, which are addressed in turn below:

*(1) Is there a timeframe in which the Commission must appoint a sheriff? 2) When should an election be held to fill the unexpired term in the office of sheriff? 3) May the Commission hold a special election before the 2014 general election instead of appointing an individual to serve? 4) If an election is held before the 2014 general election, can that election be held at any time or must it be held the first Tuesday in November? 5) If the Commission is permitted to conduct a special election before the next general election, how should candidates be nominated for that election?*

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***Question One: Is there a timeframe in which the Commission must appoint a sheriff?***

Neither the West Virginia Constitution nor the Code directly addresses the exact timeframe within which the Commission must appoint a person to fill the vacancy in the office of Sheriff. However, the West Virginia Constitution does provide, in pertinent part,

When vacancies occur prior to any general election, *they shall be filled by appointments*, in such manner as may be prescribed herein, or by general law, which appointments shall expire at such time after the next general election as the person so elected to fill such vacancy shall be qualified.

W. Va. Const., art. IV, § 7 (emphasis added). Furthermore, with respect to a vacancy “occurring in the office of . . . sheriff,” the West Virginia Code states that such vacancy “*shall be filled* by the county commission by appointment of a person of the same political party as the officeholder vacating the office.” W. Va. Code § 3-10-8 (emphasis added).

**West Virginia law imposes a mandatory duty upon the Commission to appoint a person to fill the vacancy in the office of Sheriff.**

This constitutional and statutory language—“shall be filled”—imposes a mandatory duty upon the Commission to fill the vacancy in the office of Sheriff. *See* Syl. Pt. 5, *W. Va. Citizen Action Group v. Tomblin*, 715 S.E.2d 36 (W. Va. 2011) (“As used in constitutional provisions, the word ‘shall’ is generally used in the imperative or mandatory sense.”); Syl. Pt. 2, *Terry v. Sencindiver*, 171 S.E.2d 480 (W. Va. 1969) (“The word ‘shall’, in the absence of language in the statute showing a contrary intent on the part of the legislature, should be afforded a mandatory connotation.”); *see also Wayne v. Sims*, 90 S.E.2d 288 (W. Va. 1955) (recognizing that “shall ” language imposes upon governor mandatory constitutional duty to appoint person to fill state senate vacancy). Therefore, under Article IV, Section 7 of the state Constitution, and Section 3-10-8 of the state Code, the Commission must appoint a person to fill the vacancy in the office of Sheriff, and that person must be of the same political party as the previous officeholder.

**West Virginia law does not provide a specific timeframe within which the Commission must appoint a person to fill the vacancy in the office of Sheriff.**

Although the West Virginia Code provides specific timeframes for appointing replacements for other offices, such as members of Congress (W. Va. Code § 3-10-4), state legislators (W. Va. Code § 3-10-5), circuit court clerks (W. Va. § 3-10-6), and county commissioners and county commission clerks (W. Va. Code § 3-10-7), no such guidance is provided with regard to county sheriffs. In addition, no judicial decisions directly address your question.

Nevertheless, even without controlling precedent, the mandatory nature of the appointment language suggests that the vacancy must be filled by appointment within some reasonable period. Clearly, a mandate must have some meaning and cannot be ignored. *Cf. Brotherton v. Moore*, 230 S.E.2d 638 (W. Va. 1976) (holding that the governor, by waiting two years to appoint a superintendent for the West Virginia Industrial Home for Girls, waited too long and was subject to a mandamus ruling). Since no specific timeframe for appointments are found under the Code, the Attorney General's office cannot provide the Commission with an exact date within which the Commission must fill the vacancy in the office of Sheriff. To effectuate the term "shall be filled," however, the Commission should, as soon as practicable, endeavor to proceed with an appointment in order to adhere to the Constitution and the Code.

***Question Two: When should an election be held to fill the unexpired term in the office of sheriff?***

**West Virginia law requires that there be an election to fill the unexpired term of the Sheriff.**

Section 3-10-1 of the West Virginia Code, entitled "Elections to fill vacancies," requires an election to fill the unexpired term of any office (save for vacancies in the offices of state officials, United States senators and representatives, and state judges) that has more than one year remaining:

*Except as provided in sections three and four of this article, elections to fill vacancies shall be conducted to fill any unexpired term when more than one year of the term of office remains at the time of such election. When less than one year of the term of office remains at the time of the election, the person appointed to fill the vacancy shall continue in office until the completion of the term. Elections to fill vacancies shall be held at the same places, and superintended, conducted and returned, and the result ascertained, certified and declared, in the same manner, and by the same officers, as in general elections. The persons elected, having first duly qualified, shall enter upon the duties of their respective offices.*

W. Va. Code § 3-10-1 (emphasis added). Our state has long-encouraged a reading of election law in a manner that allows voters to choose their public officials. As the Supreme Court of Appeals of West Virginia stated more than sixty years ago, "a liberal application of any statute should be made so as to afford the citizens of this State or any political subdivision thereof an opportunity to vote for the persons of their choice." *Lockhart v. Rogers*, 61 S.E.2d 258, 262 (W. Va. 1950).

The Sheriff's resignation left an unexpired term of greater than one year in that office. Therefore, under Section 3-10-1, any person the Commission appoints to the office of Sheriff may not serve the complete term of that office, which would have run through 2016. Rather, an election must be held to fulfill the remainder of the term. The pertinent question then becomes, when must that election occur?

**The election to fill the unexpired term of the Sheriff shall occur at the next general election.**

Article IV, Section 7 of the West Virginia Constitution, discussed above, provides that appointments to fill vacancies “shall expire at such time after the next general election as the person so elected to fill such vacancy shall be qualified.” W. Va. Const., art. IV, § 7. Section 3-10-8, also discussed above, speaks to a vacancy in the office of Sheriff specifically:

Any vacancy occurring in the office of . . . sheriff . . . shall be filled by the county commission by appointment of a person of the same political party as the officeholder vacating the office. *The appointed person shall hold the office until the next general election is certified*, or until the completion of the term if the term ends on the thirty-first day of December following the next general election.

W. Va. Code § 3-10-8 (emphasis added). These two provisions, one constitutional and the other statutory, clearly provide that the term of the person appointed by the Commission runs through the certification of the next general election. This language is plain and unambiguous and must be applied as written. Syl. Pts. 2, 3, & 4, *W. Va. Citizen Action Group v. Tomblin*, 715 S.E.2d 36 (W. Va. 2011) (recognizing that constitutional terms must be read and applied in accordance with their plain meaning); Syl. Pt. 5, *State v. Gen. Daniel Morgan Post No. 548 Veterans of Foreign Wars*, 107 S.E.2d 353 (W. Va. 1959) (“When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.”).

Here, the next general election will be the Tuesday following the first Monday in November 2014. *See* W. Va. Const., art. IV, § 7 (“The general elections of state and county officers . . . shall be held on the Tuesday next after the first Monday in November, until otherwise provided by law.”); W. Va. Code § 3-1-31 (“General elections shall be held . . . on the Tuesday next after the first Monday in November of each even year.”). Therefore, an election to fill the vacancy in the office of Sheriff must occur on that date.

This is the result expressly contemplated by the operation of the West Virginia Code. Section 3-10-8 provides that “[n]ominations of candidates to fill any vacancy shall be made in the manner prescribed in section six of this article for nominating candidates to fill a vacancy in the office of the clerk of the circuit court.” W. Va. Code § 3-10-8. That referenced provision, Section 3-10-6, states the following regarding nominating candidates to fill a vacancy:

If the vacancy occurs no later than the eighty-fourth day before the primary election held to nominate candidates to be voted for at the general election, *at which any vacancy is to be filled*, candidates to fill the vacancy shall be nominated at the

primary election in accordance with the time requirements and the provisions and procedures prescribed in section eleven, article five of this chapter.

W. Va. Code § 3-10-6 (emphasis added). The phrase “at which any vacancy is to be filled” modifies “the general election.” Thus, the Code expressly contemplates that the election to fill the vacancy will be at the general election.

Although, as your letter identifies, Section 3-10-1 could be read to suggest that “elections to fill vacancies” are different events from “general elections,” there is no authority providing that they must or may be held at different times. In fact, such a reading would be incongruous with the Constitution and the other statutory provisions referenced herein. The Supreme Court of Appeals has explained that “[i]t is well established in West Virginia that statutes which are not inconsistent with one another, and which relate to the same subject matter, are *In pari materia*. Statutes *In pari materia* should be read and construed together, the primary purpose being to ascertain the intention of the Legislature.” *Miller v. Locke*, 253 S.E.2d 540, 542 (W. Va. 1979). If an election to fill the Sheriff’s vacancy were required, or even allowed, to occur before the next general election, then the appointed officeholder would not serve “until the next general election is certified,” and those portions of Sections 3-10-6 and 3-10-8—and indeed, a portion of Article IV, Section 7 of the Constitution—would be rendered superfluous. *See* Syl. Pt. 3, *Jackson v. Kittle*, 34 W. Va. 207 (1890) (recognizing that statutes should be read in a manner that avoids rendering any part superfluous.). Reading Sections 3-10-6, 3-10-8, and 3-10-1 *in pari materia* compels the conclusion that an election is required to fill any unexpired term of the office of Sheriff that exceeds one year, and that that election must be held at the time of the next general election, which will occur in November 2014.

***Question Three: May the Commission hold a special election before the 2014 general election instead of appointing an individual to serve?***

As explained above, Article IV, Section 7 of the West Virginia Constitution and Section 3-10-8 of the West Virginia Code require the Commission to appoint a person to the office of Sheriff, and that appointed person must be of the same political party as the vacating officeholder. That duty is mandatory: regardless of the date of the election to fill the vacancy, the Commission is obligated to appoint a person to the office. Moreover, an election to fill the remaining term of the Sheriff must be held at the time of the next general election in November 2014. Therefore, the Commission may not hold an election to fill the Sheriff’s vacancy before the 2014 general election in lieu of appointing an individual to serve in that position.

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***Question Four: If an election is held before the 2014 general election, can that election be held at any time or must it be held the first Tuesday in November?***

Since the election to fill the unexpired term of the office of Sheriff must be held at the time of the November 2014 general election, it is the opinion of this office that this question is rendered moot.

***Question Five: If the Commission is permitted to conduct a special election before the next general election, how should candidates be nominated for that election?***

As explained above, the Commission is not permitted to conduct an election to fill the Sheriff's vacancy before the next general election to elect a person to the office of Sheriff. Therefore, this question is also moot.

Very truly yours,



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January 18, 2013

**VIA FACSIMILE**  
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West Virginia Attorney General  
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**Re: Request for Attorney General's Opinion Regarding Appointment of an  
Individual to Fill a Vacancy in the Office of Sheriff**

Dear General Morrissey:

Please consider this letter as a request for a formal attorney general's opinion regarding the manner in which the Jefferson County Commission should appoint an individual to fill a vacancy in the office of sheriff, specifically concerning when an election may be held to fill the unexpired term.

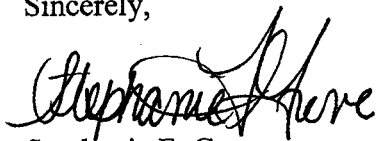
On January 11, 2013, Jefferson County Sheriff Robert Shirley submitted his resignation to the County Commission. Since that time, the Commission has been discussing the appropriate procedure to fill the vacancy in that office. As you are aware, W.Va. Code § 3-10-8 provides the procedure through which a vacancy in the office of sheriff shall be filled. That section indicates that the County Commission shall appoint an individual to serve until the next general election, which election would be held in 2014 in this instance. In addition, W.Va. Code § 3-10-1 provides the general manner in which all vacancies in elected office are to be filled. That code section indicates that an election is required to be held to fill any unexpired term when

more than one year of the term of office remains at the time of the election. In providing the manner in which a special election is to be held, this code section seems to make a distinction between a special election held in accordance with the provisions of that section and a general election. "Elections to fill vacancies shall be held at the same places, and superintended, conducted and returned, and the result ascertained and certified and declared in the same manner, and by the same officers, *as in general elections.*" W.Va. Code § 3-10-1 (emphasis added). Finally, the Commission had contacted the attorneys in the West Virginia Secretary of State's Office, who advised the Commission that it could not hold an election until the next general election in 2014.

Reading the two aforementioned code sections together and considering the advice from the Secretary of State, the Commission intends to appoint an individual until the 2014 general election, when a new sheriff will be elected to fill the unexpired term. Thus, the Commission would be following the strictures of both code sections and the Secretary of State's advice: 1) appointing an individual to serve and 2) holding an election during the 2014 general election to fill the vacancy when more than one year remains in the term. However, the Commission is seeking an opinion of your office to ensure that this is the appropriate procedure, given the apparent conflict between the two code sections. Accordingly, the Commission has the following questions concerning the process to fill the vacancy in the Sheriff's Office: 1) Is there a timeframe in which the Commission must appoint a sheriff? 2) When should an election be held to fill the unexpired term in the office of the sheriff? 3) May the Commission hold a special election before the 2014 general election instead of appointing an individual to serve? 4) If an election is held before the 2014 general election, can that election be held at any time or must it be held the first Tuesday in November? 5) If the Commission is permitted to conduct a special election before the next general election, how should candidates be nominated for that election?

Thank you in advance for your attention to this matter. I look forward to your reply. Please feel free to contact me if you need any additional information.

Sincerely,



Stephanie F. Grove  
Assistant Prosecuting Attorney