



State of West Virginia
Office of the Attorney General

Patrick Morrissey
Attorney General

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

August 6, 2021

The Honorable Jonathan "Duke" Jewell
Mingo County Prosecuting Attorney
78 East 2nd Avenue, Suite 201
Williamson, WV 25661

Dear Prosecutor Jewell:

You asked for an Opinion of the Attorney General about whether, pursuant to West Virginia Code § 3-10-7(b), the wife of a deceased Mingo County Commissioner is a "legally qualified person[]" to be appointed to fill out the remainder of the Commissioner's term. 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 in 2020, Gavin Smith, a registered Republican, was elected as a Mingo County Commissioner. He served in that role from January 1, 2021 to June 7, 2021 when he passed away. West Virginia Code § 3-10-7(a) authorizes "[a]ny vacancy in the office of county commissioner . . . [to] be filled by appointment by the county commission," provided that the appointee has been a member of "the same political party with which the person holding the office immediately preceding the vacancy was affiliated" "for at least 60 days prior to the occurrence of the vacancy." Commissioner Smith's widow is being considered to fill the vacancy. Because she was not registered as a Republican until after the vacancy occurred, however, she does not satisfy the 60-day party membership requirement for appointment pursuant to Section 3-10-7(a). Nevertheless, because the Mingo County Commission did not make an appointment within 30 days, Section 3-10-7(b) provides that the Mingo County Republican Executive Committee (the "Executive Committee") may now submit a list of three candidates from which the Commission shall fill the vacancy. Your question centers on whether the 60-day requirement is required under Section 3-10-7(b) as well.

Your request thus raises the following question of law:

Does West Virginia Code 3-10-7(b)'s requirement that individuals selected to fill a vacancy be "legally qualified" include the time requirement for party membership set forth in Section 3-10-7(a)?

We conclude that the term "legally qualified" encompasses general qualifications for the office of county commissioner, but not the additional 60-day party membership requirement that applies when a county commission fills a mid-term vacancy directly.

Discussion

West Virginia Code § 3-10-7(b) provides in relevant part:

If a quorum of the county commission fails to make an appointment within 30 days, the county executive committee of the same political party with which the person holding the office preceding the vacancy was affiliated at the time the vacancy occurred, shall submit a list of three legally qualified persons to fill the vacancy. Within 15 days from the date on which the list is received, the county commission shall appoint a candidate from the list to fill the vacancy.

This subsection requires that the nominees of the appropriate party's county executive committee be "legally qualified." There are general eligibility requirements for office-holders in the West Virginia Constitution, as well as requirements specific to election as county commissioner. For example, the Constitution allows only "citizens entitled to vote" to hold any state, county, or municipal office. W. Va. Const. art. IV, § 4. There is no doubt that "legally qualified" includes this baseline, constitutional requirement for all offices. For the office of county commissioner specifically, no two county commissioners may be elected from the same magisterial district, *see* W. Va. Const. art. IX, § 10, and a commissioner must reside in the magisterial district for which he or she is seeking to serve at the time he or she files a candidate announcement or (in the case of a ballot vacancy) is appointed, W. Va. Code § 7-1-1b(b). These office-specific provisions concern the election process and do not explicitly reference the nomination and appointment process provided in Section 3-10-7. Further, the Supreme Court of Appeals of West Virginia has not addressed whether these requirements apply outside the election context, so it is possible that they might not apply to the type of appointment at issue here. Nevertheless, because these requirements concern fair representation for constituents across the county and govern the ordinary and most common situations for selecting commissioners, it is extremely likely that a reviewing court would conclude that they are also part of what it means to be "legally qualified" for the office of county commissioner. It does not appear from your letter that this question is at issue here, however, so this Opinion need not address it further.

Your letter does not include information about the potential appointee specific to these or any other generally applicable requirements and thus this Opinion cannot answer whether she satisfies them. As long as she meets the Code's general requirements, however, she is likely "legally qualified" for nomination by the Executive Committee as a candidate for the vacancy on the Mingo County Commission.

Subsection 7(a)'s requirement that the potential replacement be registered as a member of that party "for at least 60 days prior to the occurrence of the vacancy" stands in contrast to these more general qualifications. There is no indication that the Legislature intended the 60-day time period to apply outside this one method of filling a vacancy. After all, "[i]f the Legislature explicitly limits application of a doctrine or rule to one specific factual situation and omits to apply the doctrine to any other situation, courts should assume the omission was intentional." *State ex rel. Riffle v. Ranson*, 195 W. Va. 121, 128, 464 S.E.2d 763, 770 (1995). The Legislature's failure to repeat the requirement in the very next subsection is strong evidence it did not intend for the 60-day requirement to apply more generally. There is also good reason for different rules under the two methods: Unlike when a county commission fills a vacancy, where a majority of commissioners may be members of other political parties, the subsection (b) process allows the relevant party's executive committee to select the slate of nominees itself.

Thus, potential appointees are "legally qualified" for selection under Section 3-10-7(b) where they meet the general qualifications for the office of county commissioner, regardless whether they satisfy additional requirements like the 60-day party membership rule that apply to one specific method of filling a vacancy only. It is therefore immaterial whether the potential nominee has, pursuant to Section 3-10-7(a), been a registered Republican for 60 days prior to the vacancy when assessing whether she is "legally qualified . . . to fill the vacancy" pursuant to subsection 7(b).

Sincerely,



Patrick Morrisey
Attorney General

Lindsay See
Solicitor General

Curtis R. A. Capehart
Deputy Attorney General

Jessica A. Lee
Assistant Solicitor General