



State of West Virginia
Office of the Attorney General

Patrick Morrisey
Attorney General

July 12, 2016

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Honorable Samuel R. White
Prosecuting Attorney
Office of the Nicholas County Prosecuting Attorney
203 Courthouse Annex
511 Church Street
Summersville, West Virginia 26651

Dear Prosecutor White:

You have asked for an Opinion of the Attorney General regarding the process for filling a vacancy for the position of director of the local Office of Emergency Services ("OES"). 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 upon the factual assertions set forth in your correspondence with the Office of the Attorney General.

According to your letter, the Nicholas County Commission ("Commission") recently hired a director of the Nicholas County OES, who has now resigned. You explain that the Commission went through a "formal process" of posting an employment vacancy and soliciting resumes for the position of director of the Nicholas County OES. The Commission received a number of resume submissions, from which it selected an individual to hire as director. The individual accepted the job and began his duties, subject to a ninety-day "probationary period." During the new director's "probationary period," flood waters destroyed many parts of Nicholas County. On July 7, 2016, the individual opted to resign from the position, while still within the ninety-day "probationary period." Your letter does not explain the origin of the "formal process" or the "probationary period," and does not include or reference any specific laws or available Commission procedures.

Your letter raises the following legal question:

Must the Nicholas County Commission go through the formal process of re-posting and recollecting resumes for the position of director of OES, or may the Commission appoint a new director of OES from the pool of previously collected resumes?

Under the facts you provided, we believe that nothing in the state code requires the Commission to follow a particular process in hiring a replacement director. West Virginia Code § 15-5-8 governs local organization for emergency services and instructs only that a local OES “shall be appointed by the executive officer or governing body of the political subdivision to serve at the will and pleasure of the executive officer or governing body . . .” W. Va. Code § 15-5-8. By designating the director an “at will” employee of the Commission, the statute gives the Commission wide discretion in appointing (and discharging) a director. *See, e.g., W. Virginia Bd. of Educ. v. Marple*, 236 W. Va. 654, 783 S.E.2d 75, 84 (2015) (state board has wide discretion in deciding whether to retain its appointee who “serves *at the will and pleasure of the state board*”); *State v. Macri*, 199 W. Va. 696, 704-05, 487 S.E.2d 891, 899-900 (1996) (prosecutor has wide authority to hire and control the activities of an assistant prosecutor who “shall serve at the will and pleasure of [the prosecutor]”); *Williams v. Brown*, 190 W. Va. 202, 205, 437 S.E.2d 775, 778 (1993) (“The use of the phrase ‘serve at the pleasure of the attorney general’ . . . indicates the intent of the Legislature to give the Attorney General unfettered control over the hiring and firing of assistant attorneys general.”).

We do note, however, the instruction by the West Virginia Supreme Court of Appeals that “[i]t is . . . a basic notion of due process of law that a governmental agency must abide by its own stated procedures even though it is under no constitutional obligation to provide the procedures in the first place and even though it can change the procedures at any time.” *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 65, 459 S.E.2d 329, 342 (1995). For example, in *Trimboli v. Board of Education of Wayne County*, 163 W.Va. 1, 254 S.E.2d 561 (1979), a county board of education removed the plaintiff, a director of federal programs for the county schools, from his position. West Virginia Code § 18-5-32 provided that the period of employment for directors such as the plaintiff was at the discretion of the board. *See id.* at 8, 254 S.E.2d at 565 (“[O]ne would conclude from it that [the plaintiff] served at the board’s pleasure.”). Nevertheless, the Court required the county board to comply with procedures set forth in pre-existing rules, even though “the procedure was generous beyond statutory or constitutional requirements.” *Id.* at 9, 254 S.E.2d at 565. In short, “so long as the procedures are in place, the agency must follow them.” *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 65, 459 S.E.2d 329, 342 (1995); *see also Powell v. Brown*, 160 W. Va. 723, 728, 238 S.E.2d 220, 222 (1977) (emphasizing “notions of fair play and due process”).

In sum, nothing in the state code dictates the procedures under which the Commission may hire a new OES director, but it may wish to follow any formal procedures that it previously adopted. Whether it must follow those procedures depends on facts we have not been provided. For instance, we do not know whether the procedures you reference were formally adopted by the Commission or are simply an informal, non-binding custom and practice. We do not know whether the procedures could be read to permit exceptions for emergencies or other special circumstances. If the procedures speak only to the process for hiring a *permanent* OES director, it may be that they do not preclude the appointment of a temporary, acting director. And it may also be that the Commission could simply repeal the procedures, recognizing that the Commission must ordinarily comply with certain requirements, such as the Open Government

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Proceedings Act, for conducting its business. *See, e.g., Daugherty v. Ellis*, Syl. Pt. 3, 142 W. Va. 340, 97 S.E.2d 33 (1956) (“A county court [commission] can exercise its powers only as a court, while in legal session with a quorum present, and it must follow that procedure and enter its proceedings of record to make its action valid and binding.”).

We understand that Nicholas County is facing an emergency situation and that there is great importance in filling the director of OES position quickly. We hope that this letter will assist the Commission in doing so.

Sincerely,

A handwritten signature in black ink that reads "Patrick Morrissey". The signature is written in a cursive, slightly slanted style.

Patrick Morrissey
Attorney General

Elbert Lin
Solicitor General

Katlyn M. Miller
Assistant Attorney General