

OP. NO. 03-020

ELECTIONS: FEDERAL, COMMONWEALTH, AND LOCAL OFFICERS – VACANCIES IN ELECTED CONSTITUTIONAL AND LOCAL OFFICES.

COUNTIES, CITIES AND TOWNS: CERTAIN LOCAL GOVERNMENT OFFICERS – QUALIFICATIONS; ELIGIBILITY, ETC., OF LOCAL ELECTED OFFICERS – LOCAL CONSTITUTIONAL OFFICERS, ETC. – COMMISSIONER OF THE REVENUE.

CONSTITUTION OF VIRGINIA: FRANCHISE AND OFFICERS (QUALIFICATIONS OF VOTERS) – (QUALIFICATIONS TO HOLD ELECTIVE OFFICE).

Process by which chief deputy assumes duties of office vacated by commissioner of revenue is not 'appointment.' Qualifications necessary for chief deputy to hold local constitutional office he is entitled to assume.

The Honorable Robert M.D. Turk
Judge, Twenty-Seventh Judicial Circuit
May 19, 2003

Issue Presented

You ask whether a chief deputy assuming the duties of the commissioner of the revenue under § 24.2-228.1 constitutes an "appointment" as that term is used in § 15.2-1525(A). Section 15.2-1525(A) requires every officer of a county or city to have resided within that locality for "thirty days next preceding his election or appointment."

Response

While the process by which a chief deputy assumes the duties of office vacated by the commissioner of the revenue under § 24.2-228.1(B) is not an "appointment," as that word is used in § 15.2-1525(A), it is my opinion that the chief deputy must be qualified to hold the office he is entitled to assume. In order to be qualified to hold a local constitutional office, the chief deputy must be a resident of the locality served by that office.

Background

You relate that the commissioner of the revenue for the city of Radford is retiring June 30, 2003. At that time, two-and-one-half years will remain for the commissioner's term of office. You relate that the chief deputy to the commissioner of the revenue is not a Radford city resident.

Applicable Law and Discussion

Section 24.2-228.1 sets forth the procedure for filling a vacancy in a local constitutional office. Section 24.2-228.1(A) provides that "[a] vacancy in any

elected constitutional office ... shall be filled by special election." Section 24.2-228.1(B) describes the procedure for operating the office during the vacancy. Specifically, § 24.2-228.1(B) provides:

The highest ranking deputy officer, ... if there is such a deputy ... in the office, shall be vested with the powers and shall perform all of the duties of the office, and shall be entitled to all the privileges and protections afforded by law to elected or appointed constitutional officers, until the qualified voters fill the vacancy by election and the person so elected has qualified and taken the oath of office. In the event that (i) there is no deputy officer ... in the office or (ii) the highest-ranking deputy officer ... declines to serve, the court shall make an interim appointment to fill the vacancy pursuant to § 24.2-227 until the qualified voters fill the vacancy by election and the person so elected has qualified and taken the oath of office.

Your inquiry concerns whether § 15.2-1525 requires a chief deputy that assumes the responsibilities of the vacating officer to meet the residency requirements of the statute. Section 15.2-1525(A) provides that "[e]very city and town officer ... shall, at the time of his election or appointment, have resided thirty days next preceding his election or appointment in such city or town unless otherwise specifically provided by charter."¹ Section 15.2-1525(B) provides that, "[n]otwithstanding the foregoing provisions, and except as other provisions of law may require otherwise, ... nonelected deputies of constitutional officers, shall not be required to reside in the jurisdiction in which they are appointed." For the purposes of § 15.2-1525, "[a]n appointed officer ... means a person appointed to temporarily fill an elected position."² Section 15.2-1526 provides that, "[i]f any officer, required by § 15.2-1525 to be a resident at the time of his election or appointment of the county, city, town or district for which he is elected or appointed, ... remove therefrom, ... his office shall be deemed vacant."

The 2000 Session of the General Assembly changed the process by which vacancies in constitutional offices are filled.³ Prior to the enactment of § 24.2-228.1, the circuit court of the locality appointed a person to fill the vacancy until a special election was conducted.⁴

Ordinarily, when a particular word in a statute is not defined therein, the word should be accorded its ordinary meaning.⁵ In the absence of a statutory definition, the plain and ordinary meaning of the term is controlling.⁶ Although § 15.2-1522 defines "appointed officer," it does not explain what constitutes an "appointment" for the purposes of § 15.2-1525. Therefore, I am required to give the term its ordinary meaning. The word "appointment" means "[t]he selection or designation of a person, *by the person or persons having authority therefor*, to fill an office or public function and discharge the duties of the same.... 'Election' to office usually refers to vote of people, whereas 'appointment' relates to designation *by some individual or group*."⁷ The ordinary meaning of "appointment" contemplates there being a person or entity selecting a person to fill a position. The General Assembly has demonstrated in §§ 24.2-228.1(B) and 24.2-228⁸ that when it intends to use the word "appointment," it clearly does so.

Under the process set forth in § 24.2-228.1(B), a chief deputy is not "appointed" by a person or an entity. Instead, the statute designates that the highest ranking deputy officer in the local constitutional office assumes the vacant office. This statutory process limits the appointive ability of a circuit court to circumstances

where there is no deputy officer or the highest ranking deputy officer declines to serve.

Section 24.2-228.1(B) clearly discloses the General Assembly's intent that the chief deputy, by operation of law, shall assume the vacated constitutional office until a special election is held to fill the remaining term. While the assumption of office by the chief deputy pursuant to § 24.2-228.1(B) is not an "appointment" as contemplated by § 15.2-1525, the deputy must nonetheless be qualified to hold the office he is assuming.

The only qualification to hold any office of the Commonwealth or of its governmental units, elective by the people, shall be that a person must have been a resident of the Commonwealth for one year next preceding his election and *be qualified to vote for that office*, except as otherwise provided in [the] Constitution[.]^[9]

In order to be "qualified to vote" for the office at issue, the person must be a resident of the locality that the constitutional officer serves. Article II, § 1 of the Constitution of Virginia provides:

In elections by the people, the qualifications of voters shall be as follows: Each voter shall be a citizen of the United States, shall be eighteen years of age, *shall fulfill the residence requirements set forth in this section, and shall be registered to vote pursuant to this article...*

The residence requirements shall be that each voter shall be a resident of the Commonwealth and of the precinct where he votes. Residence, for all purposes of qualification to vote, requires both domicile and a place of abode. [Emphasis added.]

Section 15.2-1601 provides that "[t]he officers required by § 15.2-1600^[10] are subject to the residency, qualification for office, bonding, dual-office-holding requirements and prohibitions provided for in Chapter 15 of [Title 15.2]." Section 15.2-1636 provides that "[t]he voters *in every county and city shall elect a commissioner of the revenue, unless otherwise provided by general law or special act.*" (Emphasis added.)

A 1992 opinion of the Attorney General notes that a citizen whose dwelling house falls entirely outside the corporate limits of a town cannot qualify for the elective offices of mayor or town council member.¹¹ The Supreme Court of Virginia and opinions of the Attorney General involving elected city and county officials have similarly focused on the physical act of residence within the boundaries of the relevant jurisdiction.¹² A nonresident of a locality is not eligible to hold an office within the locality, because the nonresident is ineligible to vote for the office. Therefore, a chief deputy who resides outside the locality is not eligible to assume the vacant office under § 24.2-228.1.

A statute is construed to promote its legislative purpose.¹³ It is an accepted principle of statutory construction that statutes relating to the same subject should be considered *in pari materia* in order to give full force and effect to each

provision.¹⁴ When taken together, Article II, §§ 1 and 5 of the Virginia Constitution, and §§ 15.2-1525(A) and 15.2-1526 represent the policy of the Commonwealth that local elected officials should be residents of the locality they represent. "[A] public office is a public agency or trust created in the interest and for the benefit of the people."¹⁵ Because the powers exercised by public officers are held in trust for the people, such officers are considered servants of the people.¹⁶ As such, the Virginia Constitution and Code require that individuals holding such offices should be residents of the locality they serve and elected by the people among whom they live.

Conclusion

While the process by which a chief deputy assumes the duties of office vacated by the commissioner of the revenue under § 24.2-228.1(B) is not an "appointment," as that word is used in § 15.2-1525(A), it is my opinion that the chief deputy must be qualified to hold the office he is entitled to assume. In order to be qualified to hold a local constitutional office, the chief deputy must be a resident of the locality served by that office.

¹You do not relate whether a specific charter provision provides for another time period. For the purposes of this opinion, I assume there is no such provision.

²Va. Code Ann. § 15.2-1522 (LexisNexis Supp. 2002).

³2000 Va. Acts ch. 787, at 1671, 1672; *id.* ch. 1070, at 2615, 2616 (adding in both chapters, § 24.2-228.1).

⁴*Id.* at 1672-72, 2615, respectively (amending and reenacting §§ 24.2-226, 24.2-227).

⁵See *McKeon v. Commonwealth*, 211 Va. 24, 27, 175 S.E.2d 282, 284 (1970).

⁶See *Sansom v. Bd. of Supvrs.*, 257 Va. 589, 514 S.E.2d 345 (1999); *Commonwealth v. Orange-Madison Coop.*, 220 Va. 655, 658, 261 S.E.2d 532, 533-34 (1980); 1999 Op. Va. Att'y Gen. 10, 11.

⁷Blacks Law Dictionary 99 (6th ed. 1990) (emphasis added).

⁸"When a vacancy occurs in a local governing body or an elected school board, the remaining members of the body or board, respectively, within forty-five days of the office becoming vacant, shall *appoint* a qualified voter of the election district in which the vacancy occurred to fill the vacancy. If a majority of the remaining members cannot agree, or do not act, the judges of the circuit court of the county or city shall make the *appointment*....

"If a majority of the seats on any governing body or elected school board are vacant, the remaining members shall not make interim *appointments* and the vacancies shall be filled as provided in § 24.2-227.

"B. When a vacancy occurs in the office of a mayor who is elected by the voters, the council shall make an interim *appointment* to fill the vacancy as provided in subsection A.

"C. For the purposes of [Article 6, Chapter 2 of Title 24.2] and subsection D of § 22.1-57.3, local school boards comprised of elected and *appointed* members shall be deemed elected school boards." Va. Code Ann. § 24.2-228 (Michie Repl. Vol. 2000) (emphasis added).

⁹Va. Const. art. II, § 5 (emphasis added).

¹⁰Section 15.2-1600(A) provides for the election of local constitutional officers—sheriffs, commissioners of the revenue, circuit court clerks, treasurers, and Commonwealth's attorneys.

¹¹1992 Op. Va. Att'y Gen. 108, 111 (citing Op. Va. Att'y Gen.: 1989 at 69, 71 (town council member); 1955-1956 at 39 (mayor)); *accord* Roche v. Jones, 87 Va. 484, 486-87, 12 S.E. 965, 966 (1891) (holding that councilman who moved outside corporate limits of town is *de facto* officer); see Va. Const. art. II, § 5 (conditioning eligibility for elective office on qualification to vote).

¹²1992 Op. Va. Att'y Gen., *supra* note 11, at 111 (citing Dotson v. Commonwealth, 192 Va. 565, 66 S.E.2d 490 (1951) (county supervisor); Williams v. Commonwealth, 116 Va. 272, 81 S.E. 61 (1914) (city council member); Op. Va. Att'y Gen.: 1975-1976 at 27, 28 (county supervisor); 1971-1972 at 166 (county supervisor); 1970-1971 at 138, 139 (city councilman); 1958-1959 at 117, 118 (county supervisor)).

¹³See Dowdy v. Franklin, 203 Va. 7, 10, 121 S.E.2d 817, 819 (1961).

¹⁴See Prillaman v. Commonwealth, 199 Va. 401, 405-06, 100 S.E.2d 4, 7-8 (1957); 1996 Op. Va. Att'y Gen. 134, 135. "*In pari materia*" is the Latin phrase meaning "[o]n the same subject; relating to the same matter." Black's Law Dictionary 794 (7th ed. 1999).

¹⁵63C Am. Jur. 2d *Public Officers and Employees* § 2, at 458 (1997), *quoted in* 2000 Op. Va. Att'y Gen. 24, 26.

¹⁶See Op. Va. Att'y Gen.: 2000, *supra* note 15, at 26; 1996 at 149, 150; see, e.g., United States v. Leon, 468 U.S. 897, 974 (1984) (noting that all state officials are "servants of the people"); Boorde v. Commonwealth, 134 Va. 625, 629, 114 S.E. 731, 732 (1922) (noting that judges are "servants of the people" (citation omitted)).

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