

OP. NO. 04-016

ADMINISTRATION OF GOVERNMENT: STATE OFFICERS AND EMPLOYEES — GENERAL PROVISIONS.

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

COUNTIES, CITIES AND TOWNS: GOVERNING BODIES OF LOCALITIES – PRESIDING OFFICERS AND VACANCIES IN CERTAIN OFFICES.

No authority for board of supervisors or circuit court to appoint temporary replacement for supervisor called to active military duty without having received notice from supervisor requesting appointment of temporary replacement member. Supervisor's position is not vacant unless or until supervisor provides notice of his absence due to active military duty. No requirement to hold special election under facts presented.

Mr. Darvin E. Satterwhite
County Attorney for Cumberland County
March 22, 2004

Issues Presented

You seek guidance concerning questions arising from the recent call to active military duty of a member of the Cumberland County Board of Supervisors. You first ask whether the notice from the board member specified in § 2.2-2802 is a required prerequisite for appointment of a temporary replacement to the board. Next, in the event the notice from the board member does not request the appointment of a temporary replacement member, you ask whether the board of supervisors may make such an appointment. Additionally, if the board of supervisors does not make any appointment of a temporary replacement member, you ask whether the position remains vacant until the board member returns from his tour of duty, or whether the circuit court may appoint a temporary replacement member under the provisions of § 24.2-228. Finally, you ask, should a temporary appointment be made, whether §§ 24.2-226 and 24.2-228 require that a special election be held at the next general election.

Response

It is my opinion that the notice specified in § 2.2-2802 is a prerequisite to the appointment by the Cumberland County Board of Supervisors of a temporary replacement member. It is also my opinion that, in the event the notice given by the board member does not request the appointment of a temporary replacement member, the board is not authorized to make such an appointment. It is further my opinion that the position of the affected member on the board is not vacant unless or until he provides the notice. Consequently, neither the board of supervisors nor the circuit court is authorized to make an appointment of a temporary replacement member. Finally, it is my opinion that §§ 24.2-226 and 24.2-228 do not require that a special election be held at the next general election under the facts presented.

Background

You advise that in November 2003, the citizens residing in District 2 elected a supervisor to represent them on the Cumberland County Board of Supervisors ("affected member"). You relate that the affected member assumed office and began serving at the initial meeting of the board in January 2004. Furthermore, you advise that the affected member serves in the United States Army Reserve and recently received notification of a call to active military duty. The affected member anticipates that the tour of active duty will last approximately 545 days, which includes service in Afghanistan as part of Operation Enduring Freedom. The duty in Afghanistan will begin on or about February 28, 2004, and the affected member will be unavailable to serve on the board until his release from active military duty.

Applicable Law and Discussion

In your written opinion,¹ you note that a 2002 opinion of the Attorney General responds to questions regarding a county treasurer who involuntarily is recalled to active military duty.² Among other issues, the opinion concludes that § 2.2-2802 does not require such a county officer to relinquish his office when involuntarily recalled to active military duty.³ The opinion notes that the Supreme Court of Virginia specifically held that a city councilman, who was inducted into active military service as an officer of a National Guard unit, did not forfeit his office.⁴

Section 2.2-2802 provides:

No ... county ... officer ... shall forfeit his title to office ... or vacate the same by reason of either engaging in the war service of the United States ... or when called to active duty in the armed forces of the United States. Any such officer ... who, voluntarily or otherwise, enters upon such war service or is called to service *may* notify the ... body authorized by law to fill vacancies in his office, of such fact, and thereupon be relieved from the duties of his office ... during the period of such service. The ... body authorized to fill vacancies shall designate some suitable person to perform the duties of such office as acting officer during the period the regular officer is engaged in such service, and during such period the acting officer shall be vested with all the powers, authority, rights and duties of the regular officer for whom he is acting. [Emphasis added.]

You observe that by using the word "may" in the second sentence of § 2.2-2802, the General Assembly evinces an intent that the vacating board member may elect whether or not to provide notice to the board of supervisors. Assuming that intent, you also observe that when notice is not given by the affected member, the position on the board of supervisors simply remains vacant until the board member returns from active military duty.

The use of the word "may" in statutes implies that the provision is discretionary, and not mandatory.⁵ It is also true, however, that the Virginia Supreme Court has held that the word "may," while ordinarily importing permission, will be construed to be mandatory when it is necessary to accomplish the manifest purpose of the legislature.⁶ On the other hand, the word "shall" used in a statute ordinarily implies that its provisions are mandatory.⁷ The context in which the term "may" is used in the second sentence of § 2.2-2802 clearly is discretionary, and not mandatory. Use of the term "may," in the discretionary context, occurs from the time the 1950 Session of the General Assembly enacted the predecessor statute to § 2.2-2802.⁸ The 2002 opinion discusses the reasoning for a public official's use of discretion concerning official duties and responsibilities.⁹ In that opinion, the location of the public officer's duty station allowed him to fulfill the duties of his public office.¹⁰ Thus, it obviously was not necessary for the public officer to vacate his office to permit a temporary appointee to fulfill the required public duties.

In the facts you present, however, the affected member will be stationed in Afghanistan and unable to fulfill his public duties. Prior opinions of the Attorney General list the criteria to consider in determining whether a position constitutes a "public office":

One important consideration is that, to constitute a public office, the position must be created by the Constitution or statutes. It is a position filled by election or appointment, with a designation or title, and duties concerning the public, assigned by law. A frequent characteristic of such a post is a fixed term of office.^[11]

The affected member clearly is a public officer.¹² "[A] public office is a public agency or trust created in the interest and for the benefit of the people."¹³ Because the powers exercised by public officers are held in trust for the people, such officers are considered servants of the people.¹⁴ Furthermore, it is presumed that public officials will discharge their duties in accordance with law.¹⁵

Therefore, the affected member is provided total discretion regarding whether the notice contemplated by § 2.2-2802 is, in fact, provided to the board of supervisors. A board member is a servant of the people holding office for the benefit of the people who elected him. As such, the member is presumed to act in the best interests of the citizens he represents. The decision regarding the continued representation is for the affected member to make. Thus, it follows that the affected member does not vacate the position unless and until that member provides the notice contemplated by § 2.2-2802.¹⁶

The 1997 Session of the General Assembly repealed Title 15.1, recodified the laws pertaining generally to counties, cities and towns within Title 15.2, and added § 15.2-1424.¹⁷ Section 15.2-1424 generally provides that vacancies in the local governing body "shall^[18] be filled as provided for in Title 24.2," which governs elections held in Virginia. The drafting note following § 15.2-1424 in the 1997 Code Commission report on the recodification of Title 15.1 states:

No substantive change in the law; provides for continuity of government by appointed officials, as provided in (§ 24.2-225 et seq.), until appointed officials are replaced by elected ones.^[19]

Section 24.2-228(A) authorizes "the remaining members of the [local governing] body ..., within forty-five days of the office becoming vacant, [to] appoint a qualified voter of the election district in which the vacancy occurred to fill the vacancy." The 1993 Session of the General Assembly recodified the Commonwealth's election laws within Title 24.2²⁰ ("1993 recodification"). Prior to the 1993 recodification, § 24.1-76, the successor statute to § 136, provided that interim appointments to fill vacancies in any county, city, town or district office were to be made by the appropriate circuit court judges when "no other provision is made for filling the same."²¹ The provisions of former § 24.1-76 were consistent with the provisions of former § 136.²² The 1975 Session of the General Assembly first enacted § 24.1-76.1, establishing an exception for vacancies in *county* governing bodies and providing for interim appointments by the remaining members of the governing body.²³ Prior to the 1993 recodification, city and town council members had the authority to fill such vacancies by appointment only if so provided in their charters.²⁴ The enactment of § 24.1-76.1 by the 1975 General Assembly created a separate mechanism for a county to fill a vacancy occurring in the membership of its governing body.

The 1993 recodification resulted in the amendment and recodification of §§ 24.1-76 and 24.1-76.1 at § 24.2-226, dealing only with special elections; and at §§ 24.2-227 and 24.2-228, dealing with interim appointments.²⁵ Section 24.2-226(A) provides that "[a] vacancy in any elected local office ... shall be filled by special election [held at] ... the next ensuing general election ... in November." The drafting note following § 24.2-226 in the Code Commission report on the recodification of Title 24.1 provides:

The provisions of existing § 24.1-76 A. for interim appointments by circuit judges are moved to proposed § 24.2-227 so that it is clear that the basic principle of ... [A]rticle [6, Chapter 2 of Title 24.2] is to fill vacancies by election.^[26]

The drafting note following § 24.2-227 provides:

Proposed § 24.2-227 is based on existing subdivision A of § 24.1-76. The only significant change in language occurs in the first sentence, where all local governing bodies are excluded from the court's power to make interim appointments to fill vacancies. This already is the case for vacancies in county governing bodies which occur during a member's term because

existing § 24.1-76.1 authorizes the governing body to make the appointment.^[27]

Section 24.2-76.1 clearly was the basis for drafting § 24.2-228, as the drafting note provides:

Proposed § 24.2-228 is based on existing § 24.2-76.1 provisions for counties and makes no substantive change with regard to the governing body's authority to make an interim appointment when a vacancy occurs during a member's term in office. The proposed section would expand the governing body's interim appointment power to include vacancies arising when a member-elect did not qualify.^[28]

Under § 24.2-228(A), "[w]hen a vacancy occurs in a local governing body ..., the remaining members ..., 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 the governing body fails to make the appointment within forty-five days, the circuit court must make the appointment.²⁹

When it is not clear which of two statutes applies, the more specific statute prevails over the more general.³⁰ In addition, when statutes provide different procedures on the same subject matter, "the general must give way to the specific."³¹ The more specific statutory provision in the matter of your inquiry is § 2.2-2802. The provisions of Titles 15.2 and 24.2 apply generally, and not specifically, to the situation where an officer involuntarily is called to active military duty. Thus, they do not apply to the facts you present. A fair construction is that when a board member is called to active military duty, the General Assembly provides that a vacancy in his office does not occur until he provides the notice specified in § 2.2-2802. When a member provides such notice, the remaining members of the board must appoint "some suitable person"³² to perform the duties of the affected member during the period of active military service. Finally, § 2.2-2802 authorizes the appointee to perform the duties of the affected member "during the period the regular officer is engaged in such service," and no longer.

Therefore, a person appointed as a member on the board of supervisors will serve as a temporary member of the board while the affected member is engaged in active military service. Under well-accepted principles of statutory construction, when a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.³³

Conclusion

Accordingly, it is my opinion that the notice specified in § 2.2-2802 is a prerequisite to the appointment by the Cumberland County Board of Supervisors of a temporary replacement member. It is also my opinion that, in the event the notice given by the board member does not request the appointment of a temporary replacement member, the board is not authorized to make such an appointment. It is further my opinion that the position of the affected member on the board is not vacant unless or until he provides the notice. Consequently, neither the board of supervisors nor the circuit court is authorized to make an appointment of a temporary replacement member. Finally, it is my opinion that §§ 24.2-226 and 24.2-228 do not require that a special election be held at the next general election under the facts presented.

¹Any request by a county attorney for an opinion from the Attorney General "shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions." Va. Code Ann. § 2.2-505(B) (LexisNexis Repl. Vol. 2001).

²See 2002 Op. Va. Att'y Gen. 58.

³*Id.* at 59.

⁴*Id.* at 61 n.7 (citing *City of Lynchburg v. Suttentfield*, 177 Va. 212, 13 S.E.2d 323 (1941) (interpreting § 290, predecessor to § 2.2-2802)).

⁵"Unless it is manifest that the purpose of the legislature was to use the word 'may' in the sense of 'shall' or 'must,' then 'may' should be given its ordinary meaning—permission, importing discretion." *Masters v. Hart*, 189 Va. 969, 979, 55 S.E.2d 205, 210 (1949), *quoted in* *Bd. of Supvrs. v. Weems*, 194 Va. 10, 15, 72 S.E.2d 378, 381 (1952); *see also* Op. Va. Att'y Gen.: 2000 at 29, 32 n.2; 1999 at 193, 195 n.6; 1997 at 10, 12.

⁶*See, e.g., Chesapeake & Oh. Ry. Co. v. Pulliam*, 185 Va. 908, 41 S.E.2d 54 (1947) (holding that statute abolishing contributory negligence as bar to recovery in actions against railroad company for injury or death caused by failure of railroad employees to give statutory warning signals upon approaching grade crossing, and providing that failure of traveler to exercise due care at such

crossing "may" be considered in mitigating damages, must be construed as mandatory, rather than permissive, and jury must consider contributory negligence in mitigation of damages).

⁷See, e.g., *Schmidt v. City of Richmond*, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965) (noting that statute using "shall" required court to summon nine disinterested freeholders in condemnation case); cf. *Ladd v. Lamb*, 195 Va. 1031, 1034-36, 81 S.E.2d 756, 758-59 (1954) (noting that statute providing that clerk of court "shall forward" copy of conviction to Commissioner of Department of Motor Vehicles within fifteen days is not mandatory, but merely directory); see also 1986-1987 Op. Va. Att'y Gen. 210, 211 ("shall" frequently is construed to be directory when used to specify time within which public official is to act); 17 Michie's Jur. *Statutes* § 60, at 436-37 (1994).

⁸See 1950 Va. Acts ch. 173, at 242, 242-43 (adding § 2-27.1 to Title 2, providing that county officer voluntarily or otherwise entering war service "may" notify body authorized to fill vacancies).

⁹See 2002 Va. Op. Att'y Gen., *supra* note 2, at 60 (noting that independence of constitutional officer derives from constitutional status of office and popular election of individual filling office).

¹⁰*Id.* at 59 (fulfilling duties as treasurer of New Kent County while serving as member of United States Army Reserve stationed in Suffolk).

¹¹1977-1978 Op. Va. Att'y Gen. 322, 323, *quoted in* 2000 Op. Va. Att'y Gen. 24, 26.

¹²See Va. Code Ann. § 15.2-1400(A) (LexisNexis Repl. Vol. 2003) (providing that qualified voters shall elect governing body for each locality).

¹³63C Am. Jur. 2d *Public Officers and Employees* § 2, at 458 (1997), *quoted in* 2000 Op. Va. Att'y Gen., *supra* note 11, at 26.

¹⁴See Op. Va. Att'y Gen.: 2000, *supra* note 11, at 26; 1996 at 149, 150; see, e.g., *United States v. Leon*, 468 U.S. 897, 974 n.28 (1984) (noting that all state officials are "servants of the people" (quoting Warren E. Burger, *Who Will Watch the Watchman?*, 14 Am. U. L. Rev. 1, 14 (1964))); *Boorde v. Commonwealth*, 134 Va. 625, 629, 114 S.E. 731, 732 (1922) (noting that "judges are the servants of the people" (quoting *Burdett v. Commonwealth*, 103 Va. 838, 848, 48 S.E. 878, 881 (1904))).

¹⁵Ours Props., Inc. v. Ley, 198 Va. 848, 850-51, 96 S.E.2d 754, 756 (1957).

¹⁶Cf. Frantz v. Davis, 144 Va. 320, 131 S.E. 784 (1926) (noting that when election is set aside under § 267, predecessor to § 24.2-812, it must be concluded that General Assembly has declared vacancy to exist that must be filled under § 136, predecessor to § 24.2-226).

¹⁷See 1997 Va. Acts ch. 587, at 976, 1069.

¹⁸"[T]he use of 'shall,' in a statute requiring action by a public official, is directory and not mandatory unless the statute manifests a contrary intent." Jamborsky v. Baskins, 247 Va. 506, 511, 442 S.E.2d 636, 638 (1994). "A statute directing the mode of proceeding by public officers is to be deemed directory, and a precise compliance is not to be deemed essential to the validity of the proceedings, unless so declared by statute." Nelms v. Vaughan, 84 Va. 696, 699, 5 S.E. 704, 706 (1888), *quoted in* Commonwealth v. Rafferty, 241 Va. 319, 324, 402 S.E.2d 17, 20 (1991).

¹⁹5 H. & S. Docs., *Report of the Virginia Code Commission on the Recodification of Title 15.1 of the Code of Virginia*, S. Doc. No. 5, at 351 (1997).

²⁰See 1993 Va. Acts ch. 641, at 812 (revising and recodifying election laws of Virginia by repealing Title 24.1 and adding Title 24.2). The 1991 Session of the General Assembly requested that the Virginia Code Commission study and revise Title 24.1 and report its findings to the Governor and the 1993 Session of the General Assembly in the form of a recodified title. See 1991 Va. Acts S.J. Res. 242, at 2135, 2135. The Virginia Code Commission rendered its report, resulting in the recodification of Title 24.1. See 5 H. & S. Docs., *Report of the Virginia Code Commission on the Recodification of Title 24.1 of the Code of Virginia*, S. Doc. No. 25 (1993) [hereinafter S. Doc. No. 25].

²¹The phrase "no other provision is made for filling the same" originally appeared in the first sentence of § 24.1-76. See 1970 Va. Acts ch. 462, at 826, 846. The 1984 Session of the General Assembly added subsection A to § 24.1-76, and the phrase continues in the first sentence of that subsection. See 1984 Va. Acts ch. 480, at 764, 769.

²²See Va. Code Ann. § 136 (1919), *amended by* 1920 Va. Acts ch. 296, at 410; 1928 Va. Acts ch. 24, at 22; 1930 Va. Acts ch. 68,

at 79. Section 136 subsequently was codified at § 24-145. See 1 Rep. of the Comm'n on Code Recodification and Proposed Code of Virginia (Michie 1947). The 1970 Session of the General Assembly repealed Title 24 and added, in lieu of § 24-145, § 24.1-76 in new Title 24.1. See 1970 Va. Acts, *supra* note 21, at 846.

²³ See 1975 Va. Acts ch. 515, at 1042, 1053 (adding § 24.1-76.1 (codified as amended at § 24.2-228)).

²⁴ See 1996 Op. Va. Att'y Gen. 127, 129.

²⁵ 1993 Va. Acts, *supra* note 20, at 822-23.

²⁶ S. Doc. No. 25, *supra* note 20, at 30.

²⁷ *Id.*

²⁸ *Id.* at 31.

²⁹ See Va. Code Ann. § 24.2-228(A) (LexisNexis Repl. Vol. 2003).

³⁰ See Va. Nat'l Bank v. Harris, 220 Va. 336, 257 S.E.2d 867 (1979); Scott v. Lichford, 164 Va. 419, 423-24, 180 S.E. 393, 395 (1935); see also City of Roanoke v. Land, 137 Va. 89, 92-93, 119 S.E. 59, 60 (1923) (noting that specific state statute prevails over general city ordinance); Op. Va. Att'y Gen.: 1990 at 227, 228; 1987-1988 at 276, 277; 1980-1981 at 330, 331.

³¹ Davis v. Davis, 206 Va. 381, 386, 143 S.E.2d 835, 839 (1965); see also 17 Michie's Jur., *supra* note 7, § 101, at 498-99; 1976-1977 Op. Va. Att'y Gen. 93, 94.

³² Section 2.2-2802.

³³ See 2A Norman J. Singer, Sutherland Statutory Construction § 47:23 (6th ed. 2000) (explaining maxim, *expressio unius est exclusio alterius*, as applied to interpretation of statutes); Op. Va. Att'y Gen : 1992 at 145, 146; 1989 at 252, 253; 1980-1981 at 209, 209-10.

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