



COMMONWEALTH of VIRGINIA

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The Honorable Jean R. Jensen
Secretary, State Board of Elections
200 North 9th Street, Suite 101
Richmond, Virginia 23219

Dear Ms. Jensen:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether § 24.2-115 permits local electoral boards to appoint nonpartisan officers of election or whether all officers of election must represent a political party.

Response

It is my opinion that the Constitution of Virginia requires a local electoral board, where it is feasible to do so, to appoint officers of election who represent the two dominant political parties. It further is my opinion that when it is not feasible to appoint representatives of such parties, a board may appoint nonpartisan officers of election.

Background

You relate that some officers of election prefer to serve in a nonpartisan manner without publicly stating their political preference. This creates a situation where some officers represent the Democratic Party in one election and the Republican Party in another election.

You also advise that the State Board of Elections interprets the phrase in § 24.2-115, which provides that “[t]he representation of the two parties shall be equal at each precinct having an equal number of officers and shall vary by no more than one at each precinct having an odd number of officers,” to require that all officers of election be partisan. You further advise that the United States Election Assistance Commission (“EAC”) recently has announced a Help America Vote Act College Pollworker grant program. The EAC grant will allow colleges, universities, and nonprofits to recruit students to work at the polls in the Commonwealth as nonpartisan officers of election.

A nonpartisan group in the Commonwealth, which focuses on issues concerning college students, has prepared a grant application for the EAC grant and desires to train nonpartisan college students to perform as officers of election in the Commonwealth. Because the State Board of Elections interprets § 24.2-115 to require that officers of election be partisan, your concern is that the Commonwealth may not obtain and use the EAC grant.

Applicable Law and Discussion

Article II, § 8, of the Virginia Constitution provides, in part, that:

Each electoral board shall appoint the officers of election and general registrar for its county or city. In appointing such officers of election, representation, *as far as practicable*, shall be given to each of the two political parties which, at the general election next preceding their appointment, cast the highest and next highest number of votes. [Emphasis added.]

Section 24.2-115 provides, in part, that:

Not less than three competent citizens shall be appointed for each precinct and, *insofar as practicable*, each officer shall be a qualified voter of the precinct he is appointed to serve, but in any case a qualified voter of the Commonwealth. In appointing the officers of election, representation shall be given to each of the two political parties having the highest and next highest number of votes in the Commonwealth for Governor at the last preceding gubernatorial election. The representation of the two parties shall be equal at each precinct having an equal number of officers and shall vary by no more than one at each precinct having an odd number of officers. If possible, officers shall be appointed from lists of nominations filed by the political parties entitled to appointments. The party shall file its nominations with the secretary of the electoral board at least 10 days before February 1 each year. [Emphasis added.]

A 1975 opinion of the Attorney General concludes that, whenever possible, officers of election for each precinct should be chosen from the two dominant political parties, and further, that such representation should be as nearly equal between the political parties as is practicable.¹ A 1971 opinion considers the general makeup for appointment of the officers of election when an independent is elected at the last general election.² The 1971 opinion concludes that because an independent does not constitute a “party,” representation would still be given to the parties obtaining the highest and next highest number of votes at the last general election.³ Furthermore, the 1971 opinion concludes that “there is no requirement that a majority of the election officers be of the party which cast the highest number of votes.”⁴

The Supreme Court of Virginia has considered the appointment of members of the local electoral boards and has concluded that:

In the appointment of the electoral boards representation *as far as practicable* shall be given to each of the two political parties which, at the general election next preceding their appointment, cast the highest and the next highest number of votes.^[5]

¹See 1974-1975 Op. Va. Att’y Gen. 158, 159 (interpreting §§ 24.1-32, 24.1-106, predecessor statutes to § 24.2-115).

²See 1970-1971 Op. Va. Att’y Gen. 140.

³*Id.*

⁴*Id.*

⁵*Dovel v. Bertram*, 184 Va. 19, 21, 34 S.E.2d 369, 370 (1945) (emphasis added) (interpreting § 31 of the 1902 Constitution of Virginia, predecessor to Article II, § 8 of the 1971 Constitution of Virginia).

The Court concluded that this language directed “that each of the political parties designated shall have representation as far as practicable.”⁶ The term “practicable” generally is defined to mean “reasonably capable of being accomplished; feasible.”⁷ Upon information and belief, this Office understands that it is not always practicable to identify and recruit members of the two dominant political parties.⁸ In addition, it is well-settled that the Virginia Constitution does not grant powers to the General Assembly but, instead, restricts powers which otherwise are practically unlimited.⁹ The Virginia Constitution only restricts the appointment of officers of election to representatives of the two political parties “as far as practicable.”¹⁰

Both Article II, § 8 and § 24.2-115 provide that representation “shall be given to each of the two political parties” receiving the highest number of votes in the general election. The use of word “shall” ordinarily implies that such provisions are mandatory.¹¹ Furthermore, in § 24.2-115, the General Assembly specifies that at least three “competent” citizens be appointed as officers of election to serve in each precinct, and “insofar as practicable, each of the citizens appointed as officers of election must be a qualified voter of the precinct in which he serves.” Finally, an officer of election is required to be a qualified voter of the Commonwealth.¹²

The primary object of statutory construction and interpretation “is to ascertain and give effect to legislative intent.”¹³ “The purpose for which a statute is enacted is of primary importance in its interpretation or construction. ‘A statute often speaks as plainly by inference, and by means of the purpose that underlies it, as in any other manner.’”¹⁴ Furthermore, words and phrases must be considered

⁶*Id.* at 23, 34 S.E.2d at 371.

⁷BLACK’S LAW DICTIONARY 1210 (8th ed. 2004).

⁸The *Code* does not require registration by political parties; therefore, there is no definitive list of members of each political party in the possession of the state. I am advised that political parties do not always respond to requests for identification. Additionally, when such parties do provide lists of persons eligible to serve as officers of election, a sufficient number of persons may not choose to serve in that capacity. Thus, what reasonable steps must be taken by the local electoral board to identify and appoint representatives of the two political parties is a question of fact to be determined on a case-by-case basis.

⁹*See, e.g., Fairfax County Indus. Dev. Auth. v. Coyner*, 207 Va. 351, 355, 150 S.E.2d 87, 91-92 (1966); *Lewis Trucking Corp. v. Commonwealth*, 207 Va. 23, 29, 147 S.E.2d 747, 751 (1966); *Morgan v. Commonwealth*, 168 Va. 731, 736-37, 191 S.E. 791, 793 (1937); *Strawberry Hill Land Corp. v. Starbuck*, 124 Va. 71, 77, 97 S.E. 362, 364 (1918).

¹⁰VA. CONST. art. II, § 8.

¹¹*See, e.g., Schmidt v. City of Richmond*, 206 Va. 211, 217-18, 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, 1035-36, 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; 17 MICHIE’S JUR. *Statutes* § 60, at 436-37 (1994).

¹²*See* VA. CODE ANN. § 24.2-115 (Supp. 2005).

¹³*Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983); *see also* 1994 Op. Va. Att’y Gen. 114, 116.

¹⁴*Norfolk S. Ry. Co. v. Lassiter*, 193 Va. 360, 364, 68 S.E.2d 641, 643 (1952) (citation omitted).

in the context in which they are used to arrive at a construction that will promote the object and purpose of the statute.¹⁵

Applying these principles of statutory construction to Article II, § 8 and § 24.2-115, it is clear that representation of both political parties receiving the highest number of votes in the preceding general election is required in the appointment of officers of election. I must, therefore, conclude that insofar as it is practicable or feasible to do so, local electoral boards must appoint officers of election that are representative of the two political parties receiving the highest number of votes. Further, such representation must be equal at each precinct having an equal number of officers and may not vary more than one at each precinct having an odd number of officers. In the event that it is not feasible to do so, electoral boards may appoint nonpartisan officers of election.

Conclusion

Accordingly, it is my opinion that the Constitution of Virginia requires a local electoral board, where it is feasible to do so, to appoint officers of election who represent the two dominant political parties. It further is my opinion that when it is not feasible to appoint representatives of such parties, a board may appoint nonpartisan officers of election.

Thank you for letting me be of service to you.

Sincerely,



Robert F. McDonnell

2:213; 1:941/06-058

¹⁵See *Turner*, 226 Va. at 460, 309 S.E.2d at 338-39 (meaning of words finds expression from purport of entire phrase of which it is a part); 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.16, at 265 (6th ed. 2000) ("If the legislative intent or meaning of a statute is not clear, the meaning of doubtful words may be determined by reference to their relationship with other associated words and phrases."); 1993 Op. Va. Att'y Gen. 192, 195.