



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

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The Honorable J. E. "Chip" Harding  
Sheriff, County of Albemarle  
411 East High Street  
Building B  
Charlottesville, Virginia 22902

Dear Sheriff Harding:

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

## Issues Presented

You inquire whether § 8.01-499 of the *Code of Virginia* mandates the collection of a commission from a sheriff's sale or whether a sheriff has discretion not to collect a commission. You also ask whether that section mandates what the sheriff is to do with the commission if and when it is collected.

## Response

It is my opinion that, pursuant to § 8.01-499, a sheriff has discretion to collect or not collect a commission from a sheriff's sale. It is further my opinion that § 15.2-1615 directs what the sheriff must do with the money should he receive a commission.

## Background

You relate that sheriff's sales are rare in the County of Albemarle and that you have elected in the past to not collect a commission in order to allow the full amount of the sale to go to the judgment creditor. You further relate that the Commonwealth of Virginia Auditor of Public Accounts, Shenandoah Valley Region Team, interprets § 8.01-499 as making collection of such commission mandatory.

## Applicable Law and Discussion

Sheriffs are constitutional officers "whose duties and authority are controlled by statute."<sup>1</sup> Section 15.2-1609 of the *Code of Virginia* provides that "the sheriff shall exercise all the powers conferred and perform all the duties imposed upon sheriffs by general law." Except as limited by law,

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<sup>1</sup> *Keathley v. Vitale*, 866 F. Supp. 272, 276 (E.D. Va. 1994) (citing *Hilton v. Amburgey*, 198 Va. 727, 96 S.E.2d 151 (1957)); see also VA. CONST. art. VII, § 4 ("The duties and compensation of such officers shall be prescribed by general law or special act.").

constitutional officers are "free to discharge [their] constitutional duties in a manner in which [they] deem most appropriate."<sup>2</sup>

As a means of enforcing monetary judgments, Virginia law permits sheriffs to sell tangible property of a debtor when such property has been properly levied.<sup>3</sup> As part of this process, § 8.01-499 of the *Code of Virginia* provides the following:

An officer receiving money under this chapter shall make return thereof forthwith to the court or the clerk's office of the court in which the judgment is entered. For failing to do so, the officer shall be liable as if he had acted under an order of such court. After deducting from such money a commission of 10 percent and his necessary expenses and costs, including reasonable fees to sheriff's counsel, he shall pay the net proceeds, and he and his sureties and their representatives shall be liable therefor, in like manner as if the same had been made under a writ of fieri facias on the judgment.

The plain language of the statute authorizes an officer to collect a ten percent commission from the money realized from a sale.<sup>4</sup> No express language in the statute mandates collection of said commission. Rather, it authorizes collection of the commission and then directs what the sheriff should do with the remainder: "he shall pay the net proceeds . . . in like manner as if..."<sup>5</sup>

The General Assembly knows how to express its intention.<sup>6</sup> There is no explicit direction that the sheriff must charge the commission.<sup>7</sup> Moreover, even if the statute were to provide that the sheriff "shall" charge the commission, that would not necessitate a finding that the commission must be charged. As the Virginia Supreme Court has noted,

the use of 'shall,' in a statute requiring action by a public official, is directory and not mandatory unless the statute manifests a contrary intent. As this Court explained in *Commonwealth v. Rafferty*, 241 Va. 319, 402 S.E.2d 17 (1991), '[a] statute directing the mode of proceeding by public officers is to be deemed directory, and a precise

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<sup>2</sup> 1984-85 Op. Va. Att'y Gen. 284, 284.

<sup>3</sup> See VA. CODE ANN. §§ 8.01-466 through 8.01-505 (2012 & Supp. 2013) (establishing process for obtaining and enforcing a writ of execution).

<sup>4</sup> 2003 Op. Va. Att'y Gen. 172, 173; 2001 Op. Att'y Gen. 20, 21.

<sup>5</sup> Section 8.01-499 (2012). Procedures respecting the payment of proceeds following execution of a writ of fieri facias are set forth at VA. CODE ANN. §§8.01-483 through 8.01-486 (2007).

<sup>6</sup> See, e.g., 2007 Op. Va. Att'y Gen. 133, 136 n.4. "We 'assume that the legislature chose, with care, the words it used when it enacted the relevant statute.'" *Alger v. Commonwealth*, 267 Va. 255, 261, 590 S.E.2d 563, 556 (2004) (quoting *Barr v. Town & Country Props., Inc.*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990)).

<sup>7</sup> Compare § 8.01-499 with VA. CODE ANN. § 15.2-1609.3(A) (2012) (the latter providing in pertinent part that "[e]very sheriff, and every sheriff's deputy shall collect all fees and mileage allowances provided by law for the services of such officer.") (emphasis added). A "commission" is not a "fee" under this section, for the statute later provides that, if a sheriff neither sells the property nor receives payment, he is not entitled to any *commission* but may still take a *fee*. Section 15.2-1609.3(C)-(D) (emphasis added); and see 1982-83 Op. Va. Att'y Gen. 260, 261. Rules of statutory construction dictate that "[w]hen the General Assembly uses two different terms in the same act, it is presumed to mean two different things." *Forst v. Rockingham Poultry Mktg. Coop., Inc.*, 222 Va. 270, 278, 279 S.E.2d 400, 404 (1981), quoted in *Simon v. Forer*, 265 Va. 483, 490, 578 S.E.2d 792, 796 (2003). Furthermore, although not specifically discussed, the difference between a commission and a fee repeatedly has been recognized in prior opinions: See 2001 Op. Va. Att'y Gen. 20, 21; 1997 Op. Va. Att'y Gen. 18, 19; 1962-63 Op. Va. Att'y Gen. 101, 102.

compliance is not to be deemed essential to the validity of the proceedings, unless so declared by statute.' Id. at 324, 402 S.E.2d at 20 (quoting *Nelms v. Vaughan*, 84 Va. 696, 699, 5 S.E. 704, 706 (1888) (citation omitted)).<sup>8]</sup>

Accordingly, I conclude that while § 8.01-499 authorizes a sheriff to collect a ten percent commission, it does not require him to do so.<sup>9</sup>

With respect to your second question, § 8.01-499 does not address what must be done with a commission when a sheriff elects to collect it. Thus, the ten percent commission authorized by § 8.01-499 would fall within the broad scope of § 15.2-1615, which provides that, "[a]ll money received by the sheriff shall be deposited intact and promptly with the county or city treasurer or Director of Finance."<sup>10</sup> That section's mandate is clearly stated and by its terms applies to *all* money received by the sheriff.<sup>11</sup> Therefore, I conclude that a sheriff choosing to collect the commission deposit the funds with the county or city treasurer or Director of Finance.

### Conclusion

Accordingly, it is my opinion that it is within a sheriff's discretion whether or not to collect a commission under § 8.01-499. It is further my opinion that if a commission is collected, the sheriff must comply with § 15.2-1615.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink that reads "Ken C II". The signature is stylized, with "Ken" written in a cursive script and "C II" in a more formal, blocky font.

Kenneth T. Cuccinelli, II  
Attorney General

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<sup>8</sup> *Jamborsky v. Baskins*, 247 Va. 506, 511, 442 S.E.2d 636, 638 (1994).

<sup>9</sup> This is consistent with a prior opinions of this Office, which noted in passing that a sheriff "may deduct" the commission referenced in § 8.01-499. 2001 Op. Va. Att'y Gen. 20, 21; 1997 Op. Va. Att'y Gen. 18, 19.

<sup>10</sup> VA. CODE ANN. § 15.2-1615(A) (2012).

<sup>11</sup> Section 15.2-1615(A) includes two exemptions to this requirement, however, they are inapplicable to your inquiry.