



# COMMONWEALTH of VIRGINIA

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Mr. Donald L. Palmer  
Secretary, State Board of Elections  
1100 Bank Street, First Floor  
Richmond, Virginia 23219

Dear Mr. Palmer:

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 which political party is entitled to an electoral board appointment to fill a midterm vacancy, when the original appointee for that term represented the political party of the prior Governor, who was of a different political party than the current Governor.

## Response

It is my opinion that an appointment to fill the vacancy of an unexpired electoral board term must reflect political party representation based on the votes for the office of Governor at the last preceding election at the time the appointment for the vacancy is made. Accordingly, the party of the candidate who prevailed in the most recent gubernatorial election is entitled to recommend the electoral board appointment to fill the vacancy.

## Applicable Law and Discussion

Local electoral boards are constitutionally created bodies.<sup>1</sup> Article II, § 8 of the Constitution of Virginia specifically provides that

There shall be in each county and city an electoral board composed of three members, selected as provided by law. 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. The present members of such boards shall continue in office until the expiration of their respective terms; thereafter their successors shall be appointed for the term of three years. Any vacancy occurring in any board shall be filled by the same authority for the unexpired term.

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<sup>1</sup> VA. CONST. art. II, § 8.

Section 24.2-106 of the *Code of Virginia* implements this constitutional provision and provides specific procedures by which the constitutional requirement of partisan balance on local electoral boards is to be achieved. In relevant part, it provides that

Two electoral board members shall be of the political party that cast the highest number of votes for Governor at [the most recent gubernatorial] election. . . . The political party entitled to the appointment shall make and file recommendations with the judges for the appointment not later than January 15 of the year of an appointment to a full term or, in the case of an appointment to fill a vacancy, within 30 days of the date of death or notice of resignation of the member being replaced. . . . The judges shall promptly make such appointment (i) after receipt of the political party's recommendation or (ii) after January 15 for a full term or after the 30-day period expires for a vacancy appointment, whichever of the events described in clause (i) or (ii) first occurs.

The statute thus requires that, of a three-member local electoral board, two members shall be of the political party that cast the highest number of votes for Governor in the last preceding gubernatorial election. This requirement of majority representation based on the most recent gubernatorial election does not differentiate between full-term appointments and interim appointments to fill unexpired terms of vacancies. Indeed, § 24.2-106 specifically addresses interim appointments to fill vacancies by specifying a different time schedule for filling them. The statute simply requires that two members be of the party of the prevailing gubernatorial candidate at the time of appointment, regardless of whether the appointments are for full terms or to fill vacancies. It does not require early termination of any board member in order to achieve the proper partisan balance. To the contrary, it states that “[n]o three-year term shall be shortened to comply with the political party representation requirements of this section.”<sup>2</sup> But it does require that new appointments - whether for full terms or to fill vacancies - bring the board into the proper partisan balance, based on the most recent gubernatorial election.

This interpretation is supported by guidance issued by the State Board of Elections (“SBE”), the state agency tasked with administering the election laws of the Commonwealth.<sup>3</sup> In its *General Registrar and Electoral Board Handbook* (“GRE Book”), the SBE explains as follows:

By statute, the terms of incumbent members are not interrupted to meet [the political party representation] requirement when the newly elected Governor is of a different party than the previous Governor. Rather, the representation on the electoral board changes as the terms of incumbent members expire and new appointments are made when regularly scheduled, *or when it is necessary to make an interim appointment for an unexpired term due to the death or resignation of a member. The first appointment (however occurring) for a seat previously held by a member representing the previous Governor's party must be given to the new Governor's party.*<sup>[4]</sup>

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<sup>2</sup> VA. CODE ANN. § 24.2-106 (Supp. 2013).

<sup>3</sup> See § 24.2-103 (Supp. 2013). “The fundamental objective of the State Board of Elections is to provide overall supervision and coordination of election activities throughout the Commonwealth, and to obtain uniformity in local election practices and proceedings and legality and purity in all elections.” 2005 Op. Va. Att’y Gen. 97, 101-02.

<sup>4</sup> STATE BOARD OF ELECTIONS, GENERAL REGISTRAR AND ELECTORAL BOARD HANDBOOK § 2.1.1, “Terms of Office” at 4 (rev. July 2013) (emphasis added), *available at* [http://townhall.virginia.gov/L/GetFile.cfm?File=C:\TownHall\docroot\GuidanceDocs\132\GDoc\\_SBE\\_5275\\_v1.pdf](http://townhall.virginia.gov/L/GetFile.cfm?File=C:\TownHall\docroot\GuidanceDocs\132\GDoc_SBE_5275_v1.pdf). Previous Opinions of this Office defer to an agency’s interpretations of the laws it is charged with administering, including the SBE. See, e.g., 2001 Op. Va. Att’y Gen 125; 1996 Op. Va. Att’y Gen. 124. See also 2002 Op. Va. Att’y Gen. 186; 1999 Op. Va. Att’y Gen. 3; and opinions cited in each.

This interpretation of § 24.2-106 has appeared in the GRE Book since the 2004 version of the handbook was adopted by the SBE. The Supreme Court of Virginia has a longstanding practice of according great weight to agency interpretation of a statute under these circumstances:

We have frequently said that the practical construction given to a statute by public officials charged with its enforcement is entitled to great weight by the courts and in doubtful cases will be regarded as decisive. The Legislature is presumed to be cognizant of such construction and when long continued, in the absence of legislation evincing a dissent, the courts will adopt that interpretation.<sup>[5]</sup>

Although the General Assembly has amended § 24.2-106 since 2004,<sup>6</sup> the amendments have not affected the language upon which the SBE's interpretation is based. Accordingly, I conclude that the General Assembly has acquiesced in that interpretation -- an interpretation that, as discussed above, reflects the language used in the statute.

### Conclusion

Accordingly, it is my opinion that an appointment to fill the vacancy of an unexpired electoral board term must reflect political party representation based on the votes for the office of Governor at the last preceding election at the time the appointment for the vacancy is made. Consequently, the party of the candidate who prevailed in the most recent gubernatorial election is entitled to recommend the electoral board appointment to fill the vacancy.

With kindest regards, I am

Very truly yours,



Mark R. Herring  
Attorney General

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<sup>5</sup> Commonwealth v. Appalachian Electric Power Co., 193 Va. 37, 45-46, 68 S.E.2d 122, 127 (1951).

<sup>6</sup> See 2005 Va. Acts ch. 380 (adding requirement that at least one board member attend annual SBE training); 2011 Va. Acts 764 (adding restrictions on who may serve on electoral board based on certain relationships to elected officials); 2013 Va. Acts ch. 409 (adding provision permitting temporary appointments, on a meeting-to-meeting basis, in cases of temporary absence or disability resulting in loss of quorum).