



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Mark R. Herring
Attorney General

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900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

The Honorable Rex A. Davis
Clerk of Court
Newport News Circuit Court
2500 Washington Avenue
Newport News, Virginia 23607

Dear Mr. Davis:

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

Issue Presented

Where a constitutional office becomes vacant and the highest ranking deputy of that office temporarily assumes the powers of the office by operation of law pursuant to § 24.2-228.1(B), you inquire whether the residency requirement imposed upon elected and appointed constitutional officers applies to the deputy.¹

Response

It is my opinion that, when the powers of a vacant constitutional office are assumed by the highest ranking deputy within the office as provided by § 24.2-228.1(B), the deputy need not be a resident of the locality of service.

Applicable Law and Discussion

Prior to the year 2000, vacancies in constitutional offices were filled, on a temporary or interim basis only, by judicial appointment until a special election could be held,² and there was a residency requirement: the appointee had to have resided in the locality of service for at least thirty days prior to appointment.³ This residency requirement for judicial appointments remains in effect.

In 2000, the General Assembly enacted § 24.2-228.1, which provides a different procedure for filling vacancies in local constitutional offices.⁴ The current procedure accelerates the special election,⁵

¹ You specifically ask for a review of a 2003 Opinion of this Office that concludes that there is a residency requirement for automatic succession under § 24.2-228.1. 2003 Op. Va. Att'y Gen. 104. Based on the analysis set forth herein, the 2003 Opinion is expressly overruled.

² See 2000 Va. Acts ch. 787.

³ VA. CODE ANN. § 15.2-1525(A) (2012).

⁴ See VA. CONST. art. VII, § 4 (identifying which offices are local constitutional offices).

and, by operation of law, without judicial appointment, vests the powers of the office in the highest ranking deputy until the special election can be held.⁶ The vacancy is filled by judicial appointment only if there is no deputy, or if the deputy declines to serve.

At the time this automatic succession statute was enacted, it was unmistakably clear that deputies of constitutional officers were not subject to a residency requirement: § 15.2-1525(B), as in effect at the time and now, expressly provides that the nonelected deputies of constitutional officers “shall not be required to reside in the jurisdiction in which they are appointed.”⁷

It is thus clear beyond reasonable debate that at the time of enacting the automatic succession statute, § 24.2-228.1, the General Assembly was aware that there was no residency requirement for deputies. Had the General Assembly intended to make automatic succession subject to residency, it could have easily included such a requirement in the statute. It did not do so. We assume that the legislature chose, with care, the words it used when it enacted the relevant statute.⁸ When construing a statute, the primary objective is “to ascertain and give effect to legislative intent,” as expressed by the language of the statute.⁹

In notable contrast, the General Assembly maintained a residency requirement for judicial appointments to fill constitutional vacancies.¹⁰ The significance of an explicit statutory residency for interim judicial appointments to fill constitutional vacancies and the absence of such a requirement for automatic succession cannot be ignored. The plain language of a statute should be applied unless doing so creates an absurd result.¹¹ I therefore must conclude that the legislative intent in enacting this statute was that automatic succession - for a brief period of time until a prompt special election occurs - is not subject to a residency requirement. This conclusion is consistent with the apparent purpose of the statute, which is to ensure continuous competent leadership of constitutional offices in the event of vacancies.

The question then becomes whether the Constitution of Virginia requires a different interpretation of § 24.2-228.1. I note that statutes are presumed to be constitutional;¹² and the Supreme Court will give the Constitution a liberal construction in order to sustain an enactment, if practicable.¹³

⁵ VA. CODE ANN. § 24.2-228.1(A) (2011) requires a writ of election to be issued “within fifteen days of the occurrence of the vacancy,” and a companion statute, § 24.2-682, requires that special elections to fill vacancies in constitutional offices be held “promptly.”

⁶ Section 15.2-1525(A).

⁷ Until 1984, there was a residency requirement for deputies. *See* 1984 Va. Acts ch. 711 (replacing the original language of former § 15.1-51, which imposed a residency requirement on the nonelected deputies of constitutional officers, with language exempting such deputies from the residency requirement applicable to constitutional officers).

⁸ *Alger v. Commonwealth*, 267 Va. 255, 261, 590 S.E.2d 563, 556 (2004).

⁹ *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 425, 722 S.E.2d 626, 629 (2012) (quoting *Commonwealth v. Amerson*, 281 Va. 414, 418, 706 S.E.2d 879, 882 (2011)).

¹⁰ Section 15.2-1525(A).

¹¹ *City of Albemarle v. Camirand*, 285 Va. 420, 424, 738 S.E.2d 904, 906 (2013).

¹² *Marshall v. N. Va. Transp. Auth.*, 275 Va. 419, 427, 657 S.E.2d 71, 75 (2008).

¹³ *Id.*, 275 Va. at 428, 657 S.E.2d at 75.

Article II, § 5 of the Constitution of Virginia establishes a residency requirement for constitutional officers:

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

To be qualified to vote for an elective office, a voter must reside within the territorial jurisdiction served by that office.¹⁴ The precise question, then, is whether a person who assumes the powers of a constitutional office by operation of law on an interim basis, and without election or appointment, “holds” that office.

The language of § 24.2-228.1 suggests that automatic succession is not intended to be the same as officially “holding” an office by election or appointment. Section 24.2-228.1 expressly states that

The highest ranking deputy officer . . . if there is such a deputy or assistant 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.

The statute does not provide that the deputy shall “become” the constitutional officer, nor that he shall “hold” the constitutional office.¹⁵ Instead, it states that he shall have the powers, perform the duties, and be entitled to the privileges “afforded by law to . . . constitutional officers”¹⁶ This is an important distinction. The deputy does not “hold . . . [an] office . . . elective by the people,” as contemplated by Article II, § 5. Instead, the deputy is authorized, on a temporary basis, to exercise the powers, duties, and privileges of the office.

Finally, there are similar situations where there are legal requirements for holding office, but where those requirements are inapplicable in certain temporary or interim situations. With respect to the constitutional residency requirement, members of the General Assembly, who otherwise would lose their offices for failure to remain residents of their districts,¹⁷ do not forfeit their positions when redistricting results in the official no longer living in the district. Instead, they are able to complete the term to which they were elected.¹⁸ The same is true for local elected officials.¹⁹ Additionally, administrative officers appointed by the Governor who are subject to General Assembly confirmation serve prior to

¹⁴ See VA. CONST. art. II, § 1.

¹⁵ Compare § 24.2-228.1 with §§ 24.2-226(A) (Supp. 2014) and 24.2-227 (2011) (providing that persons elected or appointed to fill vacancies in local elective offices other than constitutional offices “shall hold office” for the duration of their permitted service).

¹⁶ Entitlement to the privileges of office include receiving approved compensation for the position. See STATE COMPENSATION BOARD, POLICY & PROCEDURE: A MANUAL FOR CONSTITUTIONAL OFFICERS at 50 (2011), available at <http://www.scb.virginia.gov/policy/FY11General.pdf>.

¹⁷ “A senator or delegate who moves his residence from the district for which he is elected shall thereby vacate the office.” VA. CONST. art. IV, § 4.

¹⁸ VA. CODE ANN. § 24.2-311(A) (Supp. 2014). See also 2001 Op. Va. Att’y Gen. 34.

¹⁹ VA. CODE ANN. § 24.2-304.6 (2011). See 1981-82 Op. Va. Att’y Gen. 324; 1991 Op. Va. Att’y Gen. 159 (same conclusion for school board members).

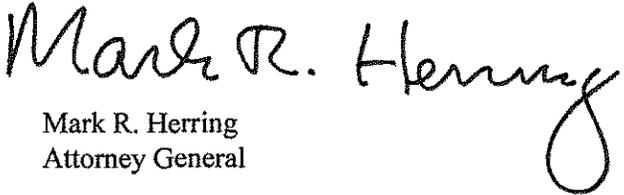
confirmation, until confirmation is either granted or denied.²⁰ Finally, I also note that a person appointed to a state board or commission or a regional authority for a fixed term remains in office after the conclusion of his term until his successor is appointed.²¹

Conclusion

Accordingly, it is my opinion that, when the powers of a vacant constitutional office are assumed by the highest ranking deputy officer within the office, as provided by § 24.2-228.1, the deputy officer need not be a resident of the locality of service.

With kindest regards, I am

Very truly yours,


Mark R. Herring
Attorney General

²⁰ VA. CONST. art. V, §§ 10, 11.

²¹ 2013 Op. Va. Att'y Gen. 220.