



# COMMONWEALTH of VIRGINIA

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July 31, 2015

The Honorable Terence R. McAuliffe  
Governor, Commonwealth of Virginia  
1111 East Broad Street  
Richmond, Virginia 23219

Dear Governor McAuliffe:

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 ask four questions regarding the interpretation of § 51.1-124.13 of the *Code of Virginia*, which requires the forfeiture of pension and related benefits provided under Title 51.1 to state employees convicted of certain felonies:

- 1) What state office, officer, or agency is considered the “employer” for purposes of applying the forfeiture statute to statewide elected officers, *i.e.*, Governor, Lieutenant Governor and Attorney General?
- 2) Whether and to whom the employer may assign responsibility for implementing the statute with respect to statewide elected officers?
- 3) At what point is an individual deemed “convicted of a felony” under the forfeiture statute?
- 4) Does the forfeiture of benefits under the statute affect other retirement benefits, such as spousal and dependent benefits entitlement and benefits accruing from service in multiple offices or positions of covered service?

## Applicable Law and Discussion

Title 51.1 of the *Code of Virginia* provides pensions, retirement systems, and other benefits for various state employees, including retirement benefits through the Virginia Retirement System (“VRS”).<sup>1</sup> In 2011 the General Assembly enacted, and the Governor signed, § 51.1-124.13, which requires that any person otherwise entitled to benefits under Title 51.1 must forfeit those benefits if they are convicted of a

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<sup>1</sup> For example, Title 51.1 establishes the Virginia Retirement System (§§ 51.1-100 through 51.1-169), the Government Employees Deferred Compensation Plan (§§ 51.1-600 through 51.1-605), and the Cash Match Plan (§§ 51.1-607 through 51.1-613).

felony arising from misconduct that occurred while that person was acting as an employee of the Commonwealth.<sup>2</sup> Specifically, the statute provides that:

No person shall be entitled to any of the benefits of this title as provided in this section if (i) he is convicted of a felony and (ii) the person's employer determines that the felony arose from misconduct occurring on or after July 1, 2011, in any position in which the person was a member covered for retirement purposes under any retirement system administered by the Board.

Pursuant to the statute, the employer determines whether a felony conviction arose from misconduct in a covered position on or after July 1, 2011. Before an employer makes that determination, however, the employer must give the employee "reasonable prior written notice and provide an opportunity to be heard."<sup>3</sup> The Board of Trustees of VRS (the "Board") implements the forfeiture of benefits "as soon as practicable after the employer notifies the Board of its final determination that the member's felony conviction arose from misconduct in any position in which the member was a member in service."<sup>4</sup>

To date, no Virginia court has interpreted § 51.1-124.13, the statute about which you inquire. To answer your questions I must therefore rely primarily on general principles of statutory construction.

**(1) The "employer" of statewide elected officers.**

You ask who is the "employer" of statewide elected officers for the purposes of § 51.1-124.13. Section 51.1-124.3 of the *Code of Virginia* provides various definitions meant to be applied throughout Chapter 1 of Title 51.1. Section 51.1-124.3 defines a "state employee" to include the "Governor, Lieutenant Governor, Attorney General, and members of the General Assembly."<sup>5</sup> In turn, the "employer" of a state employee is defined as the Commonwealth.<sup>6</sup> Thus, the Commonwealth employs state employees, including the Governor, for the purposes of § 51.1-124.13.

It is well-settled that the Commonwealth can act only through its agents.<sup>7</sup> The Constitution of the Commonwealth of Virginia vests the Governor with the authority to "take care that the laws [are] faithfully executed."<sup>8</sup> The General Assembly has also recognized that the Governor is the "Chief Personnel Officer of the Commonwealth" with broad powers of state personnel administration.<sup>9</sup> These powers include the "authority and responsibility for the formulation and administration of the policies of the executive branch."<sup>10</sup> Accordingly, it is my opinion that the Governor of Virginia, acting as an agent

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<sup>2</sup> VA. CODE ANN. § 51.1-124.13(A) (2013).

<sup>3</sup> *Id.*

<sup>4</sup> Section 51.1-124.13(C).

<sup>5</sup> Section 51.1-124.3 (Supp. 2014).

<sup>6</sup> *Id.*

<sup>7</sup> *See* Richard L. Deal & Assocs., Inc. v. Commonwealth, 224 Va. 618, 621 (1983) (explaining that "the sovereign can act only through its agents").

<sup>8</sup> VA. CONST. art. V, § 7.

<sup>9</sup> VA. CODE ANN. § 2.2-103(B) (2014).

<sup>10</sup> Section 2.2-103(A).

of the Commonwealth, is the “employer” of state employees, to include statewide elected officials, for the purpose of implementing § 51.1-124.13.

**(2) Delegation of Governor’s authority**

You next ask whether the Governor may assign responsibility for implementing § 51.1-124.13 to another member of the executive branch and, if so, to whom the Governor may delegate his authority. In § 2.2-104 of the *Code of Virginia*, the General Assembly granted the Governor the authority to:

designate and empower any secretary or other officer in the executive branch of state government who is required to be confirmed by the General Assembly or either house thereof, to perform without approval, ratification, or other action by the Governor any function that is vested in the Governor by law, or which such officer is required or authorized by law to perform only with or subject to the approval [or] ratification of the Governor; however nothing contained in this section shall relieve the Governor of his responsibility in office for the acts of any secretary or officer designated by him to perform such functions.<sup>11</sup>

Consistent with this statute, the Governor may delegate the authority to enforce § 51.1-124.13 to any executive branch employee who is confirmed with the advice and consent of the General Assembly or one of its two branches.<sup>12</sup> The Governor must make any delegation of his authority under § 2.2-104 “(i) in the form of a written executive order, (ii) subject to the terms, conditions, and limitations the Governor deems advisable, and (iii) revocable in whole or in part at any time by the Governor.”<sup>13</sup>

**(3) At what point is an individual deemed “convicted of a felony” under the statute?**

You ask for clarification about when an employer should deem an individual to have been “convicted of a felony.”

VRS currently interprets § 51.1-124.13 to effect the forfeiture of benefits at the time of conviction at the trial level: it requires employers to file VRS Form No. 180 in order to forfeit state employee benefits under § 51.1-124.13. The form specifically provides that “[i]f at any time the employee’s felony conviction is overturned, you [the employer] must contact VRS to ensure the employee’s VRS benefits are reinstated.”<sup>14</sup> In other words, VRS expects employers to file Form No. 180 forfeiting retirement benefits before all appeals are exhausted.

Courts have “construed the term ‘conviction’ in several different contexts.”<sup>15</sup> In *Smith v. Commonwealth*, the Supreme Court of Virginia examined a statute removing elected or appointed public officials convicted of crimes of moral turpitude, finding that that the “word ‘convicted’ . . . means convicted by judgment, and requires a judgment of conviction.”<sup>16</sup> The Court reiterated the *Smith*

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<sup>11</sup> Section § 2.2-104 (2014).

<sup>12</sup> See, e.g., Exec. Order No. 46, VA. R. 29:22 1689 (July 2, 2012) (delegating the Governor’s authority regarding proposals involving Virginia Port Authority qualifying transportation facilities to the Secretary of Transportation).

<sup>13</sup> Section § 2.2-104.

<sup>14</sup> VA. RETIREMENT SYSTEM, *Employer Request for Forfeiture of Member Benefits* (VRS Form No. 180), available at <http://www.varetire.org/pdf/forms/vrs-180.pdf>.

<sup>15</sup> *Starrs v. Commonwealth*, 287 Va. 1, 12 n.4 (2014).

<sup>16</sup> *Smith v. Commonwealth*, 134 Va. 589, 592 (1922).

definition in the context of parole eligibility<sup>17</sup> and guilty pleas.<sup>18</sup> In each case, the Court found that “conviction” occurs when a judgment of conviction is entered by a trial court.

A different rule is applied, however, in the context of the “insurance proceeds forfeiture provision” that prohibits murderers from inheriting property from their victims (known as the “slayer statute”). The United States District Court for the Eastern District of Virginia, in *Prudential Insurance Company of America v. Tull*, held that in the context of that statute “a person does not stand finally ‘convicted’ until the Virginia Supreme Court has reviewed the trial court’s finding of guilt and has affirmed the conviction by appropriate action.”<sup>19</sup> A conviction is interpreted in this context as final conviction after direct appeals are exhausted. The court in *Prudential Insurance Company* relied in part on the fact that the slayer statute was passed prior to the Supreme Court’s holding in *Smith*, thus, the General Assembly cannot be assumed to have known of the definition the courts in Virginia would apply to the term “conviction” at the time the slayer statute was enacted.

Unlike the statute at issue in *Prudential Insurance Company*, the General Assembly enacted § 51.1-124.13 almost ninety years after the Virginia Supreme Court adopted the *Smith* definition of “conviction.” Moreover, since *Smith*, the General Assembly has been clear about when it expects something to occur only after all appeals of a conviction have been exhausted. For example, the General Assembly amended the statute at issue in *Smith*, § 24.2-233, to provide that certain elected and appointed officers are removed by the courts “upon conviction, *and after all rights of appeal have terminated.*”<sup>20</sup> No such language appears in § 51.1-124.13, the forfeiture of retirement benefits statute. “[W]hen the General Assembly has used specific language in one instance, but omits that language or uses different language when addressing a similar subject elsewhere in the Code, we must presume that the difference in the choice of language was intentional.”<sup>21</sup> Accordingly, we must assume that the General Assembly purposefully omitted any reference to the appeals process in § 51.1-124.13, evidencing its intent that forfeiture of benefits be given effect upon final judgment of conviction in the trial court.

It is worth noting that interpreting “conviction” to be a judgment of conviction entered by a trial court is consistent with the practice of extinguishing a felon’s civil rights, including right to carry a weapon and right to vote upon judgment of conviction. In interpreting statutes, “we may look to the related statutes, reading them *in pari materia* with the statute under consideration, in order to give consistent meaning to the language used by the General Assembly.”<sup>22</sup> Like § 51.1-124.13, § 18.2-308.2 prohibits anyone “*convicted of a felony*” from possessing and transporting firearms.<sup>23</sup> Section 24.2-427 instructs the State Board of Elections to cancel the voter registration of persons “*convicted of a felony.*”<sup>24</sup> In each of these cases, the right to vote and carry a weapon is revoked upon the judgment of conviction in a court of record.

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<sup>17</sup> *Ramdass v. Commonwealth*, 248 Va. 518, 520-21 (1994).

<sup>18</sup> *Starrs v. Com.*, 287 Va. 1 (2014).

<sup>19</sup> *Prudential Ins. Co. of Am. v. Tull*, 524 F. Supp. 166, 171 (E.D. Va. 1981).

<sup>20</sup> Va. Code Ann. § 24.2-233(2) (Supp. 2014) (emphasis added).

<sup>21</sup> *Rives v. Commonwealth*, 284 Va. 1, 3 (2012) (citation omitted).

<sup>22</sup> *Armstrong v. Commonwealth*, 263 Va. 573, 583 (2002) (citing *Lucy v. Cnty. of Albemarle*, 258 Va. 118, 129 (1999)).

<sup>23</sup> VA. CODE ANN. § 18.2-308.2 (2014) (emphasis added).

<sup>24</sup> Section 24.2-427 (Supp. 2014) (emphasis added).

For those reasons, it is my opinion that an individual is convicted of a felony for the purposes of § 51.1-124.13 when a trial judge enters a judgment of conviction, notwithstanding any appellate review. If the conviction is later set aside on appeal, VRS has a procedure by which the retiree will have retirement benefits reinstated.

**(4) Does forfeiture of benefits under the statute affect other retirement benefits, such as spousal and dependent benefits entitlement and benefits accruing from service in multiple offices or positions of covered service?**

It is a “principal rule of statutory interpretation . . . that courts will give statutory language its plain meaning.”<sup>25</sup> Section 51.1-124.13 is clear – an employee convicted of a felony arising from misconduct in a VRS-covered position is not “entitled to *any of the benefits* of [title 51.1].”<sup>26</sup> Moreover, “any service credit lost from relinquishment of benefits under subsection C shall be ineligible for subsequent purchase.”<sup>27</sup> The only exception to this forfeiture of benefits is that when an employee “is or becomes a member in service after relinquishment of benefits under subsection C, he shall be entitled to the benefits under this title based solely on his service occurring after the relinquishment.”<sup>28</sup>

Thus, an employee covered under 51.1-124.13 loses all of the benefits earned at that point in time under Title 51, including all benefits administered by VRS and the benefits of the Optional Retirement Plans administered by certain colleges and universities. This includes even the residual VRS benefits that accrued prior to forfeiture and VRS benefits accruing from service in multiple offices or positions of covered service regardless of whether the felonious misconduct was related to that position or not. Had the General Assembly wished to limit the forfeiture only to VRS benefits accrued from the specific office or position underlying the employee’s felony conviction, it could have done so. It did not. In the absence of statutory language creating such exemptions, I must conclude from the plain language of the forfeiture statute that an employee forfeits *all* benefits earned at that point in time. Statutory language is to be given its plain meaning.<sup>29</sup>

This conclusion is consistent with current VRS interpretation of the forfeiture statute. VRS Form No. 180 includes a list of all VRS benefits subject to forfeiture under Code § 51.1-124.13. This form includes *all* Commonwealth-provided benefits under Title 51.1.<sup>30</sup>

**Conclusion**

Accordingly, it is my conclusion that the Governor of Virginia is the “employer” of statewide elected officers for the purposes of § 51.1-124.13. Consistent with § 2.2-104, however, the Governor may delegate the responsibility for implementing the employer’s role in § 51.1-124.13 to any state officer in the executive branch. For the purposes of § 51.1-124.13, an individual is “convicted of a felony” when

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<sup>25</sup> Davenport v. Little-Bowser, 269 Va. 546, 555 (2005) (citing Jackson v. Fidelity & Deposit Co., 269 Va. 303, 313 (2005)).

<sup>26</sup> Section 51.1-124.13(A) (emphasis added).

<sup>27</sup> Section 51.1-124.13(E).

<sup>28</sup> Section 51.1-124.13(D).

<sup>29</sup> Davenport v. Little-Bowser, 269 Va. 546, 555 (2005).

<sup>30</sup> The VRS form does, however, allow a covered employee to obtain a refund of the contributions and interest credited to the employee’s member contribution account. This refund is merely the return of the employee’s own property; it is not a benefit provided by the Commonwealth.

Honorable Terence R. McAuliffe

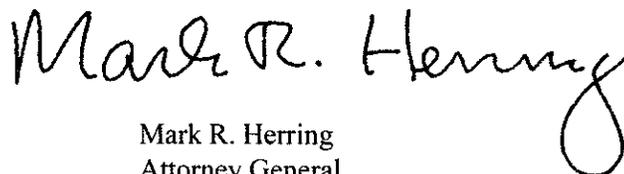
July 31, 2015

Page 6

the trial court enters a final appealable judgment of conviction. Finally, § 51.1-124.13 requires the forfeiture of all benefits awarded under Title 51, including spousal benefits and benefits accrued from service in multiple offices or positions.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink that reads "Mark R. Herring". The signature is written in a cursive style with a large, looped "H" and a long, sweeping tail on the "g".

Mark R. Herring  
Attorney General