

OP. NO. 05-040

**ADMINISTRATION OF GOVERNMENT: STATE OFFICERS AND EMPLOYEES
– GENERAL PROVISIONS.**

**CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT (COUNTY AND CITY
OFFICERS).**

**COUNTIES, CITIES AND TOWNS: LOCAL CONSTITUTIONAL OFFICERS,
ETC.**

MILITARY AND EMERGENCY LAWS: MILITARY LAWS OF VIRGINIA.

Commonwealth's attorney is not required to relinquish his office when involuntarily recalled to active military duty. Commonwealth's attorney has sole discretion to appoint assistant to perform duties of his office during such absence. Should Commonwealth's attorney resign and circuit court appoint acting Commonwealth's attorney, such attorney may act in place of and otherwise perform duties and exercise powers of regular Commonwealth's attorney.

The Honorable Gordon E. Hannett
Floyd County Commonwealth's Attorney
May 5, 2005

Issues Presented

You ask whether, as the Commonwealth's Attorney for Floyd County, you are required to relinquish your office when you involuntarily are recalled to active military duty.¹ If not, you ask whether you have the sole discretion to appoint an assistant Commonwealth's attorney to perform your duties during your absence or whether the local governing board or the circuit court may appoint an assistant. Finally, in the event that the circuit court appoints either a Commonwealth's attorney or an assistant to serve in your absence, you ask what effect such an appointment has on your elected position.

Response

It is my opinion that the Commonwealth's attorney, a local constitutional officer, is not required to relinquish his office when involuntarily recalled to active military duty. Furthermore, it is my opinion that you, as Commonwealth's attorney, have the sole discretion to appoint an assistant Commonwealth's attorney to perform the duties of your office during your absence. Finally, if you do resign and the circuit court appoints an acting Commonwealth's attorney pursuant to the provisions of § 19.2-156, such acting Commonwealth's attorney may act in place of and otherwise perform the duties and exercise the powers of a regular Commonwealth's attorney.

Background

You advise that you were elected Commonwealth's attorney for Floyd County in November 2003. Your term of office will end on December 31, 2007. You also advise that your office does not currently employ an assistant Commonwealth's attorney.

You also advise that in February 2005, your Army Reserve unit was activated for military service in Iraq. The mobilization of the unit is scheduled for May 8, 2005. You relate that you will actively manage your office during the period of your mobilization through use of electronic mail messages and frequent telephone exchanges. To that end, you advise that the State Compensation Board recently has approved your request to fund a part-time, temporary assistant Commonwealth's attorney. Such an assistant will be expected to work up to four days per week in the Commonwealth's attorney's office. You indicate that you have identified an attorney with more than twelve years experience in criminal law. You note, however, that the circuit court has advised that you must either appoint a local criminal defense attorney or the court will appoint one of them.

Applicable Law and Discussion

A 2002 opinion of the Attorney General responds to questions regarding a county treasurer who involuntarily is recalled to active military duty.² Among other issues, the opinion concludes that the provisions of § 2.2-2802 do not require such a county constitutional officer to relinquish his office when involuntarily recalled to active military duty.³ The opinion notes that the Supreme Court of Virginia specifically has held that a city councilman, inducted into active military service as an officer of a National Guard unit, does not forfeit his office under the predecessor statute to § 2.2-2802.⁴

A 2004 opinion of the Attorney General responds to questions regarding a member of a board of supervisors, a public officer, who involuntarily is recalled to active military duty.⁵ The opinion concludes that a vacancy in that member's office on the board of supervisors does not occur until he provides notice, pursuant to § 2.2-2802 to the body authorized by law to fill vacancies in his office, of his call to active duty. In the absence of the notice specified in § 2.2-2802, a vacancy in the office does not arise, and the body authorized by law to fill vacancies in such office may not appoint a temporary replacement.⁶

Section 2.2-2802, in part, provides:

No ... county ... officer ... shall forfeit his title to office ... or vacate the same by reason of either engaging in the war service of the United States ... when called to active duty in the armed forces of the United States. Any such officer ... who, voluntarily or otherwise, enters upon such war service or is called to service may notify the ... body authorized by law to fill vacancies in his office, of such fact, and thereupon be relieved from the duties of his office ... during the period of such service. The ... body authorized to fill vacancies shall designate some suitable person to perform the duties of such office as acting officer during the period the regular officer is engaged in such service, and during such period the acting officer shall be vested with all the powers, authority, rights and duties of the regular officer for whom he is acting.

"Constitutional officers" are those county and city officers who are elected by the qualified voters, i.e., treasurers, sheriffs, Commonwealth's attorneys, clerks of courts of record, and commissioners of the revenue.⁷ Accordingly, the conclusion of the 2002 opinion applies to county constitutional officers who involuntarily are recalled to active military duty.⁸ It is my opinion that your involuntary recall to active military duty does not require you to relinquish the office of Commonwealth's Attorney of Floyd County.

Furthermore, in the event that you do not provide the notice specified in § 2.2-2802, a vacancy does not occur in your office.⁹ The 2000 Session of the General Assembly changed the process by which vacancies in constitutional offices are filled.¹⁰ Prior to the enactment of § 24.2-228.1, the circuit court of the locality appointed a person to fill the vacancy until a special election was conducted.¹¹ Section 24.2-228.1(B) authorizes the circuit court to make interim appointments to fill vacancies only where there is no full-time assistant Commonwealth's attorney or where such full-time assistant declines to serve. Accordingly, any such notice under the provisions of § 2.2-2802 must be given to the circuit court, and the circuit court is authorized to make an interim appointment only where there is no full-time assistant Commonwealth's attorney.

A 1998 opinion of the Attorney General notes that § 15.2-1626 authorizes, with the approval of the Compensation Board, every county and city to provide for employing compensated assistants to the Commonwealth's attorney.¹² The opinion specifically notes that § 15.2-1626 also provides that such assistant(s) shall be appointed by the Commonwealth's attorney "for a term coterminous with his own." The Supreme Court of Virginia has commented that, as a general rule, the duties of local constitutional officers and their deputies are regulated and defined by statute.¹³ Therefore, as a constitutional officer, the Commonwealth's attorney solely is responsible for employing assistant Commonwealth's attorneys.

In § 19.2-156, the General Assembly permits the circuit court to appoint an acting Commonwealth's attorney in certain situations as follows:

If it shall be necessary for the [Commonwealth's attorney] of any county or city to absent himself for a prolonged period of time from the performance of the duties of his office, then, upon notification by such [Commonwealth's attorney], or by the court on its own motion, and the facts being entered of record, the judge of the circuit court shall appoint an attorney-at-law as acting [Commonwealth's attorney] to serve for such length of time as may be necessary. Such acting [Commonwealth's attorney] shall act in place of and otherwise perform the duties and exercise the powers of such regular [Commonwealth's attorney], and while so acting shall receive the salary and allowance for expenses fixed by the State Compensation Board for such regular [Commonwealth's attorney], who during such length of time shall not receive any such salary or allowance.

"[T]he use of 'shall,' in a statute requiring action by a public official, is directory and not mandatory unless the statute manifests a contrary intent."¹⁴ "A statute directing the mode of proceeding by public officers is to be deemed directory, and a precise compliance is not to be deemed essential to the validity of the proceedings, unless so declared by statute."¹⁵ The General Assembly does not require in clear and unambiguous language that the circuit court appoint an acting Commonwealth's attorney. When the General Assembly intends to enact a

mandatory requirement, it knows how to express its intention.¹⁶ I am of the opinion that the use of the term "shall" in § 19.2-156 is not intended as a mandatory requirement for the circuit court to appoint an acting Commonwealth's attorney to serve during the period of your military service. Furthermore, if § 19.2-156 is intended to be mandatory in certain circumstances, it is not mandatory in the situation you describe. Section 2.2-2802 specifically provides that an officer is not required to forfeit his post when called to active duty. Section 2.2-2802 was reenacted by the 2001 Session of the General Assembly.¹⁷ Section 19.2-156 has not been reenacted or amended since 1975.¹⁸ If two statutes are *in pari materia* and have certain irreconcilable provisions, the later enactment amends the earlier statute.¹⁹ Therefore, in any event, you are not required to resign your post and an appointment to replace you, absent your resignation, is not justified.

Further, I am unaware of any statute that prevents you from continuing to oversee and manage your office via use of the Internet, electronic mail, or long distance telephone calls. Accordingly, you may actively manage your office during the period of your mobilization by use of electronic mail messages and frequent telephone exchanges, and you may hire an assistant with twelve years experience in criminal law who will be in the office up to four days per week.

Conclusion

Accordingly, it is my opinion that the Commonwealth's attorney, a local constitutional officer, is not required to relinquish his office when involuntarily recalled to active military duty. Furthermore, it is my opinion that you, as Commonwealth's attorney, have the sole discretion to appoint an assistant Commonwealth's attorney to perform the duties of your office during your absence. Finally, if you do resign and the circuit court appoints an acting Commonwealth's attorney pursuant to the provisions of § 19.2-156, such acting Commonwealth's attorney may act in place of and otherwise perform the duties and exercise the powers of a regular Commonwealth's attorney.

¹By Executive Order dated September 14, 2001, the President of the United States provided authority to the Secretary of the Department of Defense to order any unit in the Ready Reserve, and any member of the Ready Reserve not assigned to an organized unit, to active duty for not more than 24 consecutive months. See Exec. Order No. 13223, 66 Fed. Reg. 48,201 (Sept. 18, 2001), amended by Exec. Order No. 13253, 67 Fed. Reg. 2,791 (Jan 18, 2002), and further amended by Exec. Order No. 13286, 68 Fed. Reg. 10,619 (Mar. 5, 2003).

²2002 Op. Va. Att'y Gen. 58.

³*Id.* at 59.

⁴*City of Lynchburg v. Suttentfield*, 177 Va. 212, 13 S.E.2d 323 (1941).

⁵2004 Op. Va. Att'y Gen. 6 (forthcoming July 2005), *available at* <http://www.vaag.com/media%20center/Opinions/2004opns/04-016w.htm>.

⁶*Id.* at 7.

⁷Va. Const. art. VII, § 4.

⁸See *supra* note 2.

⁹See *supra* note 6 and accompanying text.

¹⁰See 2000 Va. Acts ch. 787, at 1671, 1672; *id.* ch. 1070, at 2615, 2616 (adding § 24.2-228.1).

¹¹*Id.* at 1671-72, 2615, respectively (amending and reenacting §§ 24.2-226, 24.2-227 and deleting terms "constitutional office" and "constitutional officers").

¹²1998 Op. Va. Att'y Gen. 65, 65; see also *Yarbrough v. Commonwealth*, 258 Va. 347, 361 n.3, 519 S.E.2d 602, 608 n.3 (1999) (noting that Commonwealth's attorney is constitutional officer and that Compensation Board must authorize employment of assistant Commonwealth's attorney).

¹³See *Hilton v. Amburgey*, 198 Va. 727, 729, 96 S.E.2d 151, 152 (1957); *Narrows Grocery Co. v. Bailey*, 161 Va. 278, 284, 170 S.E. 730, 732 (1933).

¹⁴*Jamborsky v. Baskins*, 247 Va. 506, 511, 442 S.E.2d 636, 638 (1994); see also *Commonwealth v. Rafferty*, 241 Va. 319, 324-25, 402 S.E.2d 17, 20 (1991); *Fox v. Custis*, 236 Va. 69, 77, 372 S.E.2d 373, 377 (1988); *Moore v. Commonwealth*, 218 Va. 388, 391-92, 237 S.E.2d 187, 190 (1977); *Huffman v. Kite*, 198 Va. 196, 202, 93 S.E.2d 328, 332 (1956); *Nelms v. Vaughan*, 84 Va. 696, 699-700, 5 S.E. 704, 706 (1888).

¹⁵*Nelms*, 84 Va. at 699, 5 S.E. at 706, *quoted in Rafferty*, 241 Va. at 324, 402 S.E.2d at 20.

¹⁶See Op. Va. Att'y Gen.: 2002 at 233, 237; 1999 at 168, 171; 1998 at 87, 88.

¹⁷See 2001 Va. Acts ch. 844, at 1194 (amending and adding Title 2.2, §§ 2.2-100 through 2.2-5803, and repealing Title 2.1, §§ 2.1-1 through 2.1-817).

¹⁸See 1975 Va. Acts ch. 495, at 847 (amending and adding Title 19.2, §§ 19.2-1 through 19.2-392, and repealing Title 19.1, §§ 19.1-1 through 19.1-400).

¹⁹See 2003 Op. Va. Att'y Gen. 6, 9-10.

[Back to May 2005 Opinion Index](#)