



★ VIRGINIA ★
STATE BOARD *of* ELECTIONS

BOARD MEETING

Tuesday, October 7, 2014
Washington Building
Room B27
Noon

SBE Board Working Papers



**STATE BOARD OF ELECTIONS
AGENDA**

*DATE: October 7, 2014
LOCATION: Washington Building, Room B27
TIME: 12:00 p.m.*

I. CALL TO ORDER

*Charles E. Judd
SBE Chair*

**II. APPROVAL OF MINUTES
August 6, 2014 & August 27, 2014**

SBE Board Members

III. COMMISSIONER'S REPORT

*Edgardo Cortés
ELECT Commissioner*

IV. REPORT FROM LEGAL COUNSEL

*Kristina Perry Stoney
SBE Legal Counsel*

V. NEW BUSINESS

A. Ballot Drawing- Special Election HOD5

*Matt Abell
ELECT Election Services Lead*

B. Ballot Drawing- January Special Elections

Matt Abell

C. Ballot Drawing- Special Election-Prince William County

Matt Abell

VI. OTHER BUSINESS & PUBLIC COMMENT

VII. GOOD OF THE ORDER



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Call to Order

BOARD WORKING PAPERS



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STATE BOARD *of* ELECTIONS

Approval of Minutes

BOARD WORKING PAPERS
SBE Board Members



★ VIRGINIA ★
STATE BOARD *of* ELECTIONS

Approval of Minutes August 6, 2014

BOARD WORKING PAPERS
SBE Board Members

1 MINUTES

2

3 The State Board of Elections Board Meeting was held on Wednesday, August 6,
4 2014. The meeting was held in the General Assembly Building – Room C, Richmond,
5 Virginia. In attendance, representing the State Board of Elections (SBE) was Charles
6 Judd, Chair; Don Palmer, Secretary; Kristina Perry Stoney, Senior Assistant Attorney
7 General and SBE Counsel and Anna Birkenheier, Assistant Attorney General. In
8 attendance, representing the Department of Elections (ELECT) was Edgardo Cortés,
9 Commissioner; Susan Lee, Elections Uniformity Manager; Chris Piper, Elections
10 Services Manager; Myron McClees, ELECT Policy Analyst and Rose Mansfield,
11 Executive Assistant. Chairman Judd called the meeting to order at 1:00PM.

12 The first order of business was the approval of the Minutes from the State Board
13 of Elections Board Meeting held on June 24, 2014. Chairman Judd asked if Board
14 Members had any additions or corrections to the June 24, 2014 Board Minutes and there
15 were none. Secretary Palmer moved *to adopt the Minutes for the June 24, 2014, Board*
16 *Meeting*. Chairman Judd seconded the motion and the Board unanimously approved the
17 Minutes. Chairman Judd asked if Board Members had any additions or corrections to the
18 July 15, 2014 Board Minutes and there were none. Chairman Judd moved *to adopt the*
19 *Minutes for the July 15, 2014, Board Meeting*. Secretary Palmer seconded the motion and
20 the Board unanimously approved the Minutes. Chairman Judd asked if Board Members
21 had any additions or corrections to the July 22, 2014 Board Minutes and there were none.
22 Secretary Palmer moved *to adopt the Minutes for the July 22, 2014, Board Meeting*.
23 Chairman Judd seconded the motion and the Board unanimously approved the Minutes.

24 The second order of business was the Commissioner’s Report delivered by
25 Commissioner Cortés. Commissioner Cortés reported that a mailing was delivered to
26 voters in the commonwealth erroneously. The Department of Elections has been in the
27 process of sending mailings to voters to confirm information when crosscheck with
28 information received from other states. The mailing process “What’s your status?” was
29 meant to be delivered to individuals who ELECT believed moved out-of-state based on
30 information received from other states participating in the Crosscheck program and in the
31 Electronic Registration Information Center (ERIC) program. There were 113,000 voters

32 who were sent, in addition to the confirmation mailing, out-of-state mailers. The problem
33 was identified on July 29, 2014, and the ELECT team initiated a plan of action. On
34 August 5, 2014, all 113,000 voters were sent letters containing an apology from ELECT
35 for the error. Commissioner Cortés stated that those voters were not cancelled or
36 removed from the rolls of the commonwealth.

37 Commissioner Cortés stated that the annual training concluded successfully with
38 over 500 election officials from across the commonwealth attending. Commissioner
39 Cortés reported that the voter photo identification system has the capability to be utilized
40 in a mobile environment in a secure on-line manner. General Registrar's throughout the
41 commonwealth have conducted community events or have planned community events
42 with the voter photo identification equipment. ELECT is in the final stages of planning
43 the off-line software that supports the voter photo identification program. ELECT has
44 recently signed a contract with an agency that will assist in community outreach and will
45 provide materials for the program. ELECT has hired a community outreach coordinator.
46 Commissioner Cortés reported that 320 identifications have been issued since July 1,
47 2014.

48 The next order of business was the Legal Report presented by Kristina Perry
49 Stoney, Senior Assistant Attorney General. Ms. Stoney reported that ELECT was sent a
50 memorandum in response to the proposed amendment to define the meaning of "valid".
51 Ms. Stoney stated that the letter is not an assessment of the legality of the voter
52 identification law rather an assessment of the proposed amendment. Chairman Judd
53 stated: "I see this assessment as a position paper not an opinion." Ms. Stoney stated: "I do
54 not; this paper was provided under the normal course of review of proposed regulations
55 to ensure they are in compliance with applicable laws. At the June 24, 2014, Board
56 Meeting there was a request to review regulations." Chairman Judd stated: "The Board
57 (SBE) requested the review but you responded to the Commissioner of ELECT. Can the
58 Board expect that the answers be provided to the Board?" Ms. Stoney stated: "Previously,
59 memorandums have been addressed to the agency head." Chairman Judd stated: "In the
60 future, SBE members should receive their requested reports and the commissioner should
61 receive their requested reports."

62 The next order of business was an update on the workgroup that will be reviewing
63 the duties and responsibilities of electoral boards and general registrars presented by
64 Commissioner Cortés. Commissioner Cortés stated that the working group would be an
65 official group comprised of electoral board members and general registrars reporting the
66 results of their study to SBE. Commissioner Cortés stated that the Virginia Electoral
67 Boards Association (VEBA) and Voter Registrars Association of Virginia (VRAV) have
68 reviewed the membership nominations and the basic outline of the workgroup parameters
69 as submitted. There will be two ELECT staff members available to assist with technical
70 and administrative tasking. SBE will request agencies of the commonwealth to provide
71 assistance to the workgroup for this study, as needed. The workgroup will meet at least
72 three times and submit a report to SBE on or before December 31, 2014. Secretary
73 Palmer moved *that SBE adopt the recommended plan and accept members of the*
74 *workgroup as presented involving the review of duties and responsibilities of electoral*
75 *boards and general registrars.* Chairman Judd seconded the motion and asked if there
76 were comments and there were none. The Board unanimously approved the motion.

77 The next order of business was the Voter Photo ID Regulation-Valid Definition
78 presented by Myron McClees, ELECT Policy Analyst. Mr. McClees stated that at the
79 June 10, 2014 Board Meeting two regulations were presented for consideration.
80 Consideration of 1VAC 20-40-10 regarding the definition of “valid” was adopted during
81 that meeting. The Board voted to amend the definition and place the language on
82 Townhall for public comment which began on July 7, 2014 and ended on August 4, 2014.
83 There were 588 comments submitted through Townhall and ELECT received additional
84 comments via email and other sources which were made available for Board Members to
85 review.

86 Secretary Palmer stated that he had reviewed the comments and drafted proposed
87 language to define the meaning of “valid”. Secretary Palmer presented several versions of
88 suggested language regarding the meaning of “valid”. Secretary Palmer stated: “I feel
89 that 12 months is the proper grace period for the expiration of identification. The case of
90 *Shreve v. Virginia* supports this suggested grace period of 12 months as well as the
91 actions of other states, federal and state agencies. I do not believe the law is
92 unconstitutional; however, this is a clearer definition for the reasons I have suggested.

93 Additionally, I suggest adding a sentence that says: “The officer of elections shall
94 determine whether the document is officially acceptable based on its face.””

95 Chairman Judd stated: “The reason that photo identification is required in the
96 polling place is so that the officer of election can determine if that is the person telling us
97 who they say they are. We want this to be uniform across the commonwealth. In our
98 culture, identification is required for everything from purchasing some over the counter
99 medications to boarding a plane and ... to showing up for a medical appointment. Most
100 individuals have photo identification. You have to have photo identification to get
101 benefits from the government and ... I contend and will continue to contend that most of
102 the citizens of the commonwealth have photo identification. SBE has the desire that
103 everyone who is eligible to vote, vote! We need to protect the integrity of the voter list. ”.

104 Chairman Judd stated: “I would remove the word “valid” from the list of
105 definitions in the regulations.” Mr. McClees stated: “I would suggest, that guidance was
106 requested from the attorneys general office and what authority the Board possesses to
107 complete this action would need further research.” Chairman Judd directed the clerk,
108 Rose Mansfield, to introduce and read the statement letter from Vice Chair Bowers
109 regarding the issue and definition of “valid”.

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Vice Chair Bowers Statement: Delivered on August 6, 2014

112 [I would like to formally submit this written statement into the official record for
113 today’s meeting of the Virginia State Board of Elections. Due to required travel on
114 behalf of my employer, I am unfortunately unable to be physically present during the
115 SBE’s discussion regarding the town hall comment period that closed on August 4th.
116 While my strong opinion and statements are on the record from prior meetings around the
117 topic of Photo ID (and I previously provided comments and made the motion to have an
118 expired DMV issued license be considered a valid form of voter identification), I would
119 like to ensure that my sentiments are also read during the first meeting following the
120 conclusion of the public comment period. I am also sure that much of what I am about to
121 state will probably be expressed by others during the open comment period of this
122 meeting (as many of the comments on Town Hall that I have read reflect my sentiment).

123 We, the members of the State Board of Elections, should do everything we can to
124 ensure that voting as a process is not convoluted, confusing, intimidating, or restrictive
125 and ensure equal access to all those qualified to exercise voting rights. With so many
126 election based changes in a short period of time, I also take very seriously the role that
127 the members of this Board have in giving out guidance to the Electoral community on the
128 practices and policies that ensure the entire voting and election process is executed and
129 implemented uniformly across the Commonwealth. This responsibility is also inclusive

130 of the new voter identification laws and the subsequent guidelines around its
131 implementation.

132 There is absolutely no reason why we should not accept an expired driver's
133 license if presented at the polls as a form of identification. The Department of Motor
134 Vehicles issues a driver's license for the purpose of driving. However, its uses are many
135 and one of the main reasons it is used is for purposes of identification. In fact, this form
136 of identification is widely accepted for its validity and its authenticity in identifying an
137 individual. It was also discussed during a prior meeting that other forms of identification
138 do not have expiration dates on them, and in fact the decision was made to not to use
139 expiration dates on the free voter cards issued by the registrars offices around the
140 Commonwealth as a result of SB 1256 and subsequently the Governor's Executive Order.
141 We should not complicate the matter around whether or not this document should be
142 viewed as acceptable or get into an argument around the SBE's ability to define valid.
143 This board has sought to provide very succinct and uniform guidance to those in the field
144 and to the public (with a great deal of buy in through forums such as Town Hall)
145 throughout the changes that have occurred over the last 3 years. The guidance on this
146 matter ensures that no citizen is turned away based on an expiration date.

147 We have heard from the electoral community and from the citizens of Virginia the
148 sentiment that an expiration date should not be an additional restriction. The point of
149 voter identification remains the same- to identify the voter and verify the person who
150 walks into their respective polling location. An officially issued (Department of Motor
151 Vehicles) expired ID or an unexpired (Department of Motor Vehicles) ID will
152 accomplish exactly the same thing. Therefore, I am adamantly opposed to having an
153 expiration date be the reason that one's photo form of identification is not accepted for
154 the purposes of casting a ballot on Election Day.]

155 Thank you,



156
157 Vice Chairman
158 Virginia State Board of Elections

160 Secretary Palmer moved *that "Valid" for purposes related to voter identification*
161 *shall mean: (i) the document appears to be genuinely issued by the agency or issuing*
162 *entity appearing upon the document, (ii) the beater of the document reasonably appears*
163 *to be the person whose photograph is contained thereon, and (iii) the document shall be*
164 *current or have expired within the preceding twelve (12) months. The officer of election*
165 *shall determine whether the document is officially acceptable based on its face.* Chairman
166 Judd seconded the motion and asked if there were any public comments.

167 Public comments were provided by Delegate Vivian Watts, D-39th District;
168 Therese Martin, Virginia League of Women Voters; Tram Nguyen, Director Virginia
169 New Majority, Donna Miller Rostant, Chair Fairfax County Democrats; Maggi Luca,

170 Past Electoral Board Secretary Fairfax County; Courtney Mills, Fair Elections Legal
171 Network and Hope Amezcuita, ACLU of Virginia provided comment.

172 Chairman Judd asked Secretary Palmer to repeat the motion. Secretary Palmer
173 stated: “Valid” for purposes related to voter identification shall mean: (i) the document
174 appears to be genuinely issued by the agency or issuing entity appearing upon the
175 document, (ii) the beater of the document reasonably appears to be the person whose
176 photograph is contained thereon, and (iii) the document shall be current or have expired
177 within the preceding twelve (12) months. The officer of election shall determine whether
178 the document is officially acceptable based on its face. Chairman Judd asked for a final
179 vote. The motion carried 2-0 in favor of the presented motion.

180 The next order of business was the ballot Standards presented by Cris Piper,
181 Elections Services Manager. Mr. Piper stated the changes presented in the revised version
182 of the “Ballot Standards and Verification Procedures” document are necessary to
183 properly reflect the law changes that went into effect on July 1, 2014. Board Members
184 were provided the updated procedures. In particular noting the changes; “Vote for not
185 more than one” to “Vote for only one” and change “State Board of Elections/SBE” to
186 Department of Elections/ELECT”. Secretary Palmer moved *that the Board approve*
187 *staff’s suggested changes to the “Ballot Standards and Verification Procedures”*
188 *document*. Chairman Judd seconded the motion and asked if there were public comments
189 and there were none. The Board unanimously passed the motion.

190 Chairman Judd opened the floor to other business and public comment. Maggi
191 Luca, Past Electoral Board Secretary Fairfax County approached the podium. Ms. Luca
192 asked if the motion passed on the voter identification needed to be placed on Townhall
193 for public comment. Secretary Palmer stated: “The only change that occurred was
194 moving the time frame from 30 days to a year and this is not significant enough to place
195 back on Townhall for comment. I based the changes on the comments provided.”

196 Hope Amezcuita, ACLU of Virginia approached the podium. Ms. Amezcuita
197 stated that a letter was submitted to the Department of Elections that contained four
198 specific requests for response on the voter identification law. Ms. Amezcuita asked for a
199 response from the Board.

200 Donna Miller Rostant, Fairfax County Democrats approached the podium. Ms.
201 Rostant asked which particular comments posted to Townhall aided in the decision made
202 at this Board Meeting by Board Members regarding the voter identification interpretation
203 of “valid”. Chairman Judd stated that if an item is posted on Townhall it is because the
204 Board Members motion and approve the item for public comment. The decision made by
205 Board Members was based on those previously submitted comments.

206 Robin Lind, Goochland County Electoral Board Secretary approached the
207 podium. Mr. Lind asked for guidance on the November, 2014 election regarding multiple
208 ballots. Commissioner Cortés stated that ELECT is working on this issue and as a result
209 the single ballot will contain two separate races. Chairman Judd asked if there were
210 additional public comments and there were none.

211 Chairman Judd asked if there were comments for the Good of the Order.
212 Chairman Judd stated that legal counsel has notified SBE that the executive session listed
213 on the agenda would not be required. Chairman Judd stated: “The spirit of what SBE is
214 trying to do with photo identification is: “We have the authority or we do not have the
215 authority to define valid.” The action SBE took at this Board Meeting clears it for now,
216 and our purpose is to protect the integrity of the process and as part of this SBE wants
217 everybody to have access to their ballot so that they may cast their vote. I intend to clarify
218 in the future what is SBE authority when comes to defining regulations. For us, our
219 purpose is to determine is that person out there the person they present as and the
220 expiration date really doesn’t matter but, when it comes to defining “valid” it does. We
221 were asked to define “valid” and SBE did just that.”

222 Chairman Judd moved *that the Board adjourn*. Secretary Palmer seconded the
223 motion and without further comment the Board voted to adjourn. The meeting was
224 adjourned at approximately 2:55PM.

225 The Board shall reconvene on August 27, 2014 at 10:00AM in the General
226 Assembly Building – Room C, Richmond, Virginia.

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Secretary

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Chair

Vice Chair

DRAFT



★ VIRGINIA ★
STATE BOARD *of* ELECTIONS

Approval of Minutes August 27, 2014

BOARD WORKING PAPERS
SBE Board Members

1 MINUTES

2

3 The State Board of Elections Board Meeting was held on Wednesday, August 27,
4 2014. The meeting was held in the General Assembly Building – Room C, Richmond,
5 Virginia. In attendance, representing the State Board of Elections (SBE) was Charles
6 Judd, Chair; Kimberly Bowers, Vice Chair; Don Palmer, Secretary; Kristina Perry
7 Stoney, Senior Assistant Attorney General and SBE Counsel and Anna Birkenheier,
8 Assistant Attorney General. In attendance, representing the Department of Elections
9 (ELECT) was Edgardo Cortés, Commissioner; Susan Lee, Election Uniformity Manager;
10 Matt Abell, Election Services Lead; Pamela Blount, Candidate Processing Specialist;
11 Martha Brissette, ELECT Policy Analyst; Gary Fox, Voting Technology Specialist and
12 Rose Mansfield, Executive Assistant-Clerk. Chairman Judd called the meeting to order at
13 10:00AM.

14 The first order of business was the approval of the Minutes from the State Board
15 of Elections Board Meeting held on August 6, 2014. Chairman Judd asked if Board
16 Members had any additions or corrections to the August 6, 2014 Board Minutes. Vice
17 Chair Bowers stated that the letter introduced and read in its entirety on her behalf needed
18 an excerpt entered into the official SBE Minutes. Secretary Palmer stated that the revised
19 Minutes needed to be presented to the Board Members with this addition before
20 additional action occurred. Chairman Judd moved *to table additional discussion*
21 *regarding the Minutes until the next opportunity when the Board convenes.* Secretary
22 Palmer seconded the motion and the Board unanimously approved the motion.

23 The second order of business was the Commissioner’s Report delivered by
24 Commissioner Cortés. Commissioner Cortés reported that during the Special Election
25 held on August 19, 2014 ELECT rolled out a revised results reporting page on the
26 ELECT website. Commissioner Cortés reported that ELECT switched from a vendor
27 supported program to an ELECT Staff supported program that will decrease the time
28 required to post results to the website. Commissioner Cortés reported that he attended a
29 regional meeting of the Virginia Electoral Board Association (VEBA) in Salem, Virginia
30 on August 26, 2014. The general registrars have been hosting meetings and inviting
31 delegates and senators to speak on the roles of the general registrars in their localities.

32 Additional topics of discussion include local issues that affect elections in their areas.
33 Commissioner Cortés stated that the rollout of the voter photo identification program
34 continues and as of this date there were 611 submissions for voter photo identification.
35 Roanoke City has processed 115 photo identification applications. This is reflective of
36 the two-three public outreach events held each week by the general registrars office. With
37 the increase of public outreach events, ELECT noted an increase in requests for voter
38 photo identification. This is an applaudable effort on the part of the general registrars and
39 the localities. The off-line capability of the voter photo identification program is in the
40 final stages and is near completion. Training will be provided by ELECT after the Labor
41 Day holiday. Commissioner Cortés reported that the GREB Workgroup established by
42 the SBE Board will met for their first meeting on September 4, 2014. This will be an
43 organizational meeting therefore; the meeting posting on Town Hall is absent an agenda.

44 Commissioner Cortés stated that regarding the state’s lists maintenance activities
45 ELECT participates in two programs; (i) the Interstate Cross-Check Program and (ii) the
46 Electronic Registration Information Center (ERIC) Program. ELECT exchanges data
47 with 37 states and the District of Columbia in addition to the other information ELECT
48 receives within state departments and services. ELECT follows the practices established
49 by state and federal law in particular in accordance with the National Voter Registration
50 Act of 1993. ELECT refers any violation to the appropriate authorities or individuals
51 when a violation has occurred. The membership agreement for the ERIC program
52 requires a mailing be sent to all individuals who are eligible non-registered Virginia
53 residents.

54 Commissioner Cortés reported that Governors’ McAuliffe delivered a message
55 regarding the budget to Virginia State Agencies. ELECT was instructed on their “savings
56 targets” for the current and 2016 fiscal year. ELECT will need to reduce their budget by
57 146 thousand dollars in the 2015 fiscal year and 197 thousand dollars in 2016 fiscal year.
58 These savings targets will have an impact on the agency and the localities ELECT serve.
59 ELECT has not determined how these mandatory savings targets will be satisfied.

60 The next order of business was the Legal Report presented by Kristina Perry
61 Stoney, Senior Assistant Attorney General. Ms. Stoney reported that the Secretary of the
62 Fairfax Electoral Board referred 17 voters that allegedly voted in Virginia and Maryland

63 in the 2012 General Election to the attorney general's office. The attorney general's
64 office has received the request and the evidence. A complete review of the materials will
65 be conducted and if further investigation is required the attorney general's office will
66 work with federal and local authorities. Ms. Stoney stated that an executive session is
67 required to discuss pending litigation.

68 The next order of business was the certification of the special election held on
69 August 19, 2014 presented by Matt Abell, Election Services Lead. Mr. Abell explained
70 the process and Board Members examined the abstracts. The special elections occurred in
71 Senate District 38 and House of Delegates Districts 48 and 90. Chairman Judd announced
72 that having examined the certified abstracts of the votes cast from the August 19, 2014,
73 special elections in Senate of Virginia, 38th District, House of Delegates, 48 District and
74 House of Delegates, 90 District, the SBE determined on this 27th day of August, 2014,
75 that A. Benton Chafin, Jr. received the greatest number of votes (17,496) in Senate
76 District 38, Richard C. "Rip" Sullivan, Jr. received the greatest number of votes (5,978)
77 in House District 48 and Joseph C. "Joe" Lindsey received the greatest number of votes
78 (1,736) in House District 90 and each was duly elected as the next representative to his
79 respective General Assembly District. Chairman Judd announced that the ascertainment
80 process was complete.

81 The next order of business was the Optical Scan Trial in Clark County presented
82 by Gary Fox, ELECT Voting Technology Specialist. Mr. Fox stated that Clarke County
83 requested to utilize two pieces of optical scan voting equipment during the November 4,
84 2014 general election. Clarke County will compare the equipments' performance before
85 determining which units to purchase. Chairman Judd moved *that the Board approve the*
86 *experimental use of certified optical scan voting equipment in Clarke County for the*
87 *November 4, 2014 general election.* Secretary Palmer seconded the motion and without
88 public comment the Board unanimously approved the motion.

89 The next order of business was the Freedom of Information Act (FOIA) Meetings
90 Policy presented by Martha Brissette, ELECT Policy Analyst. Ms. Brissette stated that
91 2014 legislation created an opportunity for SBE Board Members to participate in
92 meetings electronically. Ms. Brissette stated that each board member would have a
93 maximum of two meetings per calendar year that for personal reasons they could attend

94 electronically. Ms. Brissette stated that in order for SBE to use this legislative change the
95 board must first adopt a policy regarding the electronic attendance of its' members.
96 Chairman Judd stated that he was not comfortable with being presented with a proposal
97 for the first time and then acting on a suggested policy during that same meeting. Vice
98 Chair Bowers stated that it was appreciated that the ELECT staff compiled this
99 information on the SBE meeting schedule and that holding 53 meetings during this
100 current boards' tenure of three plus years has presented some challenges. Chairman Judd
101 expressed concerns about enacting a policy of this type considering the membership of
102 this board is three members. Vice Chair Bowers stated that this policy consideration
103 arrives late in the tenure of the current board membership and this matter should be
104 discussed at a latter Board Meeting. Chairman Judd directed ELECT to place this on the
105 agenda of a future SBE Board Meeting.

106 The next order of business was the 7th District Special Election Hand-Out and
107 Absentee Ballot Insert presented by Martha Brissette, ELECT Policy Analyst. Ms.
108 Brissette stated that as with the proposed pledge materials in 2012, ELECT staff is
109 seeking Board approval to handle instructions and forms for a unique situation not clearly
110 addressed by our statutes and regulations. The race in the 7th District has garnered
111 significant attention nationally supporting that any doubt be resolved in favor of
112 requesting Board approval as well as authority to handle any adaption that may become
113 necessary as determined by ELECT in consultation with participating localities. Ms.
114 Brissette stated that there have been questions concerning the color of the band at the top
115 of the flyer and the poster and that the color is currently orange. These posters will be
116 printed at the local level. Chairman Judd stated that the localities should be uniform and
117 that the color will remain orange. Vice Chair Bower moved *that the Board approve the*
118 *explanatory poster the Department of Elections staff has developed with the participating*
119 *localities for use in the polling places and absentee balloting.* Chairman Judd seconded
120 the motion and without public comment the Board unanimously approved the motion.

121 The next order of business was the Absentee Material Omissions presented by
122 Martha Brissette, ELECT Policy Analyst. Ms. Brissette stated that the Board approved
123 posting these changes for public comment at the June 10, 2014 Board Meeting. The
124 public comment period opened on June 30, 2014, and closed on July 21, 2014. A total of

125 87 comments were received. Most of the comments opposed treating generational suffix
126 and street identifier as material. Based on the comments received, staff recommends the
127 draft without these two changes.

128 Chairman Judd stated that SBE should initiate the regulation to include the street
129 identifier, generational suffix and have the first and last name in their proper location on
130 the Absentee Ballot (AB) form. This would preserve the integrity of the vote and ensure
131 that there is no question about which voter has submitted the form. Vice Chair Bowers
132 stated that the process of filling out the AB application requires all of the information to
133 be included so that when the ballot is return there is a process for identifying the
134 corresponding information and voter data. This system offers the checks and balances
135 that are needed to ensure the integrity of the vote. Secretary Palmer stated that the
136 generational suffix is important if individuals are living at the same residence and it is
137 important for SBE to provide guidance on this issue to election officials. Chairman Judd
138 stated that the street identifier is important in neighborhoods or sub-divisions where the
139 same name is used multiple times with the only difference being street, court, or drive at
140 the end. Vice Chair Bowers stated that if you go back to the AB application, the
141 information provided on this form would assist the election official in determining the
142 identity of the AB voter. Commissioner Cortés stated that the recommendations of
143 ELECT staff were based on the comments of the general registrars and that those
144 omissions were not viewed as materials omissions by those in the election community.
145 The return AB envelope contains a barcode that links that particular ballot back to the
146 original application and this information is used by the general registrars to record
147 everything from the correct precinct to other forms of official reporting. Chairman Judd
148 asked if there were any public comments.

149 Robin Lind, Secretary of the Goochland Electoral Board approached the podium.
150 Mr. Lind stated that the explanation provided by the commissioner of the identifiers on
151 the AB envelope were helpful in this discussion. In the canvassing of the results it has
152 caused distressed to members of the electoral board community when the board must
153 discard ballots when something is omitted that we consider immaterial.

154 Chairman Judd asked if there were additional comments and there were none.
155 Chairman Judd read 1VAC20-45-40 and 1VAC20-70-20 in its entirety.

156 Vice Chair Bowers moved *that the Board approve the staff proposed changes to*
157 *its regulations: IVAC20-45-40 as read in its entirety and IVAC20-70-20 related to*
158 *material and immaterial omissions from absentee ballots to be effective on filing with the*
159 *Register of Regulations.* Secretary Palmer seconded the motion.

160 Chairman Judd moved *that the motion presented be amended to include that*
161 *IVAC20-70-20 be amended in Section C (5), materials omissions from Absentee Ballots,*
162 *be stricken and under Section B, material omissions that an addition of the language that*
163 *states “The voter omitted his generational suffix and one or more individuals with the*
164 *same name are registered at the same address and it is impossible to determine the*
165 *identity of the voter”.* Secretary Palmer seconded the motion and Chairman Judd asked if
166 there were public comments and there were none. The Board unanimously approved the
167 amended motion.

168 Chairman Judd returned the Board to the motion and asked if there were
169 additional comments and there were none. Chairman Judd moved *that the Board approve*
170 *the staff recommendation as amended.* Secretary Palmer seconded the motion and the
171 Board unanimously approved the motion.

172 The next order of business was the public comment period. Bill Bell, Secretary of
173 the Virginia Electoral Board Association (VEBA) approached the podium. Mr. Bell
174 stated that the Board should consider doing the mass mailings on list maintenance to the
175 local level. Mr. Bell stated that the localities could correct any errors noted in the
176 localities. Commissioner Cortés stated that ELECT has reviewed this option and is
177 working on a plan. Chairman Judd asked if there were additional public comments and
178 there were none.

179 Chairman Judd moved *that the Board add Robin Lind, Secretary of the*
180 *Goochland Electoral Board, to the GREB Workgroup that is reviewing the duties and*
181 *responsibilities of the general registrars and electoral board members.* Vice Chair
182 Bowers seconded the motion and the Board unanimously approved the motion.

183 Chairman Judd then moved *to close the meeting to discuss actual and probable*
184 *litigation matters and specific legal matters requiring the provision of legal advice by*
185 *legal counsel as authorized by § 2.2-3711(A)(7) of the Code of Virginia.* Vice Chair
186 Bowers seconded the motion and the Board unanimously carried the motion. Chairman

187 Judd directed Kimberly Bowers, Vice Chair; Donald Palmer, Secretary; Edgardo Cortés,
188 Commissioner; Kristina Perry Stoney, Senior Assistant Attorney General and SBE
189 Counsel; Anna Birkenheier, Assistant Attorney General and SBE Counsel and Rose
190 Mansfield, Executive Assistant, to remain with the Board during the closed session.
191 Secretary Palmer seconded the motion and the Board went into Executive Session at
192 11:20AM.

193 At 11:45AM Chairman Judd *moved to reconvene in open session and a roll call*
194 *vote was taken as required by § 2.2-3712(D) of the Code of Virginia, unanimously*
195 *certifying that during the closed meeting (i) only public business matters lawfully*
196 *exempted from open meeting requirements under this chapter, and (ii) only such public*
197 *business matters as were identified in the motion by which the closed meeting was*
198 *concerned were heard, were discussed or considered.* Vice Chair Bowers seconded the
199 motion and the Board unanimously approved the motion. Rose Mansfield, Executive
200 Assistant performed the roll call vote and all Board Members approved the motion.

201 Chairman Judd asked if there were comments for the Good of the Order and there
202 were none. Chairman Judd moved *that the Board adjourn.* Secretary Palmer seconded the
203 motion and without further comment the Board voted to adjourn. The meeting was
204 adjourned at approximately 11:55AM.

205 The Board shall reconvene on November 4, 2014 at 9:00AM in the Washington
206 Building, 1100 Bank Street, Richmond, Virginia– Room 27.

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Secretary

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Chair

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Vice Chair

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DRAFT



★ VIRGINIA ★
STATE BOARD *of* ELECTIONS

Commissioner's Report

BOARD WORKING PAPERS
Edgardo Cortés
Commissioner
Department of Elections



★ VIRGINIA ★
STATE BOARD *of* ELECTIONS

Legal Report

BOARD WORKING PAPERS
Kristina Perry Stoney
Senior Assistant Attorney General



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Mark R. Herring
Attorney General

September 26, 2014

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Virginia Relay Services
800-828-1120
7-1-1

Mr. James M. Hinshaw
Mr. Daniel H. Haworth
Mr. W. Donald Brown
City of Norfolk Office of Elections
808 City Hall Building
Norfolk, Virginia 23510

Dear Messrs. Hinshaw, Haworth, and Brown:

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 inquire regarding whether applicable law requires, permits, or forbids the Norfolk Electoral Board from accepting mailed voter registration applications with electronically created signatures.¹ In the context of this inquiry, you express concerns about possible abuses of this new technological process.

Response

It is my opinion that, although no law requires the acceptance of mailed voter registration applications with electronic signatures, the State Board of Elections is not precluded from directing that general registrars accept such applications, and the State Board, in its discretion, may do so. The State Board also has discretionary authority to establish criteria to preserve the security of confidential voter information and to ensure the authenticity and validity of electronic signatures.

Background

You express concern regarding a new technology, commonly referred to as an “electronic signature,”² that is now being used for voter registration by third-party voter registration organizations.

¹ This opinion addresses only registration by non-military personnel and military personnel who are stationed in the United States. Registration and voting by overseas military personnel is covered by a separate body of law, the Uniform Military and Overseas Voters Act, VA. CODE ANN. §§ 24.2-451 through 24.2-467 (Supp. 2014).

² As applicable to your inquiry, under both federal and Virginia law, an “electronic signature” is defined as “an electronic sound, symbol, or process attached to or logically associated with” a record and “executed or adopted by a person with the intent to sign the record[.]” 15 U.S.C. §§ 7006(5); VA. CODE ANN. § 59.1-480(8) (2006), and “‘Electronic’ means relating to technology having electrical, digital, magnetic, wireless, . . . or similar capabilities, 15 U.S.C. §§ 7006(2); VA. CODE ANN. § 59.1-480(5).

This technology uses the motion of a cursor, finger, stylus, or similar device moved by someone to capture his signature in an electronic device such as a computer, a tablet, or a cell phone. The device then transmits the signature over the Internet to a third party.

When this method is used for voter registration, the signature could be affixed to a registration form filled out by the potential voter on his electronic device, with the completed form then being transmitted to a voter registration organization, but this is not necessarily so. It is also possible for the potential voter to give all information needed to the voter registration organization via telephone so that the organization, rather than the voter, completes the form, with the potential voter then transmitting only his or her electronic signature to the organization. The organization then adds the electronic signature to the thus-completed form, which remains located only on the organization's computer, and which the potential voter has never seen. The completed form then may be printed by the organization and mailed to the appropriate registrar's office. When a registrar receives such a form, it is not initially apparent whether the form was filled in by the voter or by the voter registration organization.

Provided all applicable registration requirements are met, local registrars must register qualified voters upon receipt of the voter registration application.³ The law does not place any limits on who may submit valid application forms, so an organization mailing in completed applications to register Virginia voters could be located in Virginia, or it could be located anywhere else.⁴

You indicate that the State Board has advised Virginia general registrars to accept such electronic signatures on mailed voter registration applications.⁵ The principal concerns you express involve the possible misuse of confidential voter information by voter registration organizations (including possible identity theft) and the ability to verify the authenticity of signatures on such registration applications.

Applicable Law and Discussion

The General Assembly explicitly has provided that the State Board of Elections shall supervise and coordinate the work of the county and the city electoral boards and of the registrars to obtain uniformity in their practices and proceedings and legality and purity in all elections. It shall make rules and regulations and issue instructions and provide information consistent with the election laws to the electoral boards and registrars to promote the proper administration of election laws.⁶

“Electronic” means relating to technology having electrical, digital, magnetic, wireless, . . . or similar capabilities, 15 U.S.C. §§ 7006(2); VA. CODE ANN. § 59.1-480(5).

³ VA. CODE ANN. § 24.2-417 (2011). *See also* § 1973gg-6(1)(D) of the National Voter Registration Act of 1993, 42 U.S.C. §§ 1973gg through 1973gg-10.

⁴ The statute governing voter registration organizations is VA. CODE ANN. § 24.2-416.6 (Supp. 2014). The requirements imposed by this statute are not relevant to your inquiry, for the facts you present involve Virginia activities of a voter registration organization in Oakland, California.

⁵ An e-mail about electronic signatures on mail-in registrations dated September 25, 2013 from Justin Reimer, Deputy Secretary of the Virginia Board of Elections to all General Registrars stated, in relevant part, “SBE’s [the State Board of Elections’] advice is that general registrars should process these applications.”

⁶ VA. CODE ANN. § 24.2-103 (Supp. 2014).

Local electoral boards and registrars shall follow rules and regulations of the State Board insofar as they do not conflict with Virginia law or federal law.⁷

In your request, you specifically ask about the application of the federal Electronic Signatures in Global and National Commerce Act (“ESIGN”),⁸ which generally provides that signatures related to certain transactions “may not be denied legal effect, validity, or enforceability solely because it is in electronic form[.]”⁹ ESIGN applies only to “transaction[s] in or affecting interstate commerce”¹⁰ and defines “transaction” to mean “an action or set of actions relating to the conduct of business, consumer, or commercial affairs,” to include sales, leases, exchanges and other dispositions of property and services.¹¹ Because voter registration is civic or governmental in nature, and not “business, consumer or commercial,” I conclude that voter registration is not a “transaction” for purposes of ESIGN, and therefore this federal act does not require Virginia general registrars to accept the applications you describe.¹²

Nevertheless, Virginia has enacted its own statutes governing the use of electronic signatures: the Virginia Uniform Electronic Transactions Act (“UETA”)¹³ applies to “electronic signatures relating to a transaction.”¹⁴ Unlike ESIGN, UETA defines “transaction” as “an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or government affairs.”¹⁵ Voter registration is an action relating to government affairs and, therefore, it is a “transaction” for purposes of UETA. UETA’s actual impact, however, is governed by other applicable substantive law and circumstances.¹⁶ Specifically, whether an “electronic signature has legal consequence is determined by [UETA] and other applicable law.”¹⁷ UETA generally provides that, “[i]f a law requires a signature, or provides for certain consequences in the absence of a signature, an electronic signature satisfies the law[.]”¹⁸ however, by its terms, UETA expressly “does not require public bodies of the Commonwealth to use or permit the use of electronic . . . signatures.”¹⁹ Accordingly, I find nothing in UETA that

⁷ *Id.*

⁸ Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001 through 7031 (2012).

⁹ 15 U.S.C. § 7001(a)(1).

¹⁰ 15 U.S.C. § 7001(a).

¹¹ 15 U.S.C. § 7006 (13).

¹² While ESIGN does not require acceptance of electronic signatures, Congress does have the power to determine the time, place, and manner of conducting federal elections, including the procedures by which votes register to vote in federal elections. *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. ____ (June 17, 2013).

¹³ Uniform Electronic Transactions Act, VA. CODE ANN. §§ 59.1-479 through 59.1-498 (2006 & Supp. 2014).

¹⁴ Section 59.1-481(a) (Supp. 2014). Section 59.1-481(b) provides exemptions to UETA not relevant here.

¹⁵ Section 59.1-480(16) (emphasis added).

¹⁶ Section 59.1-481(d).

¹⁷ Section 59.1-483(e) (2006). *See also* Official Comment to the Act, stating in paragraph B, “Whether a record is attributed to a person is left to law outside this Act. Whether an electronic signature has any effect is left to the surrounding circumstances and other law.”

¹⁸ Section 59.1-485(d) (2006).

¹⁹ Section 59.1-496(c) (2006).

specifically requires general registrars to process the voter registration applications about which you inquire.

Although UETA does not require applications featuring electronic signatures to be accepted, the law clearly contemplates that public bodies, such as the State Board of Elections, may accept electronic signatures. In recognizing this authority, UETA provides that

To the extent that public bodies of the Commonwealth use . . . electronic signatures . . . , the following rules apply:

* * * *

(2) Public bodies of the Commonwealth may specify the type of electronic signature required, the manner and format in which the electronic signatures must be affixed to the electronic record, and the identity of, or criteria that must be met by, any third party used by a person filing a document to facilitate the process.

* * * *

(4) Public bodies of the Commonwealth may establish other criteria to ensure the authenticity and validity of electronic signatures.^[20]

Your inquiry concerns registering to vote by mail, which is one of three authorized means by which to register, with the other two being to apply in-person²¹ or electronically.²² Mail registration is governed by Article 3.1 of Title 24.2 of the *Code of Virginia* and related statutes.²³ Although the application must be signed,²⁴ the statutes do not require signatures to be made in a particular manner.²⁵ No statute either requires or prohibits the use of electronic signatures for mailed voter registration applications.

As prior Opinions of this Office have articulated, the State Board of Elections, through the Department of Elections, is vested with the administration of the Commonwealth's election laws, and consequently, interpretations of such laws by the Board are entitled to great weight.²⁶ Therefore, in the absence of a statutory mandate or prohibition providing otherwise, the State Board has the discretion to interpret the signature requirement applicable to voter registration applications submitted by mail to include signatures affixed to application forms by electronic means. I therefore conclude, because the applicable law neither requires nor prohibits the use of electronic signatures on mailed voter registration applications, that the State Board of Elections may direct general registrars to accept and to process

²⁰ Section 59.1-496.

²¹ See VA. CODE ANN. §§ 24.2-411 through 24.2-412 (2011 & Supp. 2014).

²² See § 24.2-416.7 (Supp. 2014).

²³ Sections 24.2-416.1 through 24.2-416.6 (2011 & Supp. 2014).

²⁴ Section 24.2-418

²⁵ The additional statutory conditions applicable to electronic registration that are contained in § 24.2-416.7, including having certain Department of Motor Vehicles records available for review by the general registrar, do not apply to mailed applications.

²⁶ See, e.g., 2006 Op. Va. Att'y Gen. 124; 2005 Op. Va. Att'y Gen. 97; 2001 Op. Va. Att'y Gen. 125; 1999 Op. Va. Att'y Gen. 3; 1996 Op. Va. Att'y Gen. 124; 1983-84 Op. Va. Att'y Gen. 140; 1983-84 Op. Va. Att'y Gen. 152.

Mr. James M. Hinshaw
Mr. Daniel H. Haworth
Mr. W. Donald Brown
September 26, 2014
Page 5

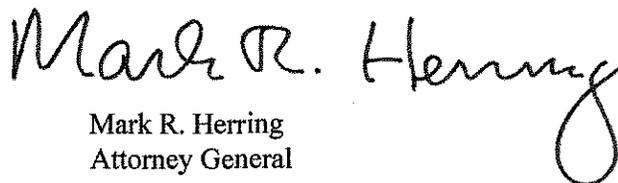
applications containing such signatures.²⁷ I further conclude that under UETA, the State Board of Elections has authority to adopt reasonable rules in furtherance of the purposes set forth in UETA. Any such actions by the State Board of Elections should be followed by local registrars and electoral boards.

Conclusion

Accordingly, it is my opinion that, although no law requires the acceptance of mailed voter registration applications with electronic signatures, the State Board is not precluded from directing that general registrars accept such applications, and the State Board may do so. The State Board also has authority to establish criteria to preserve the security of confidential voter information and to ensure the authenticity and validity of electronic signatures.

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 "R".

Mark R. Herring
Attorney General

²⁷ I note that permitting the use of electronic signatures does not alter the review process of these applications. The requirements established by Chapter 4 of Title 24.2 of the *Code of Virginia* govern the evaluation of voter registration applications, and to be approved an application also must meet the requirements of Chapter 4, regardless of the manner by which an application is signed.



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Mark R. Herring
Attorney General

October 1, 2014

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The Honorable Edgardo Cortés
Commissioner of Elections
Department of Elections
1100 Bank Street, First Floor
Richmond, Virginia 23219

Dear Mr. Cortés:

I am responding to your request for an official advisory Opinion in accordance with § 2.2-505 of the *Code of Virginia*.¹

Issue Presented

You ask whether regulations administering Chapters 9.3, 9.4, and 9.5 of Title 24.2 of the *Code of Virginia*, which concern campaign finance laws, relate to “the conduct of elections or eligibility to vote,” thereby qualifying for an exemption from the Virginia Administrative Process Act (“APA”) regulatory process.

Response

It is my opinion that regulations implementing Chapters 9.3, 9.4, and 9.5 of Title 24.2 of the *Code of Virginia* do not relate to “the conduct of elections and eligibility to vote,” and therefore do not qualify for an exemption from the regulatory process established by the APA.

Applicable Law and Discussion

The Virginia Administrative Process Act² governs the adoption of regulations by agencies of the Commonwealth. Pursuant to the APA, prior to becoming effective, agency regulations are subject to various requirements:

- public notice and, potentially, public hearings;³
- public comment and, potentially, the taking of evidence;⁴
- review by both the Attorney General and the Governor;⁵ and
- legislative review.⁶

¹ This request originally was submitted by Donald Palmer in his capacity as Secretary of the State Board of Elections prior to the establishment of the Department of Elections on July 1, 2014.

² VA. CODE ANN. §§ 2.2-4000 through 2.2-4031 (2011 & Supp. 2014).

³ Section 2.2-4007.01 (2011).

⁴ Sections 2.2-4007 (2011); 2.2-4009 (Supp. 2014).

⁵ Section 2.2-4013 (2011).

Nevertheless, the APA contains several exemptions from its applicability, including blanket exemptions for certain agencies⁷ and exemptions based on the subject matter of the agency action.⁸ Although the APA does not contain a blanket exemption for the Department of Elections, it does exempt agency action that relates to “[t]he conduct of elections or eligibility to vote.”⁹

The Chapters about which you inquire contain the Campaign Finance Disclosure Act of 2006,¹⁰ restrictions on fundraising by and for statewide officials while the General Assembly is in session,¹¹ and disclosure requirements for campaign advertisements.¹² These provisions regulate certain financial aspects of candidates’ campaigns for elected office. Because regulations implementing such provisions would not affect voter eligibility issues,¹³ your request requires only an analysis of whether regulations addressing campaign finance laws relate to “the conduct of elections.”

That matters related to “the conduct of elections” do not encompass all regulations implementing the election laws is evident from the General Assembly’s decision not to provide a blanket APA exemption to the Department of Elections, the state agency charged with the administration of the election laws.¹⁴ Moreover, such a broad interpretation would render the specific exemption of agency action related to the eligibility to vote superfluous.¹⁵ Thus, action related to “the conduct of elections” does not include all regulations that may implicate an activity associated with the election process.¹⁶ Rather, based on the General Assembly’s general treatment of election-related activities and organization of the statutory provisions governing them, as well as related case law, I conclude that the phrase is limited to activities occurring on, or in preparation for, election day, so that regulations addressing campaign finance laws do not relate to “the conduct of elections.”

The *Code of Virginia* constitutes a single body of law, and it is well established that other portions of it provide interpretative guidance.¹⁷ Although not dispositive, it is notable that the portion of

⁶ Section 2.2-4014 (2011).

⁷ See § 2.2-4002(A) (Supp. 2014).

⁸ Section 2.2-4002(B).

⁹ Section 2.2-4002(B)(8).

¹⁰ Chapter 9.3, “Campaign Finance Disclosure Act of 2006,” VA. CODE ANN. §§ 24.2-945 through 24.2-953.5 (2011 & Supp. 2014).

¹¹ Chapter 9.4, “Campaign Fundraising; Legislative Sessions, § 24.2-954 (2011).

¹² Chapter 9.5, “Political Campaign Advertisements,” §§ 24.2-955 through 24.2-959.1 (2011 & Supp. 2014).

¹³ The eligibility to vote in the Commonwealth of Virginia is governed by Article II, § 1 of the Constitution of Virginia, entitled “Qualifications of voters” and various chapters of Title 24.2 of the Code, including Chapter 4, which establishes the requirements for voter qualification and registration.

¹⁴ See § 24.2-103(A) (Supp. 2014). The newly created Department of Elections continues to fulfill many of its duties through the State Board of Elections.

¹⁵ “The rules of statutory interpretation argue against reading any legislative enactment in a manner that will make a portion of it useless, repetitious, or absurd.” *Jones v. Conwell*, 227 Va. 176, 181, 314 S.E.2d 61, 64 (1984).

¹⁶ *Cf. Moore v. Pullem*, 150 Va. 174, 189-91, 142 S.E. 415, 419-20 (1928) (distinguishing between distinct aspects of the election process and the provisions governing them, including voter qualifications, voter registration, and the method of voting, noting that laws concerning the qualification of voters do not relate, except incidentally, to the conduct of elections)

¹⁷ See, e.g., 1990 Op. Va. Att’y Gen. 126, 128 (quoting *King v. Commonwealth*, 2 Va. App. 708, 710, 347 S.E.2d 530, 531 (1986)).

Title 24.2 entitled “Conduct of Election; Election Results” is codified separately as Article 4 of Chapter 6.¹⁸ Chapters 9.3, 9.4, and 9.5 are not included there, nor does Article 4 of Chapter 6 contain provisions relating to financial matters. Rather, the statutes included in Article 4 govern activities that occur on the day of an election. For example, certain sections provide the procedures by which qualified voters are to vote at a polling place,¹⁹ while other sections address the appropriate use and handling of ballots and voting equipment on the day of an election,²⁰ as well as the counting of ballots at the close of the election day.²¹ The context of other parts of the Code where “conduct of election” is used also suggests that the term is limited to election-day operations.²²

In addition, the legislature has vested oversight of the “conduct of elections” in local electoral boards.²³ As part of this duty, electoral boards are responsible for the appointment and training of officers of election,²⁴ who are assigned to precincts on election day to manage polling place operations and to maintain order.²⁵ These activities are limited, by their essence, to events occurring on election day. In contrast, further evincing that issues related to campaign finance regulation are distinct from the conduct of elections, the role of local electoral boards in administering the provisions about which you inquire is very limited: they are charged with implementing the provisions of Chapter 9.3 only as they apply to candidates seeking local office,²⁶ and they possess no authority with respect to Chapters 9.4 and 9.5. The General Assembly otherwise has vested the State Board of Elections with the administration of campaign finance laws.²⁷

Furthermore, although the phrase “the conduct of elections” has not been defined for purposes of the exemption under the APA, similar language has been held to be limited to the management of events occurring on election day. In construing the constitutional prohibition against enacting local or special laws “[f]or registering voters, conducting elections, or designating the place of voting[,]”²⁸ the Supreme Court of Virginia has considered the extent to which this language applies to overall operations of electoral boards. In two cases, the Court distinguished between activity tied to the management of an election on election day, and other electoral board functions.

¹⁸ See §§ 24.2-643 through 24.2-680 (2011 & Supp. 2014).

¹⁹ See §§ 24.2-643 through 24.2-644 (2011 & Supp. 2014).

²⁰ See §§ 24.2-645 through 24.2-648 (2011).

²¹ See §§ 24.2-657 through 24.2-667 (2011).

²² See §§ 24.2-114(5) (Supp. 2014) (general registrar to ensure “pollbooks used for the conduct of elections” identify those voters who registered by mail); 24.2-309 (2011) (procedure available for “the conduct of elections [in precincts] where all voters do not have the same choice of candidates; 24.2-310(B) (Supp. 2014) (localities required to provide funding for ‘adequate facilities at each polling place for the conduct of elections’”).

²³ Section 24.2-109(B) (2011) (“The electoral board shall perform the duties assigned by this title including, but not limited to, the preparation of ballots, the administration of absentee ballot provisions, the conduct of the election, and the ascertaining of the results of the election.”).

²⁴ Section 24.2-115 (Supp. 2014).

²⁵ See, e.g., §§ 24.2-603 (2011); 24.2-606 through 24.2-608 (2011); 24.2-610(C) (2011); 24.2-643 (Supp. 2014); 24.2-649 (Supp. 2014); 24.2-654 (Supp. 2014); 24.2-657; 24.2-668 (2011).

²⁶ Section 24.2-948.1 (2011).

²⁷ See §§ 24.2-946 through 24.2-946.5 (2011 & Supp. 2014); 24.2-947.3:1 (2011); 24.2-947.4 (2011); 24.2-947.5 (2011); 24.2-955.3 (2011).

²⁸ VA. CONST. art. IV, § 14(11).

In *Porter v. Joy*, plaintiffs challenged legislation that permitted the election, rather than appointment, of school board members.²⁹ In upholding the enactment, the Court acknowledged that a local law authorizing a county “to set up its own regulations with respect to the time of opening and closing the polls, the selection of the judges of election, and the many other matters related to the conduct of elections, would be obviously undesirable[,]”³⁰ but concluded that the constitutional prohibition “clearly was not intended as a restriction upon the General Assembly to provide what offices in a county should be filled by election.”³¹ The Court reached a similar conclusion in *Davis v. Dusch*, which addressed an amendment to a city charter that ordered redistricting based on consolidation of the city and a county.³² In finding no constitutional violation in amending the charter, the Court stated that the constitutional provision

‘refers to the manner in which an election is conducted.’ We are not concerned in this case with the manner of conducting an election. Our concern is whether the city council has the power to reapportion itself and has the authority to order the election of a new council -- an entirely different matter from that envisioned by [the restriction on enacting local or special law related to conducting elections].^[33]

This Office, in applying the constitutional prohibition, also has interpreted the term “the conduct of elections” as a reference to overseeing and managing elections on an election day. In a previous Opinion, the Attorney General considered whether proposed legislation to establish guidelines for the nomination of candidates for certain positions constituted an unconstitutional special law.³⁴ The Attorney General concluded that the prohibition “refers purely to the manner in which elections are conducted, whereas Senate Bill No. 70 refers only to the method of nominating candidates for office.”³⁵ Later opinions also have limited contextually the application of the phrase “the conduct of elections” to those events which take place on, or are taken to directly prepare for, an election day.³⁶

As a result, the case law and prior opinions of this Office addressing the phrase “the conduct of elections” are consistent with the statutory analysis of the Code detailed above. As “the conduct of elections” routinely has been determined to include only those activities that occur on, or in preparation for, election days, campaign finance laws do not fall within the scope of this phrase. Consequently, regulations adopted for the administration of the provisions of the Campaign Finance Disclosure Act are not exempt from the APA regulatory process.

²⁹ *Porter v. Joy*, 188 Va. 801, 51 S.E.2d 156 (1949) (construing Va. Const. of 1902, art. IV, § 16, predecessor provision to current VA. CONST. art. IV, § 14(11)).

³⁰ *Id.*, 188 Va. at 806, 51 S.E.2d at 158.

³¹ *Id.*

³² *Davis v. Dusch*, 205 Va. 676, 139 S.E.2d 25 (1964).

³³ *Id.*, 205 Va. at 684, 139 S.E.2d at 30 (quoting *Porter*, 188 Va. at 805, 51 S.E.2d at 158 (1949)).

³⁴ 1969-70 Op. Va. Att’y Gen. 114.

³⁵ *Id.* at 115.

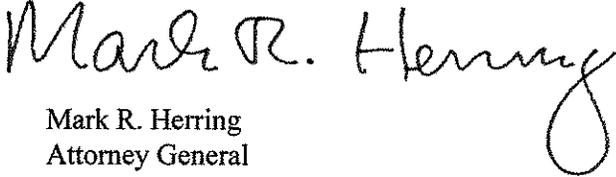
³⁶ See 2011 Op. Va. Atty Gen. 132, (addressing electoral boards’ authority to prevent actions which “impede the orderly conduct of elections” under § 24.2-604(D); 2003 Op. Va. Atty Gen. 108, 111 (concluding that while § 24.2-106 prohibits electoral board members from engaging in certain political activities, “[t]he partisan nature of selecting participants to conduct elections, however, does not require [electoral board members] to perform their duties in a partisan fashion.” The participants mentioned are officers of election, who are responsible for the administration of polling places on election days under §§ 24.2-115 and 24.2-116).

Conclusion

Accordingly, it is my opinion that regulations adopted by the SBE for the purpose of administering Chapters 9.3, 9.4, and 9.5 of Title 24.2 of the *Code of Virginia* concerning campaign finance laws do not relate to “the conduct of elections or eligibility to vote,” and therefore do not qualify for an exemption from the APA regulatory process under § 2.2-4002(B)(8).

With kindest regards, I am

Very truly yours,


Mark R. Herring
Attorney General



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Mark R. Herring
Attorney General

October 1, 2014

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Mr. Geralde W. Morgan
Mr. Arthur D. Roane
Ms. Laverne B. Abrams
King William County Electoral Board
Post Office Box 173
180 Horse Landing Road
King William, Virginia 23086

Dear Messrs. Morgan and Roane and Mrs. Abrams:

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 whether, under § 24.2-112 of the *Code of Virginia*, a general registrar has the authority to hire, as needed, additional employees on a temporary, part-time basis, irrespective of local government approval and budgeting.

Response

It is my opinion that § 24.2-112 authorizes a general registrar, in his discretion, to hire additional temporary, part-time employees when needed and requires the local governing body to compensate such employees as provided for by law.

Applicable Law and Discussion

In Virginia, a general registrar is appointed by each local electoral board to serve the city or county¹ in the administration of matters related to the registration of voters and the maintenance of pollbooks and voter registration records.² Pursuant to § 24.2-112, the general registrar may appoint assistant registrars to aid him in fulfilling his statutory duties. The number of such assistant registrars is to be determined by the electoral board, and assistant registrars, with few exceptions, must meet the same qualifications as the general registrar.³ Section 24.2-112 also provides implicitly that assistant registrars may serve without pay.

¹ VA. CODE ANN. § 24.2-109(A) (2011).

² See § 24.2-114 (Supp. 2014) (providing non-exclusive list of duties and powers of general registrars).

³ Section 24.2-112 (2011).

Mr. Geralde W. Morgan
Mr. Arthur D. Roane
Ms. Laverne B. Abrams
October 1, 2014
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In addition, § 24.2-112 expressly provides that “[t]he general registrar may hire additional temporary employees on a part-time basis as needed.” Because statutes are to be applied according to their plain language,⁴ I must conclude that the General Assembly has authorized general registrars to hire part-time, temporary employees as their work load demands.

This authority is not made contingent upon approval or agreed-upon appropriation of funds by the local governing body. Rather, the plain language § 24.2-112 clearly shows that the General Assembly has vested hiring decisions in the discretion of the general registrar. Once a temporary, part-time employee is hired, § 24.2-112 further provides that “[t]he compensation of . . . employees of the general registrar shall be fixed and paid by the local governing body.”⁵ Except for assistant registrars who agree to serve without pay, such compensation “shall be the equivalent of or exceed the minimum hourly wage established by federal law in 29 U.S.C. § 206(a)(1), as amended.”⁶

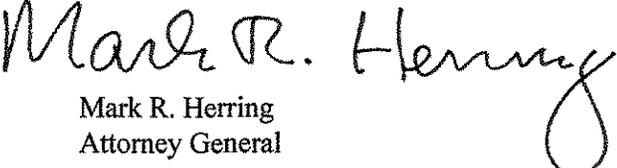
In sum, under § 24.2-112, general registrars are authorized to hire, as needed, temporary, part-time employees, and such employees are to be compensated by the local governing board at a rate that meets or exceeds the minimum hourly wage established under 29 U.S.C. § 206(a)(1).

Conclusion

Accordingly, it is my opinion that § 24.2-112 authorizes a general registrar, in his discretion, to hire additional temporary, part-time employees when needed and requires the local governing to compensate such employees as provided for by law.

With kindest regards, I am

Very truly yours,


Mark R. Herring
Attorney General

⁴ “When the language of a statute is unambiguous, we are bound by the plain meaning of that language.” *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 425, 722 S.E.2d 626, 629 (2012) (quoting *Kozmina v. Commonwealth*, 281 Va. 347, 349, 706 S.E.2d 860, 862 (2011)) (further citation and internal quotation marks omitted).

⁵ *Id.*

⁶ Section 24.2-112.



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Adjournment

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BOARD MEETING

Tuesday, October 7, 2014
Washington Building
Room B27
Noon

SBE Board Working Papers
Rose Mansfield
Executive Assistant