



# COMMONWEALTH of VIRGINIA

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The Honorable Kathy J. Byron  
Member, House of Delegates  
Post Office Box 900  
Forest, Virginia 24551

Dear Delegate Byron:

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, upon the expiration of a general registrar's four-year term of office, an electoral board is required to reappoint the incumbent registrar under § 24.2-110 of the *Code of Virginia*.

## Response

It is my opinion that an electoral board may choose not to reappoint an incumbent general registrar, provided the decision to not reappoint an incumbent general registrar does not rest on impermissible grounds, including political motivations, and provided the process for appointing a new general registrar is objective and apolitical.

## Applicable Law and Discussion

The Constitution of Virginia establishes that each county and city shall have "an electoral board composed of three members."<sup>1</sup> Board members are appointed by the circuit court for the jurisdiction in which they serve, with two members representing the political party who received the highest number of votes in the preceding gubernatorial election and the remaining member representing the political party who received the second-highest number of votes in such election.<sup>2</sup>

Electoral boards are charged with carrying out the Commonwealth's election laws.<sup>3</sup> Among other duties, "[e]ach electoral board shall appoint the . . . general registrar for its county or city."<sup>4</sup> The board is required to meet every four years to make the appointment.<sup>5</sup> Once appointed, general registrars largely are

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<sup>1</sup> VA. CONST. art. II, § 8; accord VA. CODE ANN. § 24.2-106(A) (Supp. 2022).

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

<sup>3</sup> See § 24.2-109(B) (Supp. 2022).

<sup>4</sup> VA. CONST. art. II, § 8; accord VA. CODE ANN. § 24.2-109(A).

<sup>5</sup> VA. CODE ANN. § 24.2-110 (Supp. 2022).

“subject to the authority of the electoral board” in the performance of their duties<sup>6</sup> and generally are “deemed to be employees of the county or city in which they serve except as otherwise specifically provided by state law.”<sup>7</sup> Code § 24.2-110 expressly provides that, upon appointment, “[g]eneral registrars shall serve four year terms . . . and continue in office until a successor is appointed and qualifies.”<sup>8</sup>

“When a statute, as written, is clear on its face, [we] will look no further than the plain meaning of the statute’s words.”<sup>9</sup> “[W]e are bound by the plain meaning of that language,’ unless ‘applying the plain language would lead to an absurd result.’”<sup>10</sup> Although potential appointees must satisfy certain qualification requirements,<sup>11</sup> no provision of state election law restricts an electoral board’s authority in making appointments pursuant to the plain language of Code § 24.2-110 at the end of an incumbent’s statutory term.<sup>12</sup> I specifically find nothing in state law that requires or guarantees the reappointment of an incumbent general registrar or disallows an electoral board from seeking additional applicants for the position every four years; accordingly, an electoral board may choose to appoint a new general registrar upon the expiration of a four-year term.<sup>13</sup> Code § 24.2-110 merely authorizes the incumbent to remain in office as a holdover until the board appoints a new registrar and the appointee qualifies.<sup>14</sup>

Other law, however, does limit an electoral board’s appointment power. Clearly, appointment decisions cannot be made on the basis of “race, color, religion, sex or national origin.”<sup>15</sup> Moreover, federal case law imposes certain constitutional limitations on an electoral board’s otherwise broad discretion to appoint a new general registrar every four years. These cases generally stand for the proposition that, under the First and Fourteenth Amendments, an electoral board may not decline to reappoint a general registrar to a new four-year term if the electoral board’s decision is based on political considerations.<sup>16</sup> These cases

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<sup>6</sup> 2020 Op. Va. Att’y Gen. 4, 5 (citing Code provisions evincing the board’s supervisory role).

<sup>7</sup> Section 24.2-122 (Supp. 2022).

<sup>8</sup> Section 24.2-110 (further providing that the registrar’s appointed term commences July 1).

<sup>9</sup> Va. Dep’t of Tax’n v. R.J. Reynolds Tobacco Co., 300 Va. 446, 455 (2022) (alteration in original) (quoting Commonwealth, Dep’t of Tax’n v. Delta Air Lines, Inc., 257 Va. 419, 426 (1999)).

<sup>10</sup> *Id.* (quoting Va. Elec. & Power Co. v. State Corp. Comm’n, 300 Va. 153, 161 (2021); JSR Mech., Inc. v Aireco Supply, Inc., 291 Va. 377, 383 (2016)).

<sup>11</sup> *See* § 24.2-110.

<sup>12</sup> That a board’s power to remove a general registrar from office may be limited to scenarios in which the registrar has failed to be properly certified or to discharge the duties of the office, *see* § 24.2-109(A), does not implicate the board’s power and duty to appoint a registrar every four years. The removal power is associated with a sitting registrar’s tenure during the statutory term following an appointment. To conclude otherwise would lead to the “absurd result” that, absent such failure or a resignation, a registrar, in effect, would have a lifetime appointment; such a reading would be contrary to the clear four-year term established by statute and would negate the power the General Assembly vested in each electoral board to name a successor.

<sup>13</sup> *See* 1970-1971 Op. Va. Att’y Gen. 178, 178 (stating, in relation to an electoral board’s appointment power at the end of current registrar’s term, that “[t]he registrar to be appointed may be either a new appointment or the present registrar may be reappointed”).

<sup>14</sup> *See* Johnson v. Mann, 77 Va. 265, 279-80 (1883); Burnett v. Brown, 194 Va. 103, 112-13 (1952).

<sup>15</sup> 42 U.S.C. § 2000e-2(a)(1); Fitzpatrick v. Bitzer, 427 U.S. 445, 449 n.2 (1976). *See also* VA. CODE ANN. § 15.2-1500.1 (Supp. 2022) (“No department, office, board, commission, agency, or instrumentality of local government shall discriminate in employment on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, disability, sexual orientation, gender identity, or military status.”).

<sup>16</sup> *See, e.g.,* Sales v. Grant, 158 F.3d 768, 775-76 (4th Cir. 1998) (“The First and Fourteenth Amendments protect state and local government employees . . . from discharge or other significant adverse employment actions taken

do not hold that that sitting registrars generally are not subject to replacement upon expiration of their terms. Rather, they acknowledge that replacement can occur “even if the action was motivated in part by political considerations, [provided] it would have been taken in any event for reasons unrelated to political affiliation.”<sup>17</sup> I caution, however, that a general registrar who can prove that an electoral board’s reappointment decision was due to political reasons can obtain reinstatement and money damages;<sup>18</sup> such political motivation can be proved by circumstantial evidence.<sup>19</sup>

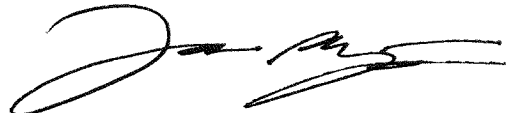
In sum, an electoral board is authorized under Code § 24.2-110 to appoint a new general registrar upon the expiration of the term of the incumbent registrar. The board may replace the registrar for a wide variety of reasons, including for example, underperformance, availability of a better a candidate, or any other permitted reason. A board, however, may not refuse to reappoint an incumbent based on prohibited grounds such as race or other legally-protected status or political affiliation. Whether an electoral board’s appointment decision is based on political or other impermissible grounds in a particular instance is a fact-specific determination beyond the scope of an opinion from this Office.<sup>20</sup>

### Conclusion

Accordingly, it is my opinion that an electoral board is not required to reappoint an incumbent general registrar, but the decision to replace the registrar must not be based on political affiliation or other impermissible grounds. It is further my opinion that the process by which an electoral board seeks to appoint a new general registrar must be objective and apolitical.

With kindest regards, I am,

Very truly yours,



Jason S. Miyares  
Attorney General

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because of their political affiliations . . .”). *See also* *Chester v. Wise Cnty. Electoral Bd.*, 1997 U.S. App. LEXIS 17394, at \*10 (4th Cir. July 11, 1997) (“A termination [of a general registrar] based solely on . . . political affiliation is a deprivation of his First Amendment rights to freedom of association and freedom of belief.”); *McConnell v. Adams*, 829 F.2d 1319, 1322 & n.1 (4th Cir. 1987) (“affirm[ing] the district court’s judgment that the failure to reappoint [former general registrars] violated their constitutional rights”) (referring to *Kilgore v. McClelland*, 637 F. Supp. 1241 (W.D. Va. 1985); *Burchett v. Cheek*, 637 F. Supp. 1249 (W.D. Va. 1985); and *Kilgore v. McClelland*, 637 F. Supp. 1253 (W.D. Va. 1986)). These and the line of cases from which they flow rest on the conclusion that, for First Amendment purposes, “there is no constitutional difference between a patronage refusal to rehire and a patronage dismissal.” *McConnell*, 829 F.2d at 1324.

<sup>17</sup> *Sales*, 158 F.3d at 776.

<sup>18</sup> *See McConnell*, 829 F.2d at 1322, 1324.

<sup>19</sup> *Sales*, 158 F.3d at 780.

<sup>20</sup> “[T]he issue of whether a particular personnel action violates any protected rights is one to be decided on the specific facts of each case.” 1983-1984 Op. Va. Att’y Gen. 323, 324 (citing *DeLong v. United States*, 621 F.2d 618 (4th Cir. 1980)). In responding to opinion requests, this Office does not make factual determinations or resolve factual disputes. *See* 2002 Op. Va. Att’y Gen. 321, 326; 1996 Op. Va. Att’y Gen. 102, 103.