

**OP. NO. 05-091**

**ELECTIONS: THE ELECTION – GENERAL PROVISIONS; POLLING PLACES.**

**No exemption for Virginia Office for Protection and Advocacy from limitation on access to polling place; representatives of Office may not enter into polling place on Election Day without express, written permission of appropriate local electoral board.**

Mr. G. W. Thomas, Jr.  
Chairman, Electoral Board

Ms. Dorothy B. Dockery  
Secretary, Electoral Board  
City of Richmond

January 31, 2006

**Issues Presented**

You ask whether the Virginia Office for Protection and Advocacy is exempt from § 24.2-604, which places certain limitations on access to polling places. Additionally, you ask whether representatives of such office may enter into any and all polling places on Election Day without the permission of the appropriate local electoral board.

**Response**

It is my opinion that the Virginia Office for Protection and Advocacy is not exempt from § 24.2-604. It is further my opinion that representatives of such office may not enter into any polling place on Election Day without the express, written permission of the appropriate local electoral board.

**Background**

You advise that the State Board of Elections has issued information to the general registrars and local electoral boards of the Commonwealth indicating that § 24.2-604 applies without exception to all persons other than election officials who seek to remain within polling places during the conduct of elections on Election Day. You further advise that representatives of the Virginia Office for Protection and Advocacy have written to the general registrar indicating that its representatives are exempt from § 24.2-604. You, therefore, inquire whether that Office and its representatives are exempt from the application of § 24.2-604.

**Applicable Law and Discussion**

The fundamental objective of the State Board of Elections is to provide overall supervision and coordination of election activities throughout the Commonwealth, and to obtain uniformity in local election practices and proceedings and legality and purity in all elections.<sup>1</sup> In all instances that require interpretation of the

election laws of the Commonwealth, any decision of the Board in performing its statutory duty, i.e. interpreting application of § 24.2-604, will be entitled to great weight.<sup>2</sup>

Title 24.2 provides for the administration of elections in the Commonwealth. Section 24.2-604(A) provides:

During the times the polls are open and ballots are being counted, it shall be unlawful for any person (i) to loiter or congregate within 40 feet of any entrance of any polling place; (ii) within such distance to give, tender, or exhibit any ballot, ticket, or other campaign material to any person or to solicit or in any manner attempt to influence any person in casting his vote; or (iii) to hinder or delay a qualified voter in entering or leaving a polling place.

Furthermore, § 24.2-604(I) provides:

A local electoral board may authorize in writing the presence of additional neutral observers as it deems appropriate, except as otherwise prohibited or limited by this section. Such observers shall comply with the restrictions in subsections A and D of this section.

The Virginia Office for Protection and Advocacy is an independent agency of the Commonwealth responsible for the protection and advocacy of the "rights of persons with mental, cognitive, sensory, physical or other disabilities."<sup>3</sup> The Office is "to receive federal funds on behalf of the Commonwealth of Virginia to implement the federal Protection and Advocacy for Individuals with Mental Illness Act, the federal Developmental Disabilities Assistance and Bill of Rights Act, the federal Rehabilitation Act, [and] the Virginians with Disabilities Act."<sup>4</sup> Section 51.5-39.4 sets forth the statutory powers and duties of the Office.

Section 51.5-39.4(1) empowers the Virginia Office for Protection and Advocacy to monitor the implementation of §§ 51.5-40 through 51.5-46, and "to render assistance to persons with disabilities in the protection of their rights." Sections 51.5-43 and 51.5-44 contain certain language that touches upon the questions that you present. Section 51.5-43 prohibits persons with a disability from being denied the opportunity both to register to vote and vote because of a disability. Section 51.5-44 expressly grants persons with a disability the same rights as persons without a disability to the full and free use of public buildings, facilities, and places. Specifically, § 51.5-44(B) provides persons with a disability the full and equal accommodation of places to which the general public is invited. Neither of these statutes, however, affords the Office the discretion to provide its representatives unfettered access to the polling places of the Commonwealth on Election Day.

Section 51.5-39.4(3) contains the specific statutory authorization for the Virginia Office for Protection and Advocacy

[t]o access facilities, institutions, and providers, as defined in §§ 37.2-100 and 37.2-403, and all other facilities and institutions that provide care or treatment to individuals with disabilities. Reasonable access shall be granted for the purposes of

conducting investigations of allegations of abuse and neglect, and performing such other activities as necessary to monitor the care and treatment provided to, and to protect the rights of, individuals with disabilities.

Pursuant to § 37.2-100, the term "facility" means

a state or licensed hospital, training center, psychiatric hospital, or other type of residential or outpatient mental health or mental retardation facility. When modified by the word "state," "facility" means a state hospital or training center operated by the Department [of Mental Health, Mental Retardation and Substance Abuse Services], including the buildings and land associated with it.

Section 37.2-403 defines the term "provider" to mean that:

[A]ny person, entity, or organization, excluding an agency of the federal government by whatever name or designation, that delivers (i) services to persons with mental illness, mental retardation, or substance abuse, (ii) services to persons who receive day support, in-home support, or crisis stabilization services funded through the Individual and Families Developmental Disabilities Support Waiver, (iii) services to persons under the Brain Injury Waiver, or (iv) residential services for persons with brain injury. The person, entity, or organization shall include a hospital as defined in § 32.1-123, community services board, behavioral health authority, private provider, and any other similar or related person, entity, or organization. It shall not include any individual practitioner who holds a license issued by a health regulatory board of the Department of Health Professions or who is exempt from licensing pursuant to § 54.1-3501, 54.1-3601, or 54.1-3701.

The term "institution" is not defined in either § 37.2-100 or § 37.2-403. When a particular word in a statute is not defined therein, the word must be given its ordinary meaning.<sup>5</sup> The term "institution" generally means "an establishment or foundation [especially] of a public character ... a building or the buildings occupied or used by such organization."<sup>6</sup>

It is apparent from a review of Title 51.5, The Virginians With Disabilities Act, that the polling places of the Commonwealth on Election Day are not the types of places where the Virginia Office for Protection and Advocacy is given reasonable and unfettered access for the purposes of protecting the rights of individuals with disabilities. The language used by the General Assembly in § 51.5-39.4 clearly does not authorize the Office to disregard the provisions of § 24.2-604.

"[A]dministrative agencies, in the exercise of their powers, may validly act only within the authority conferred upon them."<sup>7</sup> I am required to construe the statutory law as it is written. "An erroneous construction by those charged with its administration cannot be permitted to override the clear mandates of a statute."<sup>8</sup> When the language of the statute is plain and unambiguous, the plain meaning of the language must be applied.<sup>9</sup> "The province of [statutory] construction lies wholly within the domain of ambiguity."<sup>10</sup>

The plain language in § 51.5-39.4, which sets forth the express statutory powers and duties of the Virginia Office for Protection and Advocacy, clearly does not authorize the Office to access any and all polling places on Election Day without the permission of the appropriate local electoral board. I find no other statute authorizing the Office to enter polling places in the Commonwealth on Election Day without complying with § 24.2-604. I am, therefore, required to conclude that the Office must comply with the applicable provisions of Title 24.2, specifically § 24.2-604(I), in seeking admission to the polling places of the Commonwealth on Election Day. In order for representatives of the Office to obtain entry into a polling place of the Commonwealth on Election Day, the Office must follow procedures for other similar entities and individuals, that is, to obtain the written authorization of the individual electoral board of the specific jurisdiction of any polling place it seeks to enter.

### Conclusion

Accordingly, it is my opinion that the Virginia Office for Protection and Advocacy is not exempt from the provisions of § 24.2-604. It is further my opinion that representatives of such office may not enter into any polling place on Election Day without the express, written permission of the appropriate local electoral board.

<sup>1</sup>See Va. Code Ann. § 24.2-103(A) (Supp. 2005); *see also* 1983-1984 Op. Va. Att'y Gen. 152, 153.

<sup>2</sup>See *Forst v. Rockingham Poultry Mktg. Coop.*, 222 Va. 270, 276, 279 S.E.2d 400, 403 (1981) (noting that long standing construction of statute by Tax Commissioner is entitled to great weight); *Dep't of Taxation v. Prog. Comty. Club*, 215 Va. 732, 739, 213 S.E.2d 759, 763 (1975) (noting that construction of statute by state official charged with its administration is entitled to great weight); 1993 Op. Va. Att'y Gen. 226, 227 (noting that interpretation given to statute by state agency charged with its administration is entitled to great weight). This rule of statutory construction is particularly persuasive in construing individual statutes that constitute parts of a complex statutory scheme, such as the voting system established in Title 24.2. In such an instance, deference to a decision of the agency charged by the General Assembly with the statewide administration of such a system is appropriate unless the decision clearly is wrong. *See* 2002 Op. Va. Att'y Gen. 34, 36; *see also* 2004 Op. Va. Att'y Gen. 146, 147-48.

<sup>3</sup>Va. Code Ann. § 51.5-39.2(A) (2005); *see also* 2005 Va. Acts ch. 951, Item 527, at 1862, 2393 (deferring implementation date for establishing ombudsman section in Office until July 1, 2006).

<sup>4</sup>Section 51.5-39.2(A).

<sup>5</sup>See *McKeon v. Commonwealth*, 211 Va. 24, 27, 175 S.E.2d 282, 284 (1970).

<sup>6</sup>Webster's Third New International Dictionary of the English Language Unabridged 1171 (1993).

<sup>7</sup>*Sydnor Pump & Well Co. v. Taylor*, 201 Va. 311, 316, 110 S.E.2d 525, 529 (1959).

<sup>8</sup>City of Richmond v. County of Henrico, 185 Va. 176, 189, 37 S.E.2d 873, 879 (1946) (quoting Hancock Co. v. Stephens, 177 Va. 349, 356, 14 S.E.2d 332, 334 (1941)).

<sup>9</sup>Vaughn, Inc. v. Beck, 262 Va. 673, 677, 554 S.E.2d 88, 90 (2001); Shelor Motor Co. v. Miller, 261 Va. 473, 479, 544 S.E.2d 345, 348 (2001).

<sup>10</sup>Winston v. City of Richmond, 196 Va. 403, 408, 83 S.E.2d 728, 731 (1954), *quoted in* Harrison & Bates, Inc. v. Featherstone Assocs. Ltd. P'ship, 253 Va. 364, 368, 484 S.E.2d 883, 885 (1997).

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