



COMMONWEALTH of VIRGINIA

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December 18, 2014

The Honorable Mark D. Obenshain
Member, Senate of Virginia
Post Office Box 555
Harrisonburg, Virginia 22803

Dear Senator Obenshain:

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 the State Board of Elections (“SBE”) possesses the regulatory authority to define the term “valid” as used in § 24.2-643(B) of the *Code of Virginia*.¹

Response

It is my opinion that SBE possesses regulatory authority to define the term “valid” as used in § 24.2-643(B).

Background

Section 24.2-643 sets forth procedures and requirements with respect to voter identification at polling places within the Commonwealth. Since 2012, the statute has provided that a voter must present acceptable identification in order to be eligible to cast a nonprovisional ballot.² In 2013, the General Assembly amended the statute to provide that only certain photo identification is acceptable to satisfy the voter identification requirement: *inter alia*, a valid Virginia driver’s license, a valid United States passport, a valid student photo identification, or a valid employee photo identification.³ The amendment,

¹ Your request also asks whether the definition of “valid” adopted by the Board in June 2014 is consistent with state law and a proper exercise of its regulatory authority. Because the particular definition referenced in your request was amended by SBE in August 2014 and is no longer in effect, that inquiry is now moot, and it will not be addressed in this opinion. *See* 2005 Op. Va. Att’y Gen. 84, 85 (declining to opine about a possible conflict of interest arising from certain payments from a locality to a public defender’s office because such payments are not legally authorized, thus making the question moot). *See also* *Elizabeth River Crossings v. Meeks*, 286 Va. 286, 749 S.E.2d 176 (2013) (Court declining to rule on an issue because it had been rendered moot by the Court’s decision).

² *See* 2012 Va. Acts chs. 838 & 839.

³ *See* 2013 Va. Acts ch. 725. In its amended form, § 24.2-643(B) provides specifically that

The [election] officer shall ask the voter to present any one of the following forms of identification: his valid Virginia driver’s license, his valid United States passport, or any other photo identification

however, does not define the term “valid.” Prior to implementing the photo identification requirement, which became effective July 1, 2014, the SBE promulgated a regulation defining the term “valid.” You inquire whether the SBE possesses the authority to define the term via regulation.

Applicable Law and Discussion

The SBE is an administrative agency of the Commonwealth that is authorized to operate in accord with its enabling legislation.⁴ Its general responsibilities and regulatory authority are set forth in § 24.2-103, which provides, in relevant part, that it

shall supervise and coordinate the work of the county and 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.

As the language of the section indicates, the SBE is not directly responsible for the implementation of election laws; instead, those laws are implemented at the local level by electoral boards and general registrars in each of Virginia’s 133 localities.⁵ Pursuant to its supervisory authority, the SBE is charged with promulgating regulations and issuing guidance on the appropriate methods by which local authorities are to implement the Commonwealth’s election laws. One of the primary goals of this directive is to ensure uniformity among the localities in their implementation of these laws.

To fulfill its responsibilities, the SBE is vested with broad authority to adopt reasonable regulations not inconsistent with general law.⁶ The SBE also possesses the specific authority to issue interpretive guidance clarifying the meaning of statutes it is charged with administering.⁷ Considered together, these powers demonstrate that the SBE may clarify the meaning of statutes through regulation in order to further its mission of ensuring uniform election procedures. In particular, the SBE may issue regulations resolving the meaning of ambiguous terms in statutes it is charged with administering.⁸

issued by the Commonwealth, one of its political subdivisions, or the United States; any valid student identification card containing a photograph of the voter and issued by any institution of higher education located in the Commonwealth; or any valid employee identification card containing a photograph of the voter and issued by an employer of the voter in the ordinary course of the employer’s business.

⁴ See *Hurt v. Caldwell*, 222 Va. 91, 97, 279 S.E.2d 138, 142 (1981); *Segaloff v. City of Newport News*, 209 Va. 259, 261, 163 S.E.2d 135, 137 (1968). The SBE is assisted in its operations by the Department of Elections. See VA. CODE ANN. § 24.2-103(A) (Supp. 2014).

⁵ See §§ 24.2-109 (2011) (setting forth the general powers and duties of local electoral boards); 24.2-114 (Supp. 2014) (setting forth the general powers and duties of local registrars).

⁶ See *Volkswagen of Am., Inc. v. Smit*, 279 Va. 327, 340-341, 689 S.E.2d 679, 687 (2010); *Judicial Inquiry & Review Comm’n v. Elliot*, 272 Va. 97, 115, 630 S.E.2d 485, 494 (2006) (“When an administrative body is delegated rulemaking authority by the General Assembly, it is given broad discretion to determine the procedures it will employ in carrying out its legislative mandate, so long as the rules it adopts are not inconsistent with the authority of the statutes that govern it or with principles of due process.”); see also § 24.2-103(A) (providing that regulations issued by the SBE shall not conflict with general law).

⁷ See VA. CODE ANN. §§ 2.2-4001 (2014); 2.2-4008 (2014); 24.2-103(A); *Jackson v. W.*, 14 Va. App. 391, 399-400, 419 S.E.2d 385, 390 (1992); 2009 Op. Va. Att’y Gen. 94, 99.

⁸ Cf. 1974-75 Op. Va. Att’y Gen. 237, 238 (citing *Commonwealth v. Greyhound Lines, Inc.*, 206 Va. 550, 145 S.E.2d 206 (1965)) (“If a statute is ambiguous and construction is necessary an agency charged with its

The meaning of the term “valid” within the specific context of § 24.2-643 is ambiguous.⁹ A statutory term is ambiguous if it lacks “clearness and definiteness”¹⁰ or may be understood in more than one way.¹¹ While the term “valid” is used throughout the *Code of Virginia* and in some instances defined for the limited purposes of specific statutes, the *Code of Virginia* provides no general definition.¹² Although the term was included in prior versions of § 24.2-643, no definition of “valid” is incorporated into this section. Under the previous version of § 24.2-643,¹³ which also contained the term “valid,” the SBE issued guidance interpreting the term.¹⁴ This supports the conclusion that the term may be understood in more than one manner, and that administrative guidance is necessary to ensure a uniform application of § 24.2-643.

Because the term “valid,” as used in the context of § 24.2-643, is susceptible to more than one interpretation, binding administrative guidance ensures uniformity in local election practice. In clarifying the meaning of the term, the SBE provides uniform guidance to local election officials across the Commonwealth who review the documents presented by voters as proof of identity. In so doing, the SBE acts in accord with its statutory mandate and not in opposition to other law.¹⁵ It is therefore my opinion that, in the absence of a statutory definition, the SBE has the authority to issue a regulation defining the term “valid” as used in § 24.2-643(B).¹⁶

This conclusion is further supported by the SBE’s prior practice of providing an interpretation of the term “valid” under the previous version of § 24.2-643.¹⁷ The legislature is presumed to be cognizant of the agency’s practice of interpreting statutes it is tasked with administering and enforcing.¹⁸ Because

administration may interpret the statute.”). I note, however, that an agency may not interpret a statutory term in a manner inconsistent with its plain meaning. *See Superior Steel Corp. v. Commonwealth*, 147 Va. 202, 206, 136 S.E. 666, 667 (1927).

⁹ In determining whether the meaning of an undefined term within a statute is plain, courts look to the context in which the term appears. *See Protestant Episcopal Church v. Truro Church*, 280 Va. 6, 21, 694 S.E.2d 555, 563 (2010).

¹⁰ *Ayres v. Harleysville Mut. Casualty Co.*, 172 Va. 383, 393, 2 S.E.2d 303, 307 (1939).

¹¹ *Lincoln National Life Ins. Co. v. Commonwealth Corrugated Container Corp.*, 229 Va. 132, 136-37, 327 S.E.2d 98, 101 (1985).

¹² For examples of this type of limited definition, *see, e.g.*, VA. CODE ANN. § 2.2-3301 (2011) (acts, business transactions, legal proceedings, etc. on holidays valid); VA. CODE ANN. § 8.01-328.1 (Supp. 2014); VA. CODE ANN. § 22.1-298.1 (Supp. 2014) (regulations governing licensure); VA. CODE ANN. § 40.1-31 (2013) (assignment of wages and salaries; requirements); VA. CODE ANN. § 55-122 (2012) (acts of notaries public, etc., who have held certain other offices); VA. CODE ANN. § 64.2-1604 (2012) (validity of power of attorney).

¹³ *See* 2012 Va. Acts chs. 838 & 839.

¹⁴ *See* VA. DEP’T OF ELECTIONS, VOTER IDENTIFICATION CHART (former agency guidance, rev. 9/12) (available upon request of the agency) (defining “valid” as “unexpired or expired with 30 days prior to the election”).

¹⁵ *See* 2014 Op. Va. Att’y Gen. No. 13-111, available at <http://www.oag.state.va.us/index.php/citizen-resources/opinions?id=61#september> (stating that the SBE has discretion to act in the absence of a statutory mandate or prohibition providing otherwise).

¹⁶ I note that “Virginia courts . . . afford great weight to the interpretation of a statute by the state agency charged with its enforcement.” 2011 Op. Va. Att’y Gen. 143, 145 (citing *Forst v. Rockingham Poultry Mktg. Coop., Inc.*, 222 Va. 270, 276, 279 S.E.2d 400, 403 (1981); *Dep’t of Taxation v. Progressive Cmty. Club*, 215 Va. 732, 739, 213 S.E.2d 759, 763 (1975)).

¹⁷ *See supra* note 14.

¹⁸ *See Peyton v. Williams*, 206 Va. 595, 600, 145 S.E.2d 147, 151 (1965).

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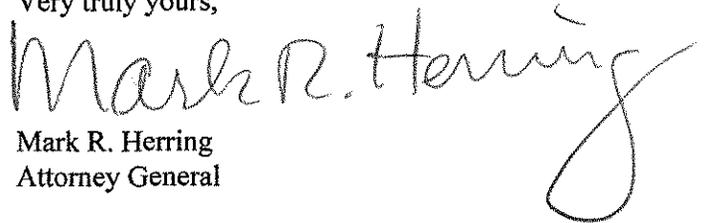
the legislature amended § 24.2-643 without either providing a definition for the term “valid,” or prohibiting the SBE from further defining this term, which SBE previously had defined, it is my opinion that the SBE has not been deprived of its authority to continue its established practice of defining the term.¹⁹

Conclusion

Accordingly, for the reasons expressed above, it is my opinion that SBE possesses regulatory authority to define the term “valid” as used in § 24.2-643(B).

With kindest regards, I am

Very truly yours,

A handwritten signature in cursive script that reads "Mark R. Herring". The signature is written in black ink and is positioned to the right of the typed name and title.

Mark R. Herring
Attorney General

¹⁹ Cf. *Gomes v. City of Richmond*, 220 Va. 449, 258 S.E.2d 582 (1979) (noting that “legislative acquiescence in administrative practices may be considered as evidence of legislative intent”).