



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

Mark R. Herring  
Attorney General

202 North Ninth Street  
Richmond, Virginia 23219  
804-786-2071  
Fax 804-786-1991  
Virginia Relay Services  
800-828-1120  
7-1-1

December 9, 2016

The Honorable Richard H. Stuart  
Member, Senate of Virginia  
Post Office Box 1146  
Montross, Virginia 22520

Dear Senator Stuart:

I am responding to your request for an official advisory opinion pursuant to § 2.2-505 of the *Code of Virginia*.

## Issue Presented

A member of a local school board (the “Board Member” and the “School Board,” respectively) who is a reserve military officer is being called into active service for a temporary deployment. You ask whether the Board Member has the right to determine whether an appointment will be made to fill his temporarily vacant position, and whether he has the right of approval over a temporary replacement. Your opinion request states that he “is not a constitutional officer.”

## Background

The Board Member recently announced at a School Board meeting that he had received mobilization orders to an overseas location. He went on to state his belief that a statute dealing with military deployment of elected officials “allows me to make a decision on whether I would like a temporary replacement who would serve as an acting school board member just during the months I am gone, or I can chose [sic] not to have a temporary replacement. . . . I want to be clear—I have not yet made my decision to request a temporary replacement[,] and I am not authorizing the board to appoint one at this time.”

## Applicable Law and Discussion

By statute, county or municipal officers will not forfeit their offices because of being “called to active duty in the armed forces of the United States,” and the officer or body authorized to fill vacancies must appoint someone to perform the responsibilities of the absent officer until he returns from active duty:

No . . . county or municipal officer . . . shall forfeit his title to office or position or vacate the same . . . when called to active duty in the armed forces of the United States. Any such officer . . . who, voluntarily or otherwise, . . . is called to service may notify the officer or body authorized by law to fill vacancies in his office, of such fact, and thereupon be relieved from the duties of his office or position during the period of such

service. The officer or body authorized to fill vacancies shall designate some suitable person to perform the duties of such office as acting officer during the period the regular officer is engaged in such service, and during such period the acting officer shall be vested with all the powers, authority, rights and duties of the regular officer for whom he is acting.<sup>[1]</sup>

This statute applies, in relevant part, to any “county or municipal officer.” The term “officer” has been defined as “[i]n public affairs . . . a person holding public office under a national, state, or local government.”<sup>2</sup> A prior Opinion of this office states that a “school board member [is] an officer of local government.”<sup>3</sup> It is thus evident that this statute applies to school board members, such as the one who is the subject of the present inquiry.

The statute is triggered when the officer who has been called into service gives notice to “the officer or body authorized by law to fill vacancies in his office.”<sup>4</sup> Once he has given that notice, he is “thereupon . . . relieved from the duties of his office . . . during the period of such service.” In this particular locality, the appointing authority to fill vacancies on the school board is the remaining members of the school board.<sup>5</sup> Here, there can be no question but that the Board Member has provided notice of his upcoming deployment to the School Board. Thus, by operation of law he has now been “relieved from the duties of office” commencing on the date of his deployment, and the replacement statute is in effect.

When the statute applies, the appointing authority is required to appoint a temporary replacement, and it alone is authorized to determine who that person shall be. The statute is devoid of any language authorizing the departing official to determine whether a temporary appointment will be made, nor does it give him the authority to select or to have a power of approval over the appointment, if there is to be one. It is well-established that rules of statutory construction prohibit adding language to or deleting language from a statute.<sup>6</sup>

I also note that the Supreme Court of Virginia has held that, under the statute in question, the official who has been called to active duty does not have the authority to determine whether a temporary replacement will be appointed. Instead, once the official provides notice, a duty devolves solely on the appointing authority to select and appoint a temporary replacement.<sup>7</sup>

---

<sup>1</sup> VA. CODE ANN. § 2.2-2802 (2014).

<sup>2</sup> BLACK’S LAW DICTIONARY 1257 (Bryan A. Garner et al. eds., 10th ed. 2014).

<sup>3</sup> 1969-1970 Op. Va. Att’y Gen. 309, 310.

<sup>4</sup> VA. CODE ANN. § 2.2-2802.

<sup>5</sup> The locality is Prince William County, which has the County Executive form of government. The School Board is elected. As per § 22.1-57.3(D), vacancies are filled under the procedures set forth in §§ 24.2-226 and 24.2-228. Under those statutes, when a vacancy occurs in the office of an elected school board member, the remaining members of the board shall within forty-five days appoint a qualified voter of the district in which the vacancy occurred. Sections 24.2-226 and 24.2-228 call for a temporary appointment followed by a special election. In contrast, § 2.2-2802 requires the temporary appointee to serve until the departed official returns from military service, without any special election. Sections 24.2-226 and 24.2-228 are of general application. That is, they deal with filling vacancies that occur for any reason. Section 2.2-2802 is of specific application: it deals specifically with filling vacancies that occur because of military service. It is a well-established canon of statutory construction that if one statute addresses a subject in a general way and another statute speaks to the same subject in a more specific manner, the latter prevails. *Beard Plumbing & Heating, Inc. v. Thompson Plastics, Inc.*, 254 Va. 240, 245 (1997).

<sup>6</sup> *Appalachian Power Co. v. State Corporation Comm’n*, 284 Va. 695, 706 (2012).

<sup>7</sup> *See In re Gordon E. Hannett*, 270 Va. 223 (2005). In that case, Floyd County Commonwealth’s Attorney Gordon Hannett—an Army reservist—notified his circuit court judge that he was being called into active duty to be

There is a different statute, § 24.2-228.1, which provides in Subsection G that if a *constitutional officer* is absent from his position because of a military deployment, “the power to relieve a constitutional officer of the duties or powers of his office or position during the period of such absence shall remain the sole prerogative of the constitutional officer unless expressly waived by him in writing.” However, a Board Member is not a constitutional officer, and your acknowledgement of that status is legally correct: a “constitutional officer” is identified in Article VII, § 4 of the Constitution of Virginia as “a treasurer, a sheriff, an attorney for the Commonwealth, a clerk, who shall be clerk of the court in the office of which deeds are recorded, and a commissioner of revenue.” Because a local school board member is not a constitutional officer, this statute does not apply, and thus the Board Member does not have the prerogative of determining whether a replacement shall be appointed for him.

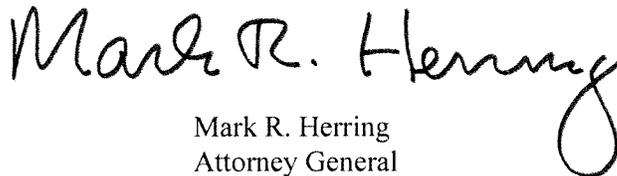
By law, a local officer who departs for military service “shall [not] forfeit his title to office or position or vacate the same.”<sup>8</sup> Once the Board Member completes this deployment, he will resume the duties of his office for the remainder of the term to which he was elected.

### Conclusion

For the reasons stated, it is my opinion that the School Board, having received notice of a Board Member’s upcoming military deployment, has both the duty and the sole authority, pursuant to a statute duly enacted by the General Assembly, and consistent with a decision of the Supreme Court of Virginia interpreting that statute, to select and to appoint a temporary replacement for him until the end of his deployment. The law does not give him the right to decide whether a replacement will be named, since he is not a constitutional officer. After he returns from deployment, he will return to his position on the School Board, where he will serve the remainder of the term to which he was elected.

With kindest regards, I am

Very truly yours,



Mark R. Herring  
Attorney General

---

deployed in Iraq. He sought to retain his official position, and he intended to hire an assistant prosecutor to run the office. He planned to supervise the assistant from his duty station in Iraq. The judge instead appointed an interim Commonwealth’s Attorney pursuant to the present statute. Hannett then sought writs of prohibition and mandamus against the interim appointment. In denying the writs, the Supreme Court of Virginia held that the circuit court was not bound by Hannett’s assertion that he could continue to perform the duties of his office while deployed in Iraq, and the circuit court’s conclusion to the contrary was not unreasonable. I note that a prior Opinion of this Office reached a contrary conclusion about this same matter prior to *Hannett* being decided. 2005 Op. Va. Att’y Gen. 9. That Opinion was effectively overturned by the Supreme Court of Virginia’s decision in *Hannett*, and therefore it is no longer of any force or effect. I also note that the analysis in the Opinion was for a statute applicable only to constitutional officers, and thus even if the Opinion were still effective, it would be inapplicable to a school board member, who is not a constitutional officer.

<sup>8</sup> VA. CODE ANN. § 2.2-2802.