

MEMORANDUM

To: West Virginia County Clerks and Staff
From: Donald Kersey, WVSOS General Counsel & Deputy Secretary of State
Date: January 4, 2022
RE: Candidate Eligibility Affected by Magisterial District Reapportionment

i. Introduction

This Memorandum is provided to West Virginia county clerks and their staff for educational purposes in regards to considerations for prospective candidates to county commission or county board of education whose eligibility is based, in part, on residency in an open¹ magisterial district for the 2022 election cycle.

The informal conclusions below are issued under the Secretary of State's authority to "advise with election officials[,]"² which conclusions are based in part on legal advice provided to counsel for the Secretary of State's Office by counsel for the Attorney General's Office.

ii. Legal Disclaimer

THIS MEMORANDUM IS NOT A FORMAL ADMINISTRATIVE ORDER OR LEGAL OPINION ISSUED BY THE SECRETARY OF STATE OR ATTORNEY GENERAL AND IS NOT LEGALLY BINDING ON ANY COUNTY COMMISSION, COUNTY CLERK, OR CANDIDATE.³

PROSPECTIVE CANDIDATES ARE STRONGLY ENCOURAGED TO SEEK INDEPENDENT LEGAL ADVICE FROM PRIVATE COUNSEL, ESPECIALLY IN CASES OF UNCERTAINTY REGARDING ELIGIBILITY TO RUN FOR OR HOLD PUBLIC OFFICE.

iii. Candidate's Duty to Determine Eligibility

It is each candidate's duty to independently make a good faith⁴ determination of his or her eligibility to run for an elected office in West Virginia.

Certificates of announcement are filed under oath⁵ by each candidate, and any candidate who knowingly provides false information on a certificate of announcement is subject to criminal penalties for false swearing.⁶

Except under rare circumstances,⁷ neither the Secretary of State nor county clerks have the authority to determine or make an inquiry or investigation into a candidate's eligibility to run for or hold public office.⁸

Rather, a candidate's eligibility may only be challenged in the manners provided by law.⁹

I. Background:

During the Third Extraordinary Session of the Legislature held in October of 2021, the Legislature passed HB 301 (effective on October 18, 2021), SB 3033 (effective on October 14, 2021), and SB 3034 (effective on October 20, 2021), all relating to the reapportionment of representation in West Virginia’s House of Delegates, Congressional, and Senate districts respectively, based on the results of the U.S. Census Bureau’s decennial population survey.

Following the Legislature’s redistricting process, each county commission is responsible for determining, based upon county population changes, whether it is necessary to reapportion the county’s magisterial districts.

Pursuant to W. Va. Code § 1-2-2b(b), as amended,¹⁰ the deadline for county commissions to complete the magisterial district reapportionment process following legislative redistricting is “prior to January 22, 2022.”¹¹

Magisterial district boundaries must be established under the parameters in W. Va. Code § 7-2-2, which provides:

Each county shall be laid off by the county court into magisterial districts, not less than three nor more than ten in number, and as nearly equal as may be in territory and population. . . . The county court may, from time to time, increase or diminish the number of such districts, and change the boundary lines thereof as necessity may require, in order to conform the same to the provisions of the Constitution of the State.

While the West Virginia Constitution (“Constitution”) sets forth requirements for legislative and congressional districts reapportionment, it does not establish requirements specifically for county magisterial districts. Therefore, at a minimum, the Constitution requires that “[e]very citizen shall be entitled to equal representation in the government, and, in all apportionments of representation, equality of numbers of those entitled thereto, shall as far as practicable, be preserved.”¹²

II. Issue Presented

Following magisterial district reapportionment, do prospective candidates to county commission or county board of education determine their eligibility based on the previous magisterial district boundaries from which sitting county officials were elected?

III. Summary Answer

No. The previous magisterial district boundaries are not considered for determining prospective candidates’ eligibility to run for or hold office on a county commission or county board of education.¹³

Rather, for the 2022 election cycle, candidates for county commission or county board of education are to determine open magisterial districts based on the newly reapportioned magisterial district boundaries.

Each magisterial district in which no current county commissioner or county board of education member resides is open, and any citizen residing in an open district may run for county commission or county board of education, as long as all other eligibility requirements for the office are met.

To determine eligibility for those offices based on residence following magisterial district reapportionment, prospective county commission or county board of education candidates are to consider (1) the current sitting officials' residences (*i.e.* physical addresses) at the time of their election, and (2) the new, reapportioned magisterial district boundaries, irrespective of the sitting officials' previous magisterial district boundaries.

In effect, following magisterial district reapportionment, it is possible to have more than one sitting county elected official whose residences are located within the same "new" magisterial district boundary, which officials' terms of office do not end in 2022.

In that case, it is possible for prospective candidates from more than one magisterial district to seek election to that county office. It follows that one or more of the new magisterial districts will not have an official from the new district serving in the elected county office. Such result is not unconstitutional, nor does it depart from legislative intent, for it is possible regardless a county reapportions its magisterial districts if, for example, a county has more magisterial districts than elected positions in the county office.¹⁴

See Attachment A for a detailed example and visual representations for further clarity.

IV. Discussion

The issue presented at its core is determining which magisterial districts are open in the 2022 election. That determination must be based on sitting elected county officials' residences at the time of their elections, whose terms of office do not expire in 2022.¹⁵

a. Post-Redistricting County Commission Candidate Residency:

Eligibility to become a candidate for county commission is generally set forth in W. Va. Code § 7-1-1b. According to the Constitution, county commissioners "hold their office for a term of six years" and "one shall be elected every two years; but no two of said commissioners shall be elected from the same magisterial district."¹⁶

When magisterial districts remain the same, determining which district is open is simple: the district from which the commissioner whose seat is on the upcoming ballot resided when elected six years prior is open. If the county has more magisterial districts than county commissioners, any additional magisterial districts without sitting commissioners residing therein are also open. Each district in which a sitting commissioner resides is therefore closed and no persons residing therein are eligible to run for county commission that election year.

This principle continues when magisterial districts are reapportioned, and a change in magisterial district boundaries affects only prospective candidates who reside in a district, according to the new magisterial district boundaries, in which a sitting commissioner also resides.

This conclusion is supported by *Burkhart v. Sine*, 200 W.Va. 328 (1997). While the facts in *Burkhart* are somewhat distinguishable, the Court’s analysis of residency when magisterial districts are reapportioned is applicable.

Specifically, the Court finds:

[A] member of the County Commission is deemed to be elected from the magisterial district in which that person resides on the day that person is elected to serve on the County Commission, that is, the date of the general election. Absent unusual circumstances, a candidate generally resides in the same district on the date of filing in which he or she resides on the date of the election; *therefore, a candidate carries that residence with him or her throughout the entire term.*

Burkhart, 200 W.Va. at 332 (emphasis added).

The above finding raises a question of whether a commissioner is continually “deemed to be elected from the magisterial district in which that person resides on the day that person is elected” for the full term of office, even after magisterial districts are reapportioned.

If that were the case, commissioners would carry the magisterial district boundary from which they were elected for the full term, regardless the districts are reapportioned. As such, following reapportionment prospective candidates (1) cannot reside within any sitting commissioner’s previous magisterial district, and (2) cannot reside in an area that now includes a sitting commissioner under the newly reapportioned magisterial districts.

Constitutionally and statutorily, such cannot be the case. That interpretation, *inter alia*, would give improper legal effect the previous magisterial district boundaries, which by nature of reapportionment were deemed to not satisfy the Constitution’s requirement for equal representation,¹⁷ and is contrary to the *Burkhart* decision.

Specifically, *Burkhart* held that “a candidate carries that residence with him or her throughout the entire term.”¹⁸ By a plain reading of the word “residence” it is clear that commissioners are to be deemed elected from the residence—*i.e.* the physical address at which they resided at the time of their election—for the full term of office (unless sooner removed by law or judicial action).

Where, as was the case in *Burkhart*, a commissioner changes residence into a different magisterial district, such change in residence shall not prevent prospective candidates who live in a different district from running for an open seat on the county commission. Moreover, the *Burkhart* Court paid no credence to the previous magisterial district boundaries in its decision; it relied fully on the newly reapportioned magisterial districts.

Applying the principle articulated in *Burkhart*, sitting county commissioners carry their residences throughout their term of office. Every two years eligible persons from an open magisterial district are able to become candidates for county commission so long as they reside in a magisterial district that does not also encompass the physical residence of a sitting county commissioner whose term of office does not expire at the end of the election cycle.

Importantly, when determining which magisterial districts are open after reapportionment, only the new magisterial district boundaries, and only the physical residences of sitting commissioners at the time of their elections, shall be considered for determining which districts are open.

Therefore, after reapportionment it is possible for more than one sitting commissioners to reside in the same newly adopted magisterial district boundary. This is acceptable because the Constitution only prohibits “no two of said commissioners shall be *elected* from the same magisterial district[.]”¹⁹ inferring that it is permissible for two or more commissioners to “reside” in the same magisterial district so long as they were not “elected” from the same district.²⁰

Given the complicated nature of this issue, please see Attachment A for a detailed example with visual representations of how this scenario occurs and is resolved.

b. Post-Redistricting County Board of Education Candidate Residency:

The residency requirements for county board of education candidates and members are strewn throughout the law, including W. Va. Code §§ 3-5-6 and 18-5-1 *et seq.*

According to the Constitution, “[n]o more than two of the members of such [county] board [of education] may be residents of the same magisterial district within any school district.”²¹ Additionally, pursuant to statute, “[n]o more than two members may . . . serve from the same magisterial district[.]”²²

The analysis and conclusion in section IV.a. of this Memorandum regarding prospective county commission candidates may be applied in full to county board of education candidates because magisterial district boundary changes, resulting from county reapportionment, are made without regard to any specific office. Rather, magisterial districts are created with respect only to county population. Candidates for both county commission and county board of education determine their eligibility based on the same magisterial district boundaries.

However, distinct from county commission candidates, the law creates an additional residency requirement for county board of education members. Importantly, this distinction does not affect candidates, but sitting members of county boards of education.

Specifically, the law provides that “[n]o more than two members may be elected *or serve* from the same magisterial district.”²³

If, for example, magisterial district reapportionment results in more than two sitting board of education members residing in the same newly reapportioned magisterial district, one could argue that such result is contrary to the statute—*i.e.* there will be more than two members serving from

the same magisterial district. In such case there must be either removal or resignation from those offices in order to comply with the statute.

However, such interpretation would be unconstitutional and contrary to legislative intent.

Regarding removal of elected official, the Constitution provides generally:

All officers elected or appointed under this constitution, may, unless in cases herein otherwise provided for, be removed from office for official misconduct, incompetence, neglect of duty, or gross immorality, in such manner as may be prescribed by general laws, and unless so removed they shall continue to discharge the duties of their respective offices until their successors are elected, or appointed and qualified.

W. Va. Const., art. 4, § 6.

For removal of a county board of education member specifically, W. Va. Code § 6-6-7 provides:

Any person holding any county, school district or municipal office, *including the office of a member of a board of education* and the office of magistrate, the term or tenure of which office is fixed by law, whether the office be elective or appointive, except judges of the circuit courts, may be removed from such office in the manner provided in this section for official misconduct, neglect of duty, incompetence or for any of the causes or on any of the grounds provided by any other statute.

Id. (emphasis added).

If it were the case that magisterial district reapportionment which results in more than two board of education members residing in the same *new* magisterial district boundaries, thereby resulting in a removal or forced resignation of the additional officers, then the Legislature must have, and would have, provided such directive and procedure in W. Va. Code § 6-6-7.

However, the removal statute makes no mention of reapportionment. Rather, the grounds upon which county board of education members can be removed are limited to “official misconduct, neglect of duty, incompetence or for any of the causes or on any of the grounds provided by any other statute.”

There being no “other statute” discussing removal grounds of county board of education members related to reapportionment, shown by the absence of such confirmed by reviewing all known Constitutional and statutory provisions relating to magisterial district reapportionment and county boards of education, there can be but one conclusion: post-reapportionment magisterial district changes resulting in more than two board of education members residing in the same newly reapportioned magisterial district boundary do not constitute more than two members who “serve” from the “same magisterial district.”

Therefore, the residence at which a board of education member was elected pre-reapportionment is where, consistent with *Burkhart, supra*, that member resides and, *arguendo*, “serves” for the full term of office. This distinction, while slight, is the only interpretation that does not violate the Constitution and removal statute.

V. Conclusion

Only the most recently adopted magisterial district boundaries are to be considered by prospective candidates for county commission or county board of education. Magisterial district reapportionment has no effect on sitting county elected officials.

However, upon the expiration of the term of office for a county commissioner or county board of education member, he or she must satisfy the eligibility requirements to become a candidate for the office, which includes residing in an open magisterial district according to the most recently adopted magisterial district boundaries.

This Memorandum is provided to West Virginia county clerks and their staff for educational purposes in regards to considerations for prospective candidates to county commission or county board of education whose eligibility is based, in part, on residency in an open magisterial district for the 2022 election cycle.

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[ENDNOTES BEGIN ON THE FOLLOWING PAGE]

ENDNOTES:

¹ The term “open” used in this Memorandum refers to a magisterial district in which no elected county commissioner official resides, or no more than two (2) county board of education members reside, and whose seat is not on the ballot because the term of office does not end during the election year. By contrast, the term “closed” refers to a magisterial district in which a current elected official resided at the time of his or her election, and who will remain in office until at least the next regularly scheduled election.

² W. Va. Code § 3-1A-6(c).

³ Given the expedient nature of the main issue discussed in this Memorandum, due to unrelated matters requiring the Attorney General’s immediate attention, the Secretary of State was advised that a formal written legal opinion under W. Va. Code § 5-3-1 could not be issued prior to the start of the candidate filing period which begins January 10, 2022. Therefore, the analysis and reasoning provided herein are educational, informal, and have no legal bearing.

⁴ W. Va. Code § 3-5-7(d)(8).

⁵ W. Va. Code § 3-5-7(d)(9).

⁶ W. Va. Code § 3-5-7(f).

⁷ *State ex rel. Maloney v. McCartney*, 159 W.Va. 513, 527 (1976) (“[I]t may be reasonably inferred that the Secretary should refuse to place on the ballot any person whose certificate of candidacy shows ineligibility on its face.”).

Other challenges under rare circumstances that permit an administrative refusal to certify a candidate for the ballot include a challenge alleging the candidate was not affiliated with a political party for the requisite timeframe under W. Va. Code § 3-5-7(e), or filing by clearly ineligible persons “such as a filing certificate tendered by a seven year old child[.]” *State ex rel. Maloney v. McCartney*, 159 W.Va. 513, 527 (1976).

⁸ *See State ex rel. Summerfield v. Maxwell*, 148 W.Va. 535, 540 (1964) (“There is mutuality of conception to the effect that neither a ballot commissioner nor any other ‘officer or person’ named in Chapter 3 of the code has ‘jurisdiction’, or the administrative or judicial power, to make an investigation or inquiry relative to the qualifications of any candidate for any national, state, county, district or municipal office.”); *but see State ex rel. McKnight v. Clark*, 86 W.Va. 496 (1920) (“It would, of course, be different if the certificate itself showed [a candidate’s] ineligibility; but in this case the certificate shows that the relator is eligible to the office for which he desires to be a candidate, and the inquiry of the board of ballot commissioners must stop there. If he should be elected to this office, a proper inquiry can then be instituted before a competent tribunal to determine the question of his eligibility.”).

⁹ *See, e.g., Adams v. Londeree*, syl. pt. 2, 139 W.Va. 748 (1954) (regarding pre-election eligibility challenges the Court held, “[w]here a person nominated to office is required by law to possess certain qualification at the time of his election, mandamus will lie to determine the qualification.”); for post-election eligibility challenges, *see* W. Va. Code § 3-7-1 *et seq.* (statutory procedures for initiating a post-election contest depending on the type of office).

¹⁰ Both HB 301 and SB 3034 amend W. Va. Code § 1-2-2b, but which amendments are slightly different. Therefore, the conflicting provisions of W. Va. Code § 1-2-2b shall be resolved by following SB 3034, which is the most recent amendment to that section. *See Wiley v. Toppings*, 210 W.Va. 173 (2001).

¹¹ W. Va. Code § 1-2-2b(b).

¹² W. Va. Const., art. II, § 4 (1872).

¹³ Each office has different, additional eligibility requirements. This Memorandum only addresses residency.

¹⁴ Pursuant to W. Va. Code § 7-1-1(b), “[a] county commission shall consist of three commissioners” unless such county follows the formal procedure to adopt an alternative form of government. However, per W. Va. Code § 7-2-2, counties may have between three (3) and ten (10) magisterial districts. Therefore, it is possible for a county to have three commissioners but, for example, ten magisterial districts, resulting in seven magisterial districts having no elected officials serving on county commission.

¹⁵ See *Burkhart v. Sine*, 200 W.Va. 328, 332 (1997) (holding that a county commissioner serves the county from where he or she resided at the time of the general election, even if the commissioner resided in a different district at the time he or she filed pre-election candidacy paperwork); *concur* The Honorable Rachel Romano, 2019 WL 3387012 (W. Va. A.G. June 27, 2019).

¹⁶ W. Va. Const., art. IX, § 10 (1974).

¹⁷ See W. Va. Const., art. II, § 4 (1872), which provides, “Every citizen shall be entitled to equal representation in the government, and, in all apportionments of representation, equality of numbers of those entitled thereto, shall as far as practicable, be preserved.”

¹⁸ *Burkhart*, *supra* note 16.

¹⁹ W. Va. Const., art. IX, § 10 (1974) (emphasis added).

²⁰ *Concur* The Honorable Rachel Romano, *supra*.

²¹ W. Va. Const., art. XII, § 6 (1986); *see also* W. Va. Code § 18-5-1 (providing in part, “[n]o more than two members shall be elected from the same magisterial district”).

²² W. Va. Code § 3-5-6(b) (last amended in 1993, this provision supersedes county board of education candidate requirements set forth in W. Va. Code § 18-5-1, which previous requirements did not prohibit more than two board of education members from serving from the same magisterial district.

Following magisterial reapportionment, it is possible that sitting board of education members will be redistricted into the same magisterial district that previously contained the maximum two members. In such case, by analogy to *Burkhart*, *supra* note 16 at syl. pt. 3, the board member “is deemed to be elected from the magisterial district in which that person resides on the day that person is elected to serve on the County [board of education], that is, the date of the general election. . . .”


²³ W. Va. Code § 3-5-6(b) (emphasis added).


ATTACHMENT A


Example Scenario:

(Note: the example below is a completely fictitious example and does not reflect the actual magisterial districts or officials' residences in Mercer County.)

Assume that Mercer County has three magisterial districts, and three county commissioners elected to 6-year staggered terms.

Commissioner Ash (District 1) was elected in 2018, whose legal residence at the time of the election is shown on the map below as a green dot  in District 1. Ash's term ends in 2024.

Commissioner Brown (District 2) was elected in 2020, whose legal residence at the time of the election is shown on the map below as a green dot  in District 2. Brown's term ends in 2026.

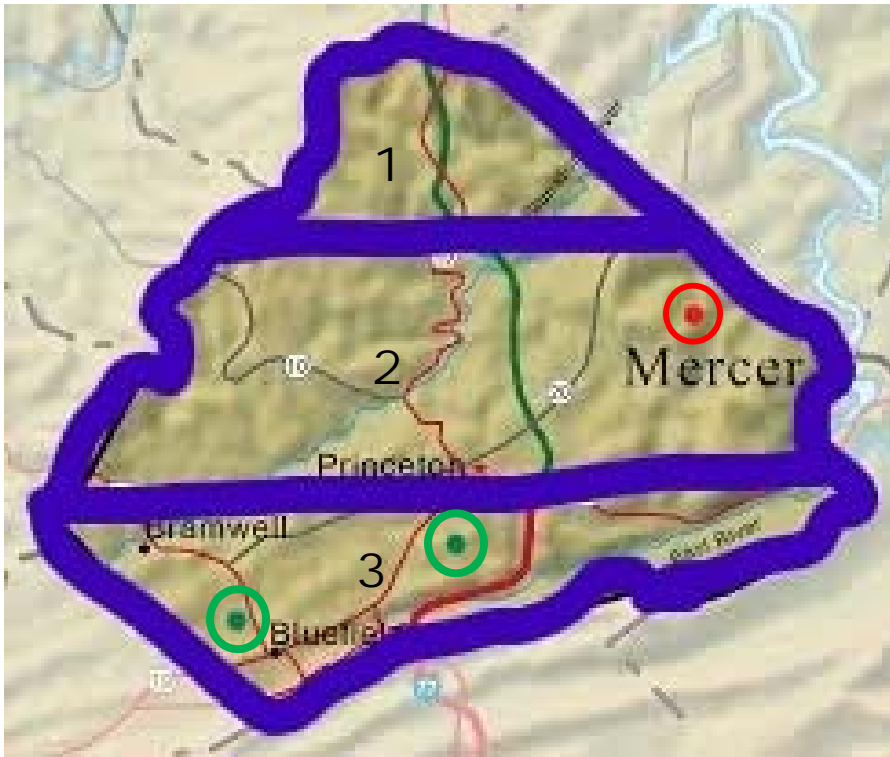
Commissioner Cody (District 3) was elected in 2016, whose legal residence at the time of the election is shown on the map below as a red dot  in District 3. *Cody's term ends in 2022 and will be on the 2022 ballot.*

Magisterial districts before county reapportionment:



In December 2021, the Mercer County Commission determined that its magisterial districts must be reapportioned based on population changes reported by the U.S. Census Bureau.

After reapportionment, the new magisterial districts resulted in two county commissioners, Ash and Brown, residing in the same district, which is now the new District 3 as shown below:



Determining Open Magisterial Districts for 2022 Election:

Following the newly reapportioned magisterial district boundaries, no prospective candidates residing in District 3 are eligible to run because it is a closed district.

Eligible persons residing in District 1 or District 2 (shaded area) satisfy the residency requirement to run for county commission in the 2022 election because no sitting commissioners reside in either district as shown below:

