



COMMONWEALTH of VIRGINIA

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September 14, 2023

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 a candidate who has qualified for a primary election and who withdraws before election day—but after his name has appeared on the ballot and after absentee voting has begun—can be “defeated” in the primary such that his name cannot be printed on the ballot in the succeeding general election pursuant to § 24.2-520 of the *Code of Virginia*.

Response

It is my opinion that a candidate who validly withdraws before election day but after his name has appeared on the ballot and after absentee voting has begun will not be “defeated” in the primary such that his name cannot be printed on the general election ballot pursuant to § 24.2-520 of the *Code of Virginia*.

Applicable Law and Discussion

Virginia law directs that “[o]nly a person fulfilling all the requirements of a candidate shall have his name printed on the ballot for the election” of the office the candidate is seeking.¹ Prospective candidates will be named on such ballot upon either qualifying as an independent candidate or securing a party nomination.² No law expressly renders these distinct means of ballot access mutually exclusive.³

¹ VA. CODE ANN. § 24.2-504 (2016). I note that, in referencing certain requirements, this Opinion is not intended to address every particular requirement that may apply to potential candidates seeking election to a specific office.

² See §§ 24.2-506 (Supp. 2022); 24.2-511 (2016); 24.2-534 (2016). It is not necessary, however, for a person’s name to be printed on the ballot in order for that person to be elected to office; voters can “write-in” additional votes in order to vote for persons whose names do not appear printed on the ballot. See 1931-32 Op. Va. Att’y Gen. 50, 50; 1959-60 Op. Va. Att’y Gen. 145, 145-46.

³ In contrast, under Tennessee law, “It is unlawful for any person to qualify as an independent candidate and as a primary candidate for the same office in the same year.” TENN. CODE ANN. § 2-5-101(f)(2).

Generally applicable requirements for candidacy include the timely filing of a “statement of qualification”⁴ and “a written statement of economic interests.”⁵ In conjunction with a mandated declaration of candidacy, prospective independent candidates must file a petition for candidacy that meets the form and signature requirements prescribed by statute.⁶ The name of an independent candidate will not be printed on the ballot unless the statutory requirements are met.⁷ The names of party nominees appear on the ballot once the nominee has been selected in the manner chosen by the political party or otherwise determined by law.⁸

Your opinion request involves party nominations conducted via primary election. Candidates seeking to have their names printed on a primary ballot are subject to filing requirements similar, but not identical, to those imposed on independent candidates seeking general ballot access.⁹ Those who “meet[] all the qualifications and fulfill[] all the requirements of a [primary] candidate, and . . . [have] complied with the rules and regulations of [their] party, shall have [their] name printed on the ballot provided for the primary election.”¹⁰ Pertinent here, Code § 24.2-520 provides that, in filing the “written declaration of candidacy” required of primary candidates, a prospective party nominee must acknowledge “that, if defeated in the primary, his name is not to be printed on the ballots for that office in the succeeding general election.”¹¹ This provision is commonly referred to as a “sore loser law.”¹²

The focus of your inquiry is the application of this provision to a candidate who, after his name has been printed on the primary ballot, no longer wants to pursue the primary nomination. More specifically,

⁴ This document is “a written statement under oath, on a form prescribed by the State Board, that he is qualified to vote for and hold the office for which he is a candidate.” Section 24.2-501 (2016). *See* VA. CONST. art. II, § 5 (With limited exceptions, “[t]he only qualification to hold any office of the Commonwealth or of its governmental units, elective by the people, shall be that a person must have been a resident of the Commonwealth for one year next preceding his election and be qualified to vote for that office.”); *accord* VA. CODE ANN. § 24.2-500 (2016).

⁵ Section 24.2-502 (Supp. 2022).

⁶ Section 24.2-506.

⁷ Section 24.2-506(A).

⁸ *See* §§ 24.2-508 (2016); 24.2-509 (Supp. 2022).

⁹ *Compare* §§ 24.2-505 (2016) and 24.2-506 (directing independent candidates to file with specified public officers the required declarations of candidacy and signature petitions for general election ballots), *with* §§ 24.2-521 (Supp. 2022) and 24.2-522 (2016) (setting forth requirements for signature petitions to appear on primary ballot and directing generally that such petitions, as well as declarations of candidacy, be filed with the primary candidate’s party committee chairman). Some distinct eligibility requirements govern a prospective nominee’s status as a primary candidate. For instance, to “qualify as a candidate at any primary, a person must be legally qualified to hold the office for which he is a candidate and be qualified to vote in the primary in which he seeks to be a candidate.” Section 24.2-519 (2016); *cf. supra* note 4. In addition, primary candidates must “pay a fee equal to two percent of one year’s minimum salary attached to the office for which he is candidate in effect in the year in which he files.” Section 24.2-523 (2016). The deadline to file the required statements of qualification and economic interests also is earlier for primary candidates. Section 24.2-503 (Supp. 2022).

¹⁰ Section 24.2-525 (Supp. 2022).

¹¹ Section 24.2-520 (2016). Defeated primary candidates may still be elected to office at the general election via “write in campaign.” 1959-60 Op. Va. Att’y Gen. at 146; *accord id.* at 154.

¹² *See, e.g.,* S.C. Green Party v. S.C. State Election Comm’n, 612 F.3d 752 (4th Cir. 2010) (rejecting constitutional challenge to South Carolina’s sore loser statute); Storer v. Brown, 415 U.S. 724 (1974) (discussing California’s sore loser provisions); Michael S. Kang, *Sore Loser Laws and Democratic Contestation*, 99 GEO. L.J. 1013, 1014 (2011) (stating generally that “sore loser laws . . . prevent a losing candidate in a party primary from subsequently filing to run as a listed candidate in the general election as the nominee of another party or as an independent candidate”).

the candidate intends to withdraw his candidacy for party nominee after in-person absentee voting has commenced but before the polls close on election day.¹³ As the issue underlies your question, I first address the ability of a prospective party nominee to withdraw under these circumstances.

Virginia law provides generally for the withdrawal of “[a] candidate who has qualified to have his name printed on the ballot for an election.”¹⁴ No such candidate will “be deemed to have withdrawn . . . until he has submitted a signed written notice declaring his intent to withdraw from such election and that notice has been received by the general registrar . . . of the county or city in which [the candidate] resides.”¹⁵ The pertinent statutory language does not limit its applicability to specified types of candidates or elections or otherwise distinguish between primary and general and special elections.¹⁶ No additional statutory provisions govern candidate withdrawal.¹⁷

The General Assembly, however, has instructed the Virginia Department of Elections (Department) to “include in its candidate guidance documents the requirements and process for candidate withdrawal.”¹⁸ Pursuant to its mandate, the Department has set forth withdrawal procedures in its principal guidance document, the *General Registrar and Electoral Board Handbook (GREB Handbook)*. Section 16.7.1 of the *GREB Handbook* directs candidates seeking to withdraw from an election to submit to their respective general registrar either ELECT-612.2 *Candidate Withdrawal Form* or “any written notice of withdrawal” that includes “the candidate’s name, the candidate’s signature, the office the candidate was seeking and the election date.”¹⁹ The notice also “must specifically state that [the candidate is] withdrawing as a candidate.”²⁰

¹³ In-person absentee voting commences 45 days before “any election and continue[s] until 5:00 p.m. on the Saturday immediately preceding the election.” Section 24.2-701.1(A) (Supp. 2022). The polls reopen at 6:00 a.m. on the day of the election and close at 7:00 p.m. the same day. Section 24.2-603 (Supp. 2022).

¹⁴ Section 24.2-612.2 (Supp. 2022).

¹⁵ *Id.*

¹⁶ See § 24.2-101 (Supp. 2022) (defining “candidate” to include “a person who seeks or campaigns for an office of the Commonwealth or one of its governmental units in a general, primary, or special election” as well as any “person who seeks the nomination of a political party or who, by reason of receiving the nomination of a political party for election to an office, is referred to as its nominee”).

¹⁷ The legislature, however, has addressed the effects of candidate withdrawal in certain situations, including setting forth certain instances when the name of the withdrawn candidate should not appear on the ballot. The provisions related to those situations do not apply to the question you present. See §§ 24.2-537 (2016) (outlining procedure when a party nominee by default dies or withdraws or has his nomination set aside “45 days or more before the day on which the primary would have been held” and instructing the “appropriate committee of the political party [to] determine the time and method of nominating its candidate for the office” in the event “that the death or withdrawal or setting aside of candidacy of any such party nominee should occur at a time which is less than 45 days prior to any such primary”); 24.2-539 (2016) (allowing the party to “nominate to fill the vacancy” of a candidate who dies, withdraws, or has his nomination set aside for any reason); 24.2-541 (2016) (instructing electoral boards on the process for printing ballots if a candidate has withdrawn at least 60 days before the election is to be held); 24.2-612.1 (Supp. 2022) (granting to the Department for both general and primary elections, the authority to instruct electoral boards on how to print or correct ballots or provide notice to voters of the “death, withdrawal, or disqualification of” a candidate).

¹⁸ Section 24.2-612.2.

¹⁹ VA. DEP’T OF ELECTIONS, *General Registrar and Electoral Board Handbook*, Ch. 16 at p. 14 (rev. July 2019).

²⁰ *Id.* (further clarifying that “[n]ewspaper articles or press conferences do *not* constitute an official notice of withdrawal”).

In addition to not expressly limiting which candidates may withdraw, neither the *Code of Virginia* nor the *GREB Handbook*²¹ imposes a deadline by which a candidate must withdraw. Accordingly, in the absence of any time restrictions, it appears that a candidate's withdrawal is effective simply upon submitting a complete notice of withdrawal to the general registrar. Accordingly, it is my opinion that a qualified candidate who follows both the statutory requirements and the instructions contained in the *GREB Handbook* may validly withdraw at any point prior to the closing of the polls on the day of the primary election.²²

You ask whether a withdrawn primary candidate who already may have received votes may be deemed to be "defeated" in a primary election for purposes of § 24.2-520. The "primary objective" in construing a statute is "'to ascertain and give effect to legislative intent,' as expressed by the language used in the statute."²³ When a term is not defined in a statute, that term must be "given its ordinary meaning, given the context in which it is used."²⁴ Further, "we 'assume that the General Assembly chose, with care, the words it used in enacting the statute, and we are bound by those words.'"²⁵

Webster Third New International Dictionary defines "defeat" as "to win victory over," or "overcome."²⁶ The conditions that constitute "defeat" vary based on the type of contest involved. In the particular electoral context you describe, a candidate is said to have been "defeated" when he remains in the contest throughout election day and is overcome on the basis of the votes cast.²⁷ If a candidate withdraws before the close of polls, he is not said to have been "defeated" because his failure to secure nomination results from his own actions rather than the number of votes tallied in his favor. Indeed, upon withdrawal, a candidate "stands upon the same footing as a person who has never filed notice of candidacy."²⁸ Therefore, even if absentee voting has begun, a candidate who validly withdraws from a primary before election day is not "defeated" as that term is used in § 24.2-520.²⁹

²¹ The Department is tasked with the administration of most of Virginia's election laws. Thus, the Department's interpretation of these provisions, insofar as they are ambiguous, is "entitled to great weight by the courts." *Jones v. Commonwealth ex rel. Von Moll*, 295 Va. 497, 503 (2018).

²² Clearly, one cannot withdraw from an election after it has concluded.

²³ *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 425 (2012) (quoting *Commonwealth v. Amerson*, 281 Va. 414, 418 (2011)).

²⁴ *Sansom v. Bd. of Sup'rs*, 257 Va. 589, 594-95 (1999) (quoting *Dep't of Taxation v. Orange-Madison Coop. Farm Serv.*, 220 Va. 655, 658 (1980)).

²⁵ *Newberry Station Homeowners Ass'n, Inc. v. Bd. of Sup'rs of Fairfax Cnty.*, 285 Va. 604, 616 (2013) (quoting *Kiser v. A.W. Chesterton Co.*, 285 Va. 12, 19 n.2 (2013)).

²⁶ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 591.

²⁷ See *Norcop v. Jordan*, 216 Cal. 764 (1932) (candidate "defeated" when loss based on the number of votes cast); *Halteman v. Grogan*, 233 Ky. 51 (Ct. App. Ky. 1930) (candidate not "defeated" when result determined on the basis of candidate ineligibility rather than on the basis of votes cast); *Anglen v. Cherokee Nation Election Comm'n*, 15 Am. Tribal Law 241, 242 (Sup. Ct. Cherokee Nation 2019) (disqualified candidate not "defeated" in an election). Cf. *Anderson v. Celebrezze*, 460 U.S. 780, 784 (1983) (noting that, given the terms of the relevant Ohio statute as then in effect, the parties had stipulated that a prospective general-election candidate's "timely withdrawal from the Ohio primary avoided the application of the State's 'sore loser' statute").

²⁸ 1930-31 Op. Va. Att'y Gen. 56, 56.

²⁹ The General Assembly knows how to express its intent, 2014 Op. Va. Att'y Gen. 95, 97, and it clearly has addressed the effect of withdrawn candidates in other circumstances, see *supra* note 17. Cf. *Zinone v. Lee's Crossing Homeowners Ass'n*, 282 Va. 330, 337 (2011) ("[W]hen the General Assembly has used specific language in one instance, but omits that language or uses different language when addressing a similar subject elsewhere in the Code,

Accordingly, § 24.2-520 does not automatically preclude a primary candidate who has withdrawn from the party nomination process under the circumstances you present from seeking, as an independent candidate, election to the same office at the succeeding general election.³⁰ Nevertheless, the withdrawn primary candidate still must meet all the statutory requirements otherwise applicable to independent candidates in order to have his name printed on the general election ballot.³¹ The candidate must file every required document with the appropriate official by the applicable statutory deadlines.³² Whether a particular candidate has satisfied these requirements is a question of fact that is beyond the scope of an advisory opinion of this Office.³³

Conclusion

Accordingly, it is my opinion that a candidate who withdraws before election day but after his name has appeared on the ballot and after absentee voting has begun will not be “defeated” in the primary such

we must presume that the difference in the choice of language was intentional.”). If the General Assembly had intended Virginia’s “sore loser” provision to encompass withdrawn candidates generally or those who have had their name printed on the primary ballot, it easily could have done so. *Compare* VA. CODE ANN. § 24.2-520, with e.g., W. VA. CODE ANN. § 3-5-23(g) (providing that “any person who was a candidate for nomination by a recognized political party . . . may not, after failing to win the nomination of his or her political party, become a candidate for the same political office by virtue of the nomination-certificate process”) and N.J. STAT. ANN. § 19:13-14.1 (providing that a “person whose name appears on the ballot at a primary election . . . as a candidate for nomination by a political party . . . shall not be eligible to serve as the candidate of any other political party for that office . . . at the general election following that primary”). This Office previously has noted that Virginia’s “sore loser” provision was not to be construed so as to prohibit former primary candidates under all circumstances from being candidates in the general election. 1943-44 Op. Va. Att’y Gen. 59, 60.

³⁰ Virginia’s “sore loser” law has been in effect in some form since 1932. *See* 1932 Va. Acts ch. 392. Prior opinions issued by this Office since then generally have understood that primary candidates were allowed to withdraw from primary consideration in order to run as an independent candidate in the succeeding general election. *See* 1971-72 Op. Va. Att’y Gen. 181; 1985-86 Op. Va. Att’y Gen. 167. This Office previously has recognized that, generally, “[a] primary is essentially a party affair, and in that respect is different from a general election. In the primary, candidates are nominated[;] in the general election, officers are elected.” 1935-36 Op. Va. Att’y Gen. 59, 60.

³¹ Sections 24.2-504; 24.2-506(A).

³² *See, e.g.*, §§ 24.2-501 to -507. *See* 1967-68 Op. Va. Att’y Gen. 94, 94 (finding it “clear . . . from the various Code sections that both the declaration properly witnessed and the petition must be filed with the proper official within the time specified and the failure to file either one within that time prevents a candidate’s name being placed on the ballot”). *See also* 1943-44 Op. Va. Att’y Gen. 56, 57; *id.* at 55, 56; 1959-60 Op. Va. Att’y Gen. 161, 161; 1971-72 Op. Va. Att’y Gen. 158, 159. Due to the difficulty associated with meeting these requirements, a late-hour withdrawal, like a defeat, is likely to prevent a candidate from running as an independent candidate for *any* office, as the declarations of candidacy and petitions for independent candidates for a November general election must be filed by 7:00 p.m. on the third Tuesday in June, § 24.2-507 (Supp. 2022)—the same day on which “[p]rimaries for the nomination of candidates for offices to be voted on at the general election date in November” are held, §§ 24.2-515 (Supp. 2022); 24.2-515.1 (Supp. 2022). Similarly, the written statements of qualification and economic interests of independent candidates seeking election “shall be filed by . . . [general election] candidates by 7:00 p.m. on the third Tuesday in June.” Section 24.2-503. *See* 1930-31 Op. Va. Att’y Gen. at 56 (opining that, once a candidate has withdrawn, he cannot again seek ballot access for the same office after the time limit for filing has past).

³³ *See, e.g.*, 2006 Op. Va. Att’y Gen. 141, 144 (relaying that “this Office does not investigate the facts behind opinion requests and does not issue opinions regarding questions of fact”).

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that his name cannot be printed on the general election ballot pursuant to § 24.2-520 of the *Code of Virginia*.

With kindest regards, I am,

Very truly yours,

A handwritten signature in blue ink, appearing to read "Jason S. Miyares", with a stylized flourish at the end.

Jason S. Miyares
Attorney General