

Overview

Del. Dave LaRock made a formal request to Attorney General Mark Herring on September 21, 2015, for clarification of various provisions in the Virginia Code prohibiting discrimination.

The request was acknowledged in writing by the Attorney General's office on September 23, 2015.

After waiting over 6 months for a response, Del. LaRock has not been given an opinion, nor has Del. LaRock received any indication as to whether an opinion is forthcoming.

March 11, 2016, Del. Dave LaRock served the Attorney General with notice that if he, Del. LaRock, does not receive the Advisory Opinion requested, or a written notice of intent to produce said opinion in a reasonable time frame, Del. LaRock will file a Writ of Mandamus asking the Circuit Court of Richmond to compel Attorney General Herring to perform his lawful obligation as Attorney General by responding to Del. LaRock's request for an advisory opinion. The AG's office responded later March 11th, but did not commit to producing an opinion or give any timeline for such.

Top-notch attorneys have helped Del. LaRock prepare the writ of Mandamus, and the writ will be filed at the Richmond Circuit Court on April 19th. A press conference is scheduled at 10:00 a.m. on April 20th in House Room 3 of the Virginia State Capitol.

WHAT QUESTION IS DEL. LAROCK ASKING THE ATTORNEY GENERAL TO WEIGH IN ON?

Del. LaRock is requesting an official advisory opinion regarding various provisions in the Virginia Code prohibiting discrimination. Specifically, the Virginia Code prohibits discrimination on the basis of sex in several contexts; however, the Code does not define the term "sex" within the context of such statutory prohibitions.

Title VII of the Civil Rights Act also prohibits workplace discrimination on the basis of sex. Like the Virginia Code, Title VII does not define the term "sex."

The U.S. Equal Employment Opportunity Commission (EEOC) has recently ruled that the term "sex" includes sexual orientation.

This ruling follows an earlier ruling that the term "sex" includes gender identity. In light of the recent EEOC decisions that have found that the term "sex" in the context of Title VII of the Civil Rights Act includes both sexual orientation and gender identity, **the Attorney General has been asked for an official advisory opinion for the question of whether the term "sex" as used in § 2.2-3901 and other various discrimination provisions in the Virginia Code include gender identity or sexual orientation.**

If the answer to this question is in the affirmative, **he has been asked for an official advisory opinion as to how the terms "sexual orientation" and "gender identity" would be defined for the purposes of the application of Virginia's various laws prohibiting sex discrimination.**

AG HERRING SHOULD RESPOND

He is not above the law.

§ 2.2-505. Official opinions of Attorney General.

A. The Attorney General shall give his advice and render official advisory opinions in writing only when requested in writing so to do by one of the following: the Governor; a member of the General Assembly;

The Attorney General was properly asked for an advisory opinion 3 months before the start of the 2016 General Assembly session.

The 2016 session has come and gone and Del. LaRock has been given no reason to expect that a reply is forthcoming beyond the acknowledgement dated September 23, 2015, of receipt of the original request by the Attorney General's office.

WHAT IS A REASONABLE TIME FRAME

The law does not specify a time limit for the Attorney General to perform this duty; absent a specific limit, the standard would be a reasonable time.

When asked by Del. LaRock for a copy of the Attorney General's Policies and Procedures for handling Advisory Opinions, Del. LaRock was informed by the Attorney General's Opinions Counsel G. Timothy Oksman that "There is no internal policy or manual for issuing opinions." The Attorney General has an annual budget of slightly less than \$40 million dollars.

Virginia State Delegates and Senators are given exceptional service when requesting service of state agencies and personnel to enhance their ability to serve the people of Virginia, the Attorney General should be no different; service should be prompt and communication should be timely and concise.

THE ATTORNEY GENERAL IS UNWILLING TO COMMUNICATE

Del. LaRock has asked in phone conversations with the Attorney General's staff for some indication as to whether there is a response pending, he was promised a response, and it never came.

Del. LaRock made a FOIA request for communication relating to his opinion request and received copies of numerous emails indicating conversations among staff members

took place in September, but he has not received confirmation if or when an opinion will be issued.

HOW MUCH TIME DOES IT TAKE TO PRODUCE A RESPONSE?

Del. LaRock has posed this question to the Attorney General's Opinions Counsel G. Timothy Oksman and has not received an answer. A former Virginia Attorney General says that a response to a fairly simple question such as what was submitted should take 2-3 months or less.

Sen. Adam Ebbin requested an opinion related to this issue on November 10, 2014; the Attorney General issued an [Opinion in response \(14-080\)](#) March 4, 2015, a turnaround of three months and three weeks.

IS THE QUESTION POSED TO THE ATTORNEY GENERAL A COMPLEX LEGAL QUESTION?

When performing his duty as a legislator, now Attorney General Herring was patron of numerous pieces of legislation seeking to insert the terms in question into Virginia Code relating to discrimination policy.

In Advisory Opinion 14-080, dated March 4, 2015, Attorney General Herring responded to a request by Sen. Adam Ebbin. The Attorney General stated that, "...*Code of Virginia, Dillon Rule, does not prevent school boards from amending their antidiscrimination policies to prohibit discrimination on the basis of sexual orientation and gender identity.*"

Attorney General Herring filed a [brief in the United States Court of Appeals for the Fourth Circuit on April 11, 2014](#), including an argument "the marriage ban discriminates on the basis of sexual orientation and gender."

IS THIS A RIPE QUESTION?

In the 2016 Session there were at least 10 pieces of legislation containing the terms sexual orientation and gender identity.

The Attorney General has used the terms sexual orientation and gender identity in proposed legislation and Official Advisory Opinions; Governor McAuliffe used these terms in Executive Order 1; there are various disputes over the meaning and application of the terms in discrimination policies in Virginia and across the nation.

Code of Virginia

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